SUPREME COURT OF FLORIDA

JENNY POOLE, etc.,	*	
	*	
Petitioner,	*	
	*	
v.	*	CASE NO. 85,232
	*	
VETERANS AUTO SALES AND LEASING COMPANY, INC.,	*	District Court of Appeal, 5th District - No. 93-1839
	*	
Respondent.	*	
	*	

* * * * * * * * * * * * * * * * *

Petition From the 5th District

PETITIONER'S INITIAL BRIEF

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PREFACE

Petitioner, JENNY POOLE, as Personal Representative of the Estate of REBECCA ANN PRITCHARD, deceased, was the Appellee in the Fifth District Court and Plaintiff at trial. The Respondent, VETERANS AUTO SALES AND LEASING COMPANY, INC., was the Appellant in the Fifth District Court and Defendant at trial. The parties will be referred to as POOLE and VETERANS.

The following symbols will be used:

R - Record on Appeal

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal from a decision by the Fifth District Court dated December 30, 1994, which affirmed in part, reversed in part and vacated an Order Granting Additur and Optional New Trial.

Petitioner, JENNY POOLE, hereafter "POOLE", is Personal Representative of the Estate of REBECCA ANN PRITCHARD, deceased. A wrongful death claim was brought on behalf of the estate and REBECCA PRITCHARD's three minor children: John J. Thayer, II, born 9-20-78; Sara Danielle Pritchard, born 7-23-82; and Andrew Jason Pritchard, born 9-14-83, against VETERANS. REBECCA PRITCHARD was 28 years old when she died on September 9, 1989. Her children were ages 10, 7 and 5 on the date of death and were ages 14, 10 and 9 at the time of trial. Trial commenced on May 17, 1993, and concluded with a verdict for the Estate and children on May 20, 1993.

During trial, POOLE introduced several fact witnesses who testified as to damages recoverable under the wrongful death act, including herself; the decedent's former spouse, Scott Pritchard (the father of Sara Danielle and Jason); the paternal grandmother, Ellen Pritchard; the three children; an economist, Frederick Raffa, Ph.D; and Dr. Judith Meyers, a clinical psychologist, who evaluated the two younger children.

The verdict totalled $98,042.76 (R9,4-5). Of that amount, the jury awarded $0 for loss net accumulations and $15,067.76 in medical and funeral expenses to the estate. Sara Danielle, was awarded $600 for loss of support and services in the past ($200 per

year) and loss of future support and services of $1,400 measured over 7 years and reduced to $825 present value.

REBECCA PRITCHARD's youngest son, Andrew Jason Pritchard, was awarded $600 for past loss of support and services and $1,600 for the loss of future support and services calculated over 8 years with a present value of $950.

John J. Thayer, II, was awarded $4,000 for past and $16,000 future loss of parental companionship, instruction and guidance and for his mental pain and suffering (R9,414-415).

Both Sara Danielle and her younger brother, Andrew Jason, were awarded $6,000 for past and $24,000 future loss of parental companionship, instruction and guidance and for their mental pain and suffering.

Although on the date of REBECCA PRITCHARD'S death primary residential care of the children was with her former spouses, there was frequent telephonic contact between John and his mother (R8,266), and the two younger children shared an uninterrupted summer visitation with their mother which ended about two weeks before her death (R7,41) (R7,151).

During trial, the paternal grandmother, Ellen Pritchard, testified,

> ". . .Sara has things that her mother gave her that she still sleeps with and when she gets really upset about anything, it doesn't matter what it is, she starts crying and you know, she'll say, I want my Mommy, and then I can't comfort her for some reason. I am sure she remembers her mother much better than Jason. She - you know, I guess she just gets her on her mind and she can't be

> comforted for a little while." (R7,124-125).

Mrs. Pritchard also testified, ...

> "Before, well you know, if they knew they were coming down they got really excited about it, about seeing her, and, you know, they talked about missing her and when she talked on the phone to them they, you know, they talked about the fact that they had been talking to her, and they have things that she had given them and they talked about that a lot, you know, little things". (R7,119-120).

Sara testified her mother told her that she loved her and said things that would make her feel better and she still thinks about her mother about nine (9) times a day (R8,287).

Although Jason remembers being told of his mother's death, (R8,277) he says what makes him think about his mother now is people telling me, remembering me about my mother, and I dreaming it in my sleep and he testified he thought of his mother "a couple of times a month." (R8,278). Ellen Pritchard testified as to Jason's reaction to his mother's death "...Well, his reaction hasn't been as severe as Sara's. He talks about her but not as much as Sara. He has the things that she gave him and he talks about those. I think he probably doesn't remember her as well as Sara does because he's fourteen months younger." (R7,129). Pritchard added, "They often come down, and, you know, they'll have a bad dream. Then they'll come and get in bed with me or with Scott. We have a four bedroom house, so, you know, we have our own rooms, but they get scared even with a night-light and find it hard to stay by themselves" (R7,136).

Further, Sara and Jason's father, Scott Pritchard, stated, "They were devastated. They had just... they had just seen their mother and their mother, I mean, she was a major part of their life. She was their mother. They were terribly upset". (R7,153).

Mr. Pritchard added,

> "Obviously when the death first happened they were both devastated. Shortly - well, after the accident, they had sleepless nights and they would - well, if Sara gets under stress of any type, if she starts crying or anything like that, her saying is "I want my mommy". And I mean there is no replacing her mother. So I try to comfort her as best I can. She thinks about Beck quite a bit. And she has had dreams of her. Obviously, on Beck's birthday and Mother's day, Mother's day was just here and it's a hard day for both kids. Sara was very close with her mother. Both kids were very close. They really enjoyed that last summer that they were together. Jason, we talk about a lot of good things about Beck. It's you know, I mean we lived together. We were married for quite a while. So we had quite a few good times and I try and just re-enforce with them, you know, the good times rather than ultimately what happened." (R7, 156 & 157).

John Thayer testified she called a lot and wrote letters and stuff and I went down there for a summer, went to the beach and stuff. We spent a lot of time together (R8,266). John testified he saw his mother for the last time a month before she died. Further, John testified he used to go places a lot - like we used to go to the beach and stuff like that, like I said before. She liked to spend time with us". (R8,268).

John added his mother advised him to say his prayers and brush his teeth (R8,268), instructions which are normally given to a young son by their mother.

The decedent wrote many letters to her son, 12 of which were obtained and introduced into evidence (R6,865-878).

POOLE also had the opportunity for a period of time to watch and to observe the relationship between the decedent and Sara (R7,31). She stated, "Every other day or so we were doing things with the children". (R7,31). Poole recalled when Sara and Jason came down to visit their mother during the summer of 1989 (R7,41). She indicated she had observed the decedent interact with Sara and Jason. She testified they went to the beach, McDonalds, the market, everything, Fun World. We were always out with the children, movies (R7,41-42). Poole was there the morning Sara and Jason saw their mother for the last time and recalled the decedent telling them to go back and do good in school, that Mommy loves you (R7,44).

The psychological evaluation of Dr. Judith Meyers on both Sara and Jason were submitted into evidence (R8,362-363). According to the psychological evaluation report prepared by Dr. Meyers of Jason (R6,892-902):

> "Jason's unresolved issues relating to his mother's death are most dramatically illustrated by the fact that he included his mother in the drawing of his family. Also, he was asked questions regarding his subjective experiences of his mother's death, using the format of the Impact of Events Scale. He endorsed items in a way

> that indicated a high degree of subjective distress" (R6,895).

Dr. Meyers indicated in her report that "both children, in their different ways, have a difficult time expressing themselves." (R6,896).

> "In summary, Jason has gone through and will continue to go through a significant degree of medical distress related to the loss of his mother and the subsequent disruption to his care and nurturing. He requires special education and psychological support now and will require psychological support in the future" (R6,896).

During the clinical interview, Sara stated that her father had explained the reason for the evaluation. She said that there was going to be a trial. The courts were interested in how she was doing since her mother's death, however, it was obviously difficult for her to discuss this. She answered direct questions, but tended to minimize her difficulties. She revealed more about herself through stories and memories (R6,904).

In the emotional status section of the report, Dr. Meyers stated:

> "Sara is currently experiencing a severe degree of emotional disturbance . . .
>
> It is clear that Sara has tremendous rage that her mother died, but **does not know how to articulate her feelings or attach the emotions to something or someone tangible.** (R6,905). . . .At an unconscious level, she may feel responsible for her mother's separation from her. It is a conflict that could not be resolved due to her mother's untimely death." (R6,905).

In the summary and recommendation, Dr. Meyers states with reasonable medical certainty her emotional problems will increase with age (R6,906).

Dr. Meyers concluded:

> "In summary, Sara has gone through and will continue to go through a significant amount of mental distress related to the death of her mother and subsequent disruption to her care and nurturing. She requires psychological intervention now and will require psychological support in the future." (R6,906-907).

The jury was provided the underlying data which provided the basis for Dr. Meyers' conclusions as well as Dr. Meyers' qualifications (R8,364).

After the verdict, POOLE timely moved for Additur and, alternative, Motion for a New Trial (R4,760).

POOLE asked the court to add $10,599.52 to the award of medical and funeral expenses, alleging the jury improperly deducted this amount from the hospital bill which had been listed as a "payment" for organ donation because it was payment made by or on behalf of the estate under Section 768.21(6)(b), Fla. Stat.

The Personal Representative also requested the trial court to increase loss of support and services to Sara Danielle in the past by $5,452 and in the future by $11,134. The court was asked to add $5,452 to those measures of damages for Andrew Jason in the past and $14,552 in the future. Poole based the request on the testimony of the economist. As to loss of instruction, guidance and parental companionship and mental pain and suffering for John

Thayer, II, POOLE requested an additur of $12,000 in the past and $60,000 in the future. She also requested additur of $25,000 in past and $100,000 in future for Sara Danielle Pritchard and $20,000 in the past and $80,000 in the future for Andrew Jason Pritchard.

In its Order Granting Additur and Optional New Trial (R5,826-830), the court increased the award for medical and funeral expenses by $10,599.52, finding the credit given by the hospital reflecting "payment" in that amount represented payment by or on behalf of decedent pursuant to Section 768.21(6)(b), Fla. Stat.

The trial court also found the jury improperly calculated the number of years over which the two younger children could expect to receive support and services reasoning that if the jury found these damages in the past, they should be awarded at least until the age of 18 (R9,520), the age argued by VETERANS' trial counsel as being the age of majority (R8,380).

The court increased the award to John J. Thayer, II, for past mental pain and suffering by $8,000 to $12,000 and for future mental pain and suffering by $32,000 to $48,000. Total additur of non-economic damages for John was $40,000. The court added $12,000 in past mental pain and suffering to each of the younger childrens' award and increased the future mental pain and suffering award for each by $48,000, thus increasing each total award for those measures by $60,000. Respondent was given the option of a new trial if it disagreed with the additur.

On June 22, 1993, VETERANS furnished a Notice of Disagreement with Order Granting Additur (R5,816-817), and on July 8, 1993,

VETERANS served a Notice of Refusal to Accept Additur (R5,820-821).

On July 16, 1993, the trial court entered an Order for a New Trial on damages only (R5,831), and on July 29, 1993, VETERANS filed its Notice of Appeal of the Order granting new trial on the issue of damages only (R5,834-835). On July 29, 1993, VETERANS moved for stay pending appeal which was granted on August 19, 1993 (R5,836-837).

On December 30, 1994, the district court entered its decision indicating the primary issue of the appeal was whether the trial court exceeded its authority by granting a Motion for Additur. The majority analyzed Sec. 768.043 and Sec. 768.74 and their listed criteria, along with their reading of the record and concluded:

> "In view of the limited contacts the children had with their mother, the jury's ability to observe the childrens' demeanor, and the arguments of counsel as to the value to be placed on the pain and suffering of the children, it does not appear that the jury ignored the evidence in reaching the verdict or misconceived the merits of the case relating to the damages. Neither does the award appear to be the product of corruption or passion. While the trial court disagreed with the damages awarded by the jury and while we may agree that the award was unquestionably a low one, the award is nonetheless supported by the evidence and could be adduced in a logical manner by reasonable persons."

The majority went on to cite **Hawks v. Seaboard System Railroad, Inc.**, 547 So. 2d 669 (Fla. 2nd DCA), rev. dis'm., 549 So. 2d 1014 (Fla. 1989), a remittitur case involving a large monetary verdict for the loss of children in an auto-train accident. The majority reasoned the comments, citations and reasoning in that

opinion are just as appropriate in a case involving additur. The court went on to modify the maximum recovery rule set forth in **Rowlands v. Signal Construction Company**, 549 So. 2d 1380 (Fla. 1989), and quoted the rules set forth by this court in **Bould v. Touchette**, 349 So. 2d 1181, 1184 (Fla. 1977), in finding "the award in the instant case for pain and suffering was not 'so inordinately [small] as obviously to [be below] the [minimum] of a reasonable range within which the jury may properly operate." 349 So. 2d at 1184-85.

In this case, the district court affirmed both the trial court's grant of additur as to loss of support and services for the two younger children and the $10,599 increase for medical expenses.

In a specially concurring opinion, Judge Harris expressed some reservation and a suggestion that the matter be certified to this court. Judge Harris concurred because, regardless of the standard of review applicable, the trial court failed to "set forth specific findings from the record" to support the additur.

Judge Harris's reservation was because the majority based its decision on Sec. 768.74(5)(e), Fla. Stat. (1993), which appears to set forth a reasonable person standard of review as opposed to the reasonableness test followed by this court in **Baptist Memorial Hospital, Inc., v. Bell**, 384 So. 2d 145, 146 (Fla. 1980). The concurring opinion went on to certify the following question:

> IF SECTION 768.74 PERMITS A TRIAL JUDGE TO ORDER A NEW TRIAL UNLESS THE AFFECTED PARTY AGREES TO ACCEPT A REMITTITUR OR ADDITUR WHEN A REASONABLE PERSON COULD AGREE THAT THE RECORD SUPPORTS THE JURY DECISION (ASSUMING NO TRIAL ERROR OR JURY

MISCONDUCT), DOES THIS SECTION VIOLATION ARTICLE I, SECTION 22, CONSTITUTION OF THE STATE OF FLORIDA?

Petitioner timely filed a Motion to Relinquish Jurisdiction pursuant to Rule 1.530(f), Fla. R. Civ. P., and for subsequent rehearing applying the reasonableness test. On January 30, 1995, both Motions were denied without opinion. Petitioner timely filed her Notice to Invoke Discretionary Jurisdiction requesting this court to review the decision.

SUMMARY OF ARGUMENT

The district court erred in applying the wrong standard of review in finding an abuse of discretion of the trial court's decision to grant new trial. Alternatively, the district court erred by failing to temporarily relinquish jurisdiction to the trial court for specific findings in the Order Granting New Trial.

ARGUMENTS

The district court erred in finding an abuse of discretion in the trial court's decision to grant additur and optional new trial.

The majority opined if a reasonable person could agree with the verdict, it should not be disturbed. As noted in the specially concurring opinion, this reasoning appears to disregard the standard of review adopted by this court in **Baptist Memorial Hospital, Inc., v. Bell**, 384 So. 2d 145, 146 (Fla. 1980), and, subsequently, reaffirmed in **Smith v. Brown**, 525 So. 2d 868 (Fla. 1988), after the adoption of the Tort Reform and Insurance Act of 1986, Chapter 86-160, Laws of Florida.

Under Sec. 768.74, Fla. Stat., when a verdict is returned awarding money damages, the trial court is required to review it to determine if the amount is excessive or inadequate in light of the facts and circumstances presented to the jury. The Legislature requires the trial court to subject all such awards to **close scrutiny** and that they be adequate and not excessive. In determining excessiveness or inadequacy and the amount that such award exceeds a reasonable range of damages or is inadequate, the court is to consider:

(a) Whether the amount awarded is indicative of prejudice, passion or corruption on the part of the trier of fact;

(b) Whether it appears that the trier of fact ignored the evidence in reaching the verdict or misconceived the merits of the case relating to the amount of damages recoverable;

(c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;

(d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injuries suffered; and

(e) Whether the amount awarded is supported by the evidence and, as such, could be adduced in a logical manner by reasonable persons.

If the trial court exercises its discretion to grant additur and the party adversely affected does not agree, the court must order a new trial on the issue of damages specifying the specific grounds therefor in a written order.

On review, the appellate court is called upon to determine whether the trial court abused its discretion in granting a new trial. The additur order is rendered moot upon its rejection and, as such, does not appear to be restorable in whole or part by the appellate court. To permit this would nullify the optional nature of the order and enable the appellate court to assess damages which the jury never awarded and the party against whom the original order operated specifically rejected.

The court must balance the rule of law which gives the jury great discretion in determining a monetary award and which prohibits a judge from sitting as a seventh juror, **Bould v. Touchette**, 349 So. 2d 1181 (Fla. 1977), against the competing rule which gives the trial judge broad discretion to grant a new trial

and which requires this appellate court to affirm the trial court's discretionary decision if reasonable persons could differ as to the propriety of that action. **Smith v. Brown**, 525 So. 2d 868. In **Hawk v. Seaboard System RR**, 547 So. 2d 669 (Fla 2nd DCA 1989), the second district stated:

> "This is not an area which lends itself to exact tests. An appellate court should approach the task by giving the trial judge the full benefit of the doubt, while requiring this appellate act of faith to be supported by some proof within the record which reasonably suggests that the jury went astray." 547 So. 2d at 673.

In providing the trial court the full benefit of the doubt, the appellate court must know the trial court's reasoning and apply the appropriate tests. Appellate review without this foundation allows the appellate court to arbitrarily substitute its judgment for that of the trial court and to ignore the second sentence of Rule 1.530(f). **Prime Motor Inns, Inc., v. Waltman**, 480 So. 2d 88, 89-90 (Fla. 1985). Rule 1.530(f), Fla. R. Civ. P., mandates the order "specify the specific grounds therefor" and if such an order lacking specificity is appealed, the Appellate Court shall relinquish its jurisdiction to the trial court for entry of an order specifying the grounds for granting the new trial.

Because the standard of review of a new trial order is the reasonableness test, an independent review of the record must be preceded by a clear understanding of trial court's reasons for concluding one or more of the criteria of Section 768.74(5)(a-e) applied.

However, if the appellate court is able to clearly discern the trial court's reasons for granting the new trial, relinquishment of jurisdiction may be unnecessary. In **Lindenfield v. Dorazio by Dorazio**, 606 So. 2d 1255 (Fla. 4th DCA 1992), the fourth district affirmed a new trial order despite the trial court's use of conclusory references to the criteria set forth in F.S. 768.74(5). The appellate court should review the decision in light of whether a reasonable person can agree with the propriety of the trial court's action. If so, there is no abuse of discretion and the order granting new trial should be affirmed.

The logic behind this standard of review is based upon the trial court's superior vantage point in reviewing the behavior and credibility of the witnesses as opposed to an appellate court which must rely upon a cold record.

In **Baptist Memorial Hospital v. Bell**, 384 So. 2d 145,146 (Fla. 1980), this court cited **Cloud v. Fallis**, 110 So. 2d 669 (Fla. 1959), in applying the broad discretion rule granted to trial courts in granting a new trial:

> "When a motion for new trial is made it is directed to the sound, broad discretion of the trial judge, . . . who because of his contact with the trial and his observation of the behavior of those upon whose testimony the finding of fact must be based is better positioned than any other one person fully to comprehend the processes by which the ultimate decision of the triers of fact, the jurors, is reached . . .
>
> Inasmuch as such motions are granted in the exercise of a sound, broad discretion the ruling should not be disturbed in the

> absence of a clear showing that it has been abused . . . (Citations omitted.)"

110 So.2d at 673.

While the trial judge must rely on his notes and memories of the facts and circumstances presented, the matter must be reviewed while it is fresh in mind. Rule 1.530(b), Fla. R. Civ. P., requires the motion be filed within 10 days of the rendition of the verdict.

In **Smith v. Brown**, supra at 868 (Fla. 1988), this court stated:

> ". . .When the judge who must be presumed to have drawn on his talents, his knowledge and his experience to keep the search for the truth in a proper channel, **concludes** that the verdict is against the manifest weight of the evidence, it is his duty to grant a new trial, and he should always do that if **the jury has been deceived as to the force and credibility of the evidence** or has been influenced by considerations outside the record, . . ." (emphasis supplied)

In the instant case, while the order granting new trial did not set forth specific grounds, the record of hearings on the motion illustrates the trial court's reasoning. The court pointed to testimony by Dr. Meyers about Sara and Jason that indeed these children had undergone fairly significant mental pain and suffering because of the loss of their mother. (R8,469).

The trial judge indicated in the initial hearing he was considering ordering an additur under the provisions of Section 768.74, particularly for the mental pain and suffering, loss of parental companionship, instruction and guidance of the three minor

children because the ratio of past damages for those measures against future damages taking into account a 52 year life expectancy under Life Tables "seem inordinately small". (R8,471).

The court went on to say:

> "...certainly I respect the province of the jury. I am not the 7th jury member of the jury and I am mindful very much of what the case law says on that, but this one shocked me when I heard the verdict. When I say shocked, let me not make that sound like it blew me away, but it surprised me I think is a better word. It seemed inordinately low at the time to me." (R8,471).

During a second hearing held on June 11, 1993, the court ruled the organ donation listed as payment on the hospital bill submitted to the jury came under the provisions of Section 768.21(6)(b), Fla. Stat., because the payment was by or on behalf of the decedent. (R9,476 and 518).

The trial judge found that it appeared the triers of fact ignored the evidence in reaching the verdict or misconceived the merits of the case relating to the amount of damages recoverable for loss of parental companionship, instruction, guidance and the childrens' mental pain and suffering.

> ". . .there was extensive testimony by Dr. Meyers as to the effect it had on these two survivors, Sara and Jason, and by John's own testimony, it impacted him also. I just find that the jury did not consider the evidence as they should have on that . . . Further under 768.74(5)(d) that the amount awarded for those same elements for each of the three children seem to be out of relation to the amount of injury suffered by the three children for the loss of their mother. . . also and not as strongly but (5)(e), that on those same elements that the amount awarded just wasn't supported by the evidence and could not be adduced in a

> logical manner by reasonable persons based upon the life expectancy of 52.1 years and the tender age of these children, and the psychological testimony, the letter testimony, and the individual testimony of the children." (R9,520).

The district court affirmed the trial court's findings that the jury improperly calculated the number of years over which Sara and Andrew could be expected to receive support and services and the jury improperly deducted payment given as a credit against its bill by the hospital. They were instructed damages for loss of support and services were recoverable to the age of 25 (R8,385). VETERANS suggested the jury award about $7,500 each to the two younger children for loss of support and services (R8,387). The opinion is silent as to which criteria the district court applied in reaching its conclusion on economic damages, however, the jury must have ignored the evidence as to these measures and it cannot be argued the amount awarded for those measures was adduced in a logical manner by reasonable persons. If the jury ignored evidence or awarded economic damages that bore no reasonable relation to the damages proved or injury suffered, is it reasonable to conclude the jury was more sensitive and attentive to the evidence offered in support of non-economic damages?

The majority cites to **Bould v. Touchette**, 349 So. 2d 1181, 1184 (Fla. 1977). There the trial court denied a motion for new trial, and the district court ordered a new trial on all issues finding an $800,000 award of punitive damages against a corporate defendant atop a $65,000 compensatory damages award was "grossly

excessive and contrary to the law and evidence". 349 So. 2d at 1184. In reversing, this court adopted the "maximum recovery rule". Id. at 1185. The concurring opinion in this case cites to **Rowlands v. Signal Construction**, 549 So. 2d 1380 (Fla. 1989), a remittitur case, where the "impropriety identified by the trial court and the district court involved the percentages of liability, not merely excessiveness of the verdict". 549 So. 2d at 1382. This court held the matter was not correctable by remittitur. The court reiterated its adoption of the "maximum recovery rule" followed by some federal circuit courts of appeal, since it better comports with Article I, Section 22 of the Florida Constitution. This rule allows the trial court the discretion to deny the defendant's motion for new trial if the plaintiff will accept a remittitur that reduces the award by subtraction to the maximum recovery supported by the evidence (footnote omitted) (citations omitted). Id. at 1382.

Does the reasoning behind the "maximum recovery rule" in remittitur cases apply equally to a "minimum recovery rule" in additur cases? Does such a rule better comport with Article I, Section 22 of the Florida Constitution in that additur adds to the award, thereby, placing the trial court in the position of awarding damages, whereas remittitur reduces the amount already awarded by the jury? In the final analysis, the optional nature of the order appears to be its constitutional saving grace.

The district court's establishment of a "minimum recovery rule" disregards the fact the federal courts have not fashioned

such a rule because they do not recognize additur. As early as 1935, they ruled an order of additur violates the seventh amendment right to a jury trial in civil cases. **Hattaway v. McMillian**, 903 F. 2d 1440, 1451 (11th Cir. 1990), **Dimick v. Schiedt**, 293 U.S. 474, 486-88, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935); **Hawkes v. Ayers**, 537 F. 2d 836, 837 (5th Cir. 1976). Although the seventh amendment does not apply to state court proceedings, it is applied when federal courts determine state claims. 903 F. 2d at 1451.

The federal courts' logic in a case involving remittitur is the jury has actually assessed an award, but the trial court, in its discretion, has determined that award to be excessive and against the manifest weight of evidence or the result of improper influences. In a case involving additur, the trial court and not the jury is the one actually awarding damages. This distinction has led federal courts to conclude additur, unlike remittitur, is an unconstitutional intrusion on the jury's right to award damages.

An incongruity in the certified question is the assumptions contained therein. It assumes no trial error or jury misconduct. Before remittitur or additur is appropriate, the trial court must conclude the award was excessive or inadequate in light of the facts and circumstances presented to the trier of fact. This finding must be based upon the application of one or more of the criteria set forth in subsection (5)(a-e). Such a finding cannot be made without a finding the jury engaged in some form of error or misconduct, whether it ignored evidence; misconceived the merits of the case relating to the amount of damages recoverable; awarded

damages that bears no reasonable relation to the amount of damages proved and the injuries suffered; or one or more of the other criteria set forth in Sec. 768.74(5)(a-e), **Fla. Stat.**

CONCLUSION

In this case, whether the additur order presents troubling constitutional questions, it was rejected in whole by pleading and a new trial on damages only was ordered. The district court thereafter erred by applying the wrong standard in its review of the trial court's discretionary decision to grant a new trial on damages. The record of hearings on POOLE's motion reflects the trial court specified grounds for its conclusion that the jury went astray in its award of damages and a reasonable person could agree with the trial court's conclusion. The two younger children were awarded less than that which was argued as reasonable by VETERANS trial counsel. Such an award does not appear to be within a reasonable range of damages. If the findings were too unspecific or too conclusory to enable the district court to clearly discern the trial court's reasoning, jurisdiction should have been temporarily relinquished to the trial court for an order setting forth specific grounds. This court is respectfully urged to quash the district court's decision and reinstate the order granting new trial on damages or, alternatively, relinquish jurisdiction to the trial court with instructions to specifically set forth its grounds for granting the new trial order and review by the district court of such order applying the reasonableness test.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to David C. Beers, Esq., Counsel for Respondent, Post Office Box 948600, Maitland, Florida 32794-8600; Abbott M. Herring, Jr., Esq., Co-counsel for Petitioner, 1302 McGowen, Houston, Texas 77004; and Charles R. Stepter, Jr., Esq., Corporate counsel for Veterans, 170 East Washington Street, Orlando, Florida 32801, by U.S. Mail, this 24th day of March, 1995.

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