IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 64,959

PROTECTIVE CASUALTY INSURANCE COMPANY and CHRISTOPHER WEHAGE,

Defendants/Petitioners,

vs.

DENNIS KILLANE, individually and as Guardian for FLORENCE KILLANE, his wife,

Plaintiff/Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

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PREFACE

The parties will be referred to as the plaintiff and the defendants.

The following symbol will be used:

A - Petitioner's Appendix.

STATEMENT OF THE CASE AND FACTS

We agree with the petitioner's statement of the case and facts.

ARGUMENT

ISSUE ON JURISDICTION

WHETHER THE OPINION OF THE LOWER TRIBUNAL PRESENTS PRIMA FACIE CONFLICT WITH THIS COURT'S PENDING DECISION(S) IN LAFFERTY v. ALLSTATE INS. CO., 425 So.2d 1147 (Fla. 4th DCA 1982) and INSURANCE CO. OF NORTH AMERICA v. PASAKARNIS, 425 So.2d 1141 (Fla. 4th DCA 1982).

It is clear from what occurred in the Fourth District that it was originally of the opinion that the seat belt issue in the present case should be certified to this Court, as it had done in two previous seat belt cases. The court subsequently granted plaintiff's motion for rehearing, and based on the contents thereof, withdrew its certification.

Plaintiff's motion for rehearing in the Fourth District pointed out that in the two cases which are pending before this Court on the availability of the seat belt defense, defendant introduced or proffered expert testimony that if an available seat belt had been fastened the extent of the plaintiff's injury from the accident would have been lessened.

The present case never really involved the seat belt defense either at the pleading stages or trial. The only affirmative defense was comparative negligence. The pretrial stipulation did not state that the seat belt defense was an issue.

It was not until the first day of trial that defense counsel first mentioned seat belts. The trial court denied defendant's request to introduce evidence on this subject because it had never been raised prior to trial and plaintiff would have been prejudiced by not having the opportunity to obtain an expert on this issue (A 5, 6).

On the first day of trial defense counsel advised plaintiff's counsel that he would like to have his expert look at the wrecked vehicle to determine whether it even

contained seat belts. The vehicle was 13 years old. Counsel for plaintiff responded that there was no evidence that the vehicle even exists (A 6).

Thus, as plaintiff's motion for rehearing pointed out, while in Lafferty and Pasakarnis there was evidence that the vehicle was equipped with seat belts, that they were usable, and had they been used plaintiff's injuries would have been lessened, the record in the present case does not even show whether the 13 year old vehicle existed, whether it had seat belts, or whether they were usable.

Fla. Statute § 90.104 (1)(b) provides that a court may reverse on the basis of excluded evidence when:

> " . . . the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked."

In order to preserve error in this particular case it would have been necessary to proffer that the car was equipped with usable seat belts and that failure to use them contributed to plaintiff's injuries. We don't contest that defendant had an expert who would have testified that failure to use the seat belt would have contributed to the

injuries. The problem is that this record does not show whether the car was equipped with usable seat belts or whether the car even existed at this point in time. There was no proffer sufficient to preserve this issue for appellate review..

It would be a gross miscarriage of justice for the present case to be reversed for a new trial, if this Court changes the law on the seat belt defense, because there is nothing in this record to show how this defendant was prejudiced by the ruling of the trial court. Defendant did not have an expert available to proffer the necessary testimony at trial, nor was there any evidence in the record that the 13 year old car exists, whether it had seat belts and whether the seat belts were functional. In Musachia v. Terry, 140 So.2d 605 (Fla. 3d DCA 1962), the court stated on page 608:

> The proffer was necessary, and was an essential part of the plaintiff's case. When evidence offered by a party is ruled inadmissible, unless the testimony desired to be presented is otherwise shown on the record, it is necessary to make a proffer thereof so that a reviewing court may determine what was excluded and whether the exclusion was prejudicial....

In the present case neither the Fourth District nor this Court can determine what was excluded or whether the exclusion was prejudicial in the trial court. Review should therefore be denied.

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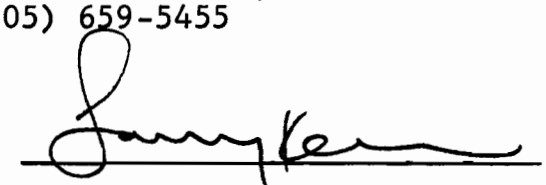
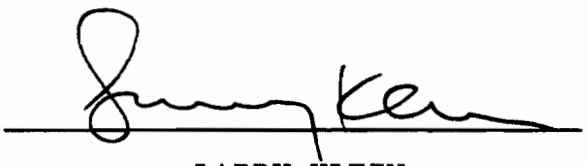
By 

LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished, by mail, this 29th day of March, 1984, to: GERALD E. ROSSER, Suite 412, Biscayne Building, 19 West Flagler Street, Miami, FL 33130.



LARRY KLEIN