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.
_____/

RESPONDENT'S BRIEF ON THE MERITS

RICCI & ROBERTS, P.A.
P. O. Box 3947
West Palm Beach, FL 33402
(305) 684-4800
and
LARRY KLEIN
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33402
(305) 659-5455

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PREFACE

The parties will be referred to as plaintiffs and defendants.

The following symbols will be used:

R - Record.

T - Transcript.

A - Petitioners' Appendix.

STATEMENT OF THE CASE AND FACTS

We agree with defendant's statement of the case and facts, with the following additions. The only affirmative defense was comparative negligence. The seat belt defense was never mentioned in the pleadings, as the opinion of the Fourth District recognizes. The order directing pretrial procedure provided that all novel issues of law were to be listed in the pretrial stipulation and there were none listed (R 484, 493). The pretrial stipulation did not mention the seat belt defense as an issue (R 493).

The seat belt defense was never mentioned in this case until the first day of trial (T Vol.4 - 362). The lower court ruled that the defendant could not introduce evidence on the seat belt defense because it was never raised until the beginning of trial and plaintiff would have been

prejudiced by not having an expert on this issue (T Vol.4 - 362-366).

Defense counsel had never examined the vehicle or had it examined. It was 13 years old. It cannot be determined from the record whether the vehicle even exists at this time (T Vol.4 - 360-361).

ISSUE

We submit the two issues on this appeal are as follows:

ISSUE I

IS THE AFFIRMATIVE DEFENSE THAT PLAINTIFF WAS GUILTY OF COMPARATIVE NEGLIGENCE SUFFICIENT TO RAISE THE DEFENSE THAT PLAINTIFF FAILED TO USE A SEAT BELT?

ISSUE II

WAS THERE A PROFFER SUFFICIENT TO PRESERVE THE SEAT BELT ISSUE WHERE IT CANNOT BE DETERMINED FROM THE RECORD IF THE AUTOMOBILE EXISTS OR IF THE SEAT BELTS WORK?

ARGUMENT

We shall combine our argument of both issues since they are related.

In Insurance Company of North America v. Pasakarnis, ___So.2d___, (Fla. Supreme Court Case No. 63,312, opin. filed April 13, 1984) [9 F.L.W. 128], this Court held:

> ... evidence of failure to wear an available and fully operational seat belt may be considered by the jury in assessing a plaintiff's damages where the 'seat belt defense' is pled and it is shown by competent evidence that failure to use the seat belt produced or contributed substantially to producing at least a portion of the damages.
>
> * * *
>
> ...Defendant has the burden of pleading and proving that the plaintiff did not use an available and operational seat belt, that plaintiff's failure to use the seat belt was unreasonable under the circumstances, and that there was a causal relationship between the injuries sustained by the plaintiff and plaintiff's failure to buckle up.... (Emphasis added)

In the present case the seat belt defense was not pled, nor was there any proffer of evidence that it was available, operational or contributed to plaintiff's damages. If the trial judge had allowed the seat belt defense, notwithstanding it was first mentioned at trial, defendants had no evidence to present. They had never examined the automobile. There is nothing in the record to show it even exists.

In Pasakarnis, supra, the defendant prepared the case from the beginning in order to pursue the seat belt defense, by pleading it specifically, by proffering the necessary evidence to preserve the record and by pursuing the appeal to this Court. In the present case the seat belt defense was not pled. Neither plaintiffs nor the lower court knew the seat belt issue would be involved in this case until defendant mentioned it during the trial.

The pretrial order provided that all novel issues of law were to be listed (R 484). The pretrial stipulation did not mentioned the seat belt defense (R 493). Certainly this defense was novel, since the courts of this state have previously held that failure to wear a seat belt was not an affirmative defense. Had defendant really meant to raise this as a defense, the issue could not possibly have been tried, where it was first mentioned during trial. In Binger v. King Pest Control, 401 So.2d 1310 (Fla. 1981), this Court stated on page 1314:

> Requiring reasonable compliance with a pretrial order directing witnesses' disclosure will help to eliminate surprise and avoid trial by "ambush."

Had the trial court permitted defendant to try the seat belt issue, where it had not been raised until during the trial, it would clearly have been reversible error. It would have constituted exactly what our present Rules of Civil Procedure are designed to avoid, trial by "ambush".

The trial court properly ruled that the attempt to raise the seat belt issue was much too late, recognizing plaintiff could not possibly have been prepared on this issue (T Vol.4 - 362-366). The decision of the Fourth District in the present case, therefore, conflicts with this Court's decision in Pasakarnis, which holds that the seat belt defense must be specifically pled.

As this Court recognized in Pasakarnis, the failure to use a seat belt is not negligence contributing to an accident and accordingly there is a distinction between the type of conduct which will reduce plaintiff's recovery on the liability issue and the failure to wear a seat belt. These issues will be considered separately by juries. Thus, unquestionably, the simple allegation in an answer that a plaintiff is guilty of comparative negligence will not suffice to raise the seat belt defense. There is no better reason for this than that given by the trial court in the present case, which is that expert testimony will be

required to determine whether and if failure to use a seat belt enhanced plaintiff's injuries. The defendant cannot, therefore, wait until the trial to raise this issue.

Unlike INA v. Pasakarnis, supra, this was never a seat belt case. The seat belt issue was injected far too late in this law suit. If the lower court had permitted it, defendant would have had no evidence to submit on it.

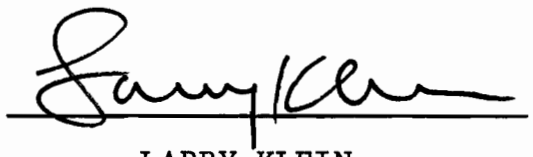
Apparently the Fourth District was also concerned about the lack of evidence in the record. The first opinion of the Fourth District certified the seat belt question to this Court (A 3). After the lack of proffer was pointed out on motion for rehearing, the Fourth District wrote a new opinion in which the certification was eliminated and the judgment was affirmed.

CONCLUSION

It is respectfully submitted that the portion of the decision of the Fourth District which holds that simply alleging comparative negligence as an affirmative defense is

sufficient to raise the seat belt issue should be reversed and the opinion of the Fourth District otherwise affirmed.

RICCI & ROBERTS, P.A.
P. O. Box 3947
West Palm Beach, FL 33402
(305) 684-4800
and
LARRY KLEIN
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

By 

LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished, by mail, this 20th day of July, 1984, to: GERALD E. ROSSER, Penthouse, The McCormick Building, 111 Southwest Third Street, Miami, FL 33130.

LARRY KLEIN