

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,959

**FILED**

SID J. WHITE

MAR 12 1984

PROTECTIVE CASUALTY INSURANCE COMPANY and CHRISTOPHER WEHAGE

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

Defendants/Petitioners,

vs.

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

Plaintiff/Respondent.

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ON PETITION FOR REVIEW FROM THE DISTRICT  
COURT OF APPEAL, FOURTH DISTRICT

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BRIEF ON JURISDICTION OF PETITIONERS  
PROTECTIVE CASUALTY INSURANCE  
COMPANY and CHRISTOPHER WEHAGE

---

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## INTRODUCTION

In this brief the parties will be referred to as they stood at trial. Thus, Petitioners in this proceeding will be referred to as Defendants, and Respondents in this proceeding will be referred to as Plaintiffs.

References to the Appendix will be by the letter "A" and a page number.

## STATEMENT OF THE CASE AND FACTS

This litigation arose from an automobile accident. Plaintiffs were the injured wife and her husband. Defendants desired to present evidence that the wife's injuries would have been diminished or non-existent if she had used her seat belt. The trial court ruled that Defendants' pleadings were inadequate to present such evidence. The verdict and judgment were for Plaintiffs. (A 1-2)

The Fourth District Court of Appeal held that the pleadings were adequate to present the seat belt defense. On the strength of its own decisions 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) the lower tribunal held that the seat belt defense was unavailable in Florida. (A 1-2)

The lower tribunal issued two opinions. (A 1-2, 3-4) The second was issued upon Plaintiffs' motion for rehearing. (A 5-7) The essence of the motion for rehearing was that Defendants were unprepared to show the automobile had seat

belts, and that the question should not be certified. A response was filed. (A 8-9) In its second opinion the lower tribunal, having granted the motion for rehearing (A 10), did not certify the question. (A 1-2) The lower tribunal did, however, grant a stay of all proceedings on the judgment it affirmed. (A 10)

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).

ARGUMENT

In Jollie v. State, 405 So.2d 418 (Fla. 1981) this Court held:

.....a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise jurisdiction. (at 420)

Although the opinion below was not per curiam, it does rely on decisions pending in this Court: Lafferty, supra Case No.63,251); Pasakarnis, supra (Case No. 63,312). In accordance with this Court's suggestion in Jollie, the lower tribunal recognized that the cited decisions were dispositive, and, accordingly, granted a stay of all proceedings upon motion by Defendants. There is thus no meaningful distinction

for jurisdictional purposes, between the opinion below and per curiam opinions which rely on decisions pending there. Indeed, the opinion below makes prima facie jurisdiction all the more visible.

Although Plaintiffs have raised the issue of whether the subject car even had seat belts, the lower tribunal did not withdraw its opinion and affirm on the basis that no such evidence existed of record. Defendants response to Plaintiffs' motion for rehearing adequately disposes of that issue.

This Court may constitutionally exercise its jurisdiction. It should do so since a miscarriage of justice will result if this Court decides Lafferty and Pasakarnis in favor of the seat belt defense and the decision in the instant case is allowed to stand.

#### CONCLUSION

Based on the foregoing, the Court can and should exercise its discretionary jurisdiction. Defendants ask the Court to grant the petition, consider this case on its merits, and to validate the seat belt defense in Florida thus reversing this cause for new trial along with Lafferty and Pasakarnis.

Respectfully submitted,

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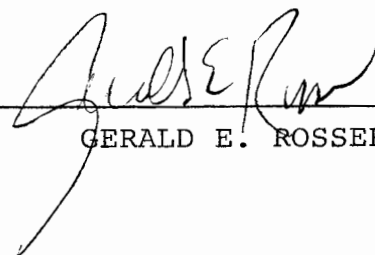
  
GERALD E. ROSSER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction of Petitioners, PROTECTIVE CASUALTY INSURANCE COMPANY and CHRISTOPHER WEHAGE, was mailed this 9th day of March, 1984, to: EDWARD M. RICCI, ESQUIRE, Ricci & Roberts, P.A., Post Office Box 3947, West Palm Beach, Florida 33402; and LARRY KLEIN, ESQUIRE, 501 South Flagler Drive, Suite 201, West Palm Beach, Florida 33401.

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