IN THE SUPREME COURT OF 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.

BRIEF OF PETITIONERS ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The parties will be referred to as they stood at trial. Petitioners herein will be referred to as Defendants, and the Respondents will be referred to as Plaintiffs. References to the record will be by the letter "R" and a page number; references to the trial transcript will be by the letter "T" and a page number; 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 the Defendants' pleadings were inadequate to present such evidence. A verdict and judgment were entered in favor of Plaintiffs. (A 1-2)

The Fourth District Court of Appeal held that the pleadings were adequate to present the seat belt defense. (A 1-2) However, consistent with its own opinions in *Lafferty v. Allstate Insurance Co.*, 425 So.2d 1147 (Fla. 4th DCA 1982) and *Insurance Co. of North America v. Pasakarnis*, 425 So.2d 1411 (Fla. 4th DCA 1982), quashed and remanded, ____ So.2d ____ (1984) (9 FLW/ SCO 128, 4/13/84), the lower tribunal held that the seat belt defense was unavailable in Florida. (A 1-2)

The lower tribunal issued two (2) opinions. (A 1-2, 3-4) The first opinion certified the question of the seat belt defense to this Court(A 1-2)

Plaintiffs filed a motion for rehearing, which in essence argued that the question should not be certified because the Defendants were unprepared to show the vehicle had seat belts. (A 5-7) Defendants filed a

response which stated, *inter alia*, that Plaintiffs' counsel admitted that the automobile was equipped with seat belts. (A 8-9, T Vol. IV 363) The lower tribunal then issued its second opinion, deleting the certified question. (A 3-4) The lower tribunal granted a stay of proceedings on the judgment entered in the trial court. (A 10)

This court accepted jurisdiction on June 8, 1984. (A 11)

ISSUE ON APPEAL

WHETHER THE LOWER TRIBUNAL ERRED IN HOLDING THAT THE SEAT BELT DEFENSE WAS NOT AVAILABLE TO THE DEFENDANTS.

ARGUMENT

The seat belt defense was recently adopted in Florida by this court in the landmark decision of *Insurance Co. of North America v. Pasakarnis*, ____ So.2d ____ (1984) (9 FLW/SCO 128, 4/13/84). The defense is now available to determine whether, under the particular circumstances of each case, nonuse of a seat belt by plaintiff amounted to failure to use reasonable care. If so, the injured party should not be able to recover those damages which would not have occurred had he buckled his seat belt.

In the instant case, the Fourth District Court of Appeal ruled that the Defendants could not present the seat belt defense because it had not been adopted in Florida. *Pasakarnis*, supra, overruled the Fourth District Court of Appeal's decision. In accordance with the decision in *Pasakarnis*, supra, this case must be remanded for a new trial on the sole issue of what percentage, if any, of the Plaintiff's damages were caused by her failure to wear a seat belt. In the event any percentage of

Plaintiff's damages were caused by her not wearing a seat belt, the $2,350,000 verdict must be reduced accordingly.

The instant case should be remanded for further proceedings based solely on *Pasakarnis*, supra. However, in an abundance of caution, the Defendants will address any doubts raised by Plaintiffs' motion for rehearing as to whether or not the car had seat belts. This question is easily settled in the record. Counsel for Plaintiffs admitted during trial that the vehicle had seat belts. Counsel said, "I think Mr. Killane testified whether or not there were seat belts in the car and there are photos that show there were. This was an equipped vehicle." (T Vol. IV 363) (emphasis added).

Furthermore, the National Traffic and Motor Vehicle Safety Act was passed on September 9, 1966. Motor Vehicle Safety Standard No. 208, requiring seat belt installations in passenger cars, was enacted under this legislation. The effective date of March 1, 1967 was extended to January 1, 1968; however, most manufacturers had already taken steps to meet the March 1, 1967 deadline. 32 Federal Register 2408, 2415, February 3, 1967. In 1964, United States automobile manufacturers had installed front seat belts as standard equipment. In 1965, Chrysler Corporation (the car in question is a 1968 Plymouth) and Ford Motor Company made rear safety belts standard equipment. 16 Am. Jur. Proof of Facts 355.

Plaintiffs cannot now be allowed to question whether or not the car had seat belts when counsel admitted their existence during trial and in light of the foregoing history of seat belt installation by U.S. automobile manufacturers. Based on the strength of this court's decision in *Pasakarnis*, supra, the instant case must be remanded for a

determination of whether any of Plaintiff's damages were caused by her failure to wear a seat belt.

CONCLUSION

Defendants respectfully request that this court remand the instant case for a new trial on the sole issue of whether, and to what extent, if any, Plaintiffs' $2,350,000 verdict should be reduced as a result of Plaintiff's failure to wear her seat belt.

Respectfully submitted,

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BY Gerald E. Rosser
GERALD E. ROSSER

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing was furnished by mail this 26th day of June, 1984,to Edward M. Ricci, Esquire, RICCI & ROBERTS, P.A., P.O. Box 3947, West Palm Beach, FL 33402 and to Larry Klein, Esquire, 501 S. Flagler Drive, Suite 201, West Palm Beach, FL 33401.

By Gerald E. Rosser
GERALD E. ROSSER