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.

REPLY BRIEF OF PETITIONERS ON THE MERITS

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ISSUE ON APPEAL

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

ARGUMENT

Plaintiff's position before this Court appears to be that this Court should apply the pleading rule announced in *Insurance Co. of North America v. Pasakarnis*, ____So.2d_____(Fla. 1984)(9 FLW/SCO 128, April 13, 1984,) Case No. 63,312, ex post facto, that this Court should consider an inadequacy of proffer argument raised here for the first time, and that admissions of counsel on the record should be ignored.

Article 1, S10 of the United States Constitution, and Article 1, S10 of the Florida Constitution prohibit ex post facto laws. Although this is generally a restriction on legislative bodies, it does express a philosophy. In the instant case Defendant did raise comparative negligence as an issue. Defendant had no crystal ball to predict that this Court, if persuaded to allow non-use of seat belts as a defense, would require a specific pleading. No such specificity is required, for example, when a defendant's theory of comparative negligence is that plaintiff was sppeding.

As for any surprise or trial by ambush contention, that is simply answered: Plaintiff did not take the discovery necessary to prevent the surprise now complained of. The discovery rules were presumably instituted to give litigants the tools with which to forestall surprises. Use of such rules is entirely optional: You can lead a horse to water but you cannot make him drink.

The argument portion of Plaintiff's brief below was approximately one and one-fifth pages long. It is apodictic that issues not raised below may not be raised for the first time on appeal. Inadequacy of proffer was not mentioned. Further, the following statement was made by the trial court:

> So I am going to deny the proffer. But certainly the matter is in the record and if you wish to appeal it, you have a record to do that. (T 364)

Counsel for Plaintiff stated to the trial court:

> 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 363)

If this non-issue of whether or not Plaintiff's vehicle had functional seat belts, which was never, for obvious reasons, raised at trial, is allowed to be raised now, then a great deal of judicial time, labor and resources has been wasted in the appellate history of this case. In essence, counsel's admission at trial means the issue was raised for the first time on appeal, and, at that, it was not raised until the motion for rehearing filed in the Fourth District Court of Appeal. It is worthy of note that the motion for rehearing was the first pleading filed by Plaintiff's new appellate counsel. Trial counsel who made the admission doubtless recalled it, or noted it in the transcript, which goes far towards explaining why the presence of functional seat belts vel non was not argued in Plaintiff's brief on the merits below.

CONCLUSION

None of the matters argued by Plaintiff are genuine issues properly before this Court. 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, Plaintiff's $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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8th day of August, 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.

GERALD E. ROSSER, P.A.

BY _____
GERALD E. ROSSER