IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO: 67,303

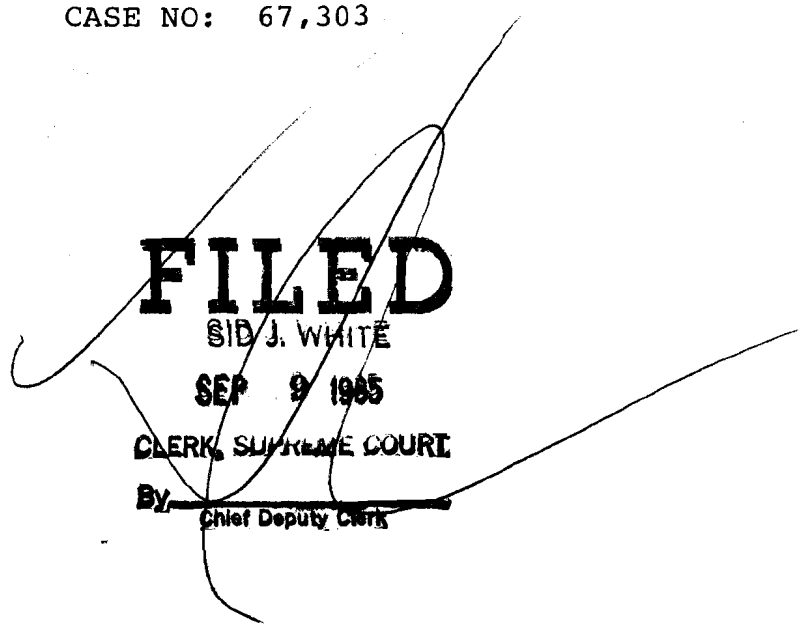
RODNEY KERFOOT,

Petitioner,

vs.

CHARLIE EARNEST WAYCHOFF et al.,

Respondents.



ON CERTIFIED QUESTION FROM THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS
THEODORE SEVERSON, JR.,
and
COLONY HOTEL, INC.,

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STATEMENT OF THE FACTS

The Defendant/Respondent Severson adopts the Statement of the Facts set forth in the opinion of the Fourth District and in the Plaintiff/Petitioner's brief. (See diagram in the appendix to this brief.)

It is important to note that this accident occurred in slowly moving rush hour traffic. What happened was that a driver of a car (Waychoff) wanted to cross two lanes of traffic. This Defendant (Severson) was stopped in the first lane and waved for Waychoff to pass in front of him. Waychoff stated that for some reason he took this signal to mean that all lanes were clear and that he could therefore proceed across the street without watching for traffic in the other lanes. The Plaintiff, (Kerfoot) was driving a motorcycle coming up in lane two, and collided with Waychoff. Therefore the driver of the motorcycle sued Waychoff and also this Defendant for waving him by. The Plaintiff settled with Waychoff but proceeded with this suit against the waver. The trial court granted a directed verdict to this Defendant, and the Fourth District affirmed but certified this question to the Supreme Court.

SUMMARY OF ARGUMENT

CERTIFIED QUESTION

DOES AN AUTOMBILIE DRIVER WHO, BY SIGNALS, RELINQUSHES HIS RIGHT OF WAY TO ANOTHER VEHICLE, OWE ANDY DUTY TO REASONABLY ASCERTAIN WHETHER TRAFFIC LANES, OITHER THAN HIS OWN, WILL SAFELY ACCOMMODATE THE OTHER VEHICLE?

SUMMARY OF ARGUMENT

The Plaintiff failed to present a prima facie case of negligence and therefore the directed verdict for the Defendant was proper. Specifically the Plaintiff failed to show any breach of duty. The Defendant in the present case assumed a duty to Waychoff not to proceed until Waychoff had cleared Defendant's lane. Defendant did not breach that duty. The District Court affirmed the trial court decision on this basis. This signal should not be interpreted to mean that he could cross both lanes without looking for traffic. In his brief, the Plaintiff is essentially arguing that the Defendant's signal relieved Waychoff of his obligation to drive carefully. This is an unreasonable position and it is not the law in any jurisdiction.

Both parties have cited Annot., 90 A.L.R. 1431 (1962). The Plaintiff mistakenly asserts that there is a "trend" in other jurisdictions imposing liability upon the signaling driver. This is not the case. In fact, the almost unanimous position is that there is no liability. The only

narrow exceptions have been in the following situations: 1) Where a bus driver signals to a passenger who has left the bus; 2) Where a driver signals a small child to cross the road; and 3) Where one driver is in a clearly superior position to observe the traffic. None of these exceptions applies in the present case. No court has ever found liability for the signaler under these facts. Moreover, the cases clearly indicate that no jury question is presented as to the signaling driver's liability.

ARGUMENT

CERTIFIED QUESTION

DOES AN AUTOMOBILE DRIVER WHO, BY SIGNALS, RELINQUISHES HIS RIGHT OF WAY TO ANOTHER VEHICLE, OWE ANY DUTY TO REASONABLY ASCERTAIN WHETHER TRAFFIC LANES, OTHER THAN HIS OWN, WILL SAFELY ACCOMMODATE THE OTHER VEHICLE?

The Plaintiff in this case has tried to convert a courteous act into a tort. He argues that a driver who simply relinquishes his right of way to another vehicle is liable when that vehicle collides with another vehicle in another lane of traffic. No jurisdiction has ever imposed liability on the signaling driver under these facts. It is respectfully submitted that this Court should answer the certified question in the negative.

The Plaintiff asks this court to focus on what the Defendant meant when he signaled to Mr. Waychoff. Common sense indicates that the trial court correctly stated that the signal meant something like this:

> "I am allowing you to proceed in front of me, and I won't run into your car."

The Plaintiff is asking this Court to consider the following as a reasonable alternative:

> "I am allowing you to proceed in front of me, and you don't have to watch for traffic coming up on my right. I assure you that the right lane is clear."

It is submitted that no reasonable person in Waychoff's

position would interpret the signal in this way. The mere fact that a driver waves another driver to cross in front of him does not relieve the other driver of his duty to exercise reasonable care as to other lanes of traffic. The District Court was clearly correct in limiting the Defendant's duty of care to his own lane of traffic. As a result there was no breach of duty, and no negligence as a matter of law. There was nothing for the jury to decide under these facts.

DUTY OF CARE

The Fourth District affirmed the directed verdict for the Defendant because it found that the Defendant did not breach any duty of care owed to the Plaintiff. The Court essentially found that no reasonable person in Waychoff's position would have interpreted the Defendant's signal in the manner argued by the Plaintiff. The Court noted that one who assumes to act must do so with reasonable care. Barfield v. Langley, 432 So.2d 748 (Fla. 2d DCA 1983). The Defendant in the present case assumed a duty to Waychoff not to proceed until Waychoff had cleared Defendant's lane. Defendant did not breach that duty.

The heart of the District Court's opinion is the following sentence:

> However, as we see it, the action undertaken here [Defendant's signal to Waychoff] required the exercise

> of reasonable care as to the lane occupied by the signaling driver. Accordingly, we affirm the trial court's ruling.

In so doing the court rejected the view that the Defendant's signal represented a guarantee that all lanes of traffic were clear. Finding as a matter of law that the law could not place such an interpretation on the Defendant's signal nor liability on the courteous driver, the trial court directed a verdict for the Defendant, and the District Court affirmed.

The Fourth District's ruling is supported by many decisions from other jurisdictions. In exactly the same type three-vehicle situations that we have in the present case, the courts have held that there is no jury question as to the signaling driver's liability.

In Nolde Brothers Inc. v. Ray, 221 Va. 25, 266 S.E.2d 882 (1980), the Virginia Supreme Court reversed a judgment against the signaling driver, holding that it was error to submit the issue of his negligence to the jury.

> Nevertheless, a jury question concerning a driver's negligence in giving such a signal is not presented where the signal could not reasonably have been interpreted as a signal to proceed across lanes of oncoming traffic. The signaler's ability to foresee potential danger is a factor giving meaning to a signal. Where a driver is not in a position to ascertain whether the person receiving the signal may safely proceed, it is unreasonable to conclude that the driver's gestures are a signal that it is safe to proceed. This

> rule has been applied to the situation under consideration in this case, where the signaler was in the driver's seat of his vehicle and thus not in a position to see right lane traffic traveling in the same direction. 266 S.E. at 884.

In Government Employees Insurance Company v. Thompson, 351 So.2d 809 (La. App. 1977), the plaintiff's suit against the signaling driver was dismissed, and the appellate court affirmed.

> Plaintiffs argue that Mr. Decuir was negligent in "leading Thomas to believe that he could safely make the turn when he could not and encouraging Thomas to leave a position of safety to one of peril." We can not agree. Mr. Decuir's signal was intended to give Mr. Thomas permission to pass in front of Mr. Decuir's stopped truck. Mr. Thomas can not be relieved thereby of his obligation to keep a proper lookout for oncoming traffic in other lanes of traffic. His misinterpretation of Mr. Decuir's courteous gesture can not serve to render Mr. Decuir guilty of negligence proximately causing the ensuing accident." 351 So.2d at 810.

Likewise in Devine v. Cook, 3 Utah 2d 134, 279 P.2d 1073 (1955), the Utah Supreme Court held that the signaling driver was not negligent in any way, and should have received a directed verdict.

> All the signal amounted to, if given, was a manifestation on the part of Metcalf to Mrs. Cook that as far as he was concerned Mrs. Cook could proceed. At the most all he did was to signal to Mrs. Cook and indicate, as far as Metcalf was concerned, he yielded her the right of way. She could see that he was on the left side of the cab of

> his truck and therefore in no position to see or to give her any assurance, that there was no traffic approaching upon the right of his truck from the rear. 279 P.2d at 1082.

In Van Jura v. Row, 175 Ohio St. 41, 191 N.E.2d 536 (1963), a truck driver waved for the defendant to make a left turn across his path. The defendant then collided with the plaintiff, who was approaching from the truck driver's right. The Court asked the following question:

> Can one who is waiting to make a left turn depend upon the action of another motorist and absolve himself from liability for injury committed upon a party, by showing that he was invited to proceed in his left turn by such other motorist, who, at the time, had the right to proceed uninterruptedly in the direction in which he was headed?

The Court stated that the truck driver's signal was one of courtesy, not obligation, and that neither party could avoid the consequences of their own negligence by trying to shift responsibility to the signaler.

> So far as Row is concerned, he can not be heard to say that his failure to proceed to the left with due care was because of the act of the truck operator. His obligation, as he moved left across the path of other vehicles, was to keep a look-out for such traffic, and not depend upon the act of another. In that respect, the conduct required by Section 4511.39, Revised Code, can not be delegated to another, and therefore absolve the offending party from proceeding with due care. When Row, without exercising any care, proceeded to complete his left turn, and thereby collide with the

> vehicle being operated by Bires, he became guilty of negligence as a matter of law. 191 N.E.2d at 537-538.

Similarly in Allstate Insurance Company v. Employers' Liability Assurance Corp., 98 So.2d 852 (La. App. 1957), the fact that the other driver waved for the defendant to pass did not relieve her of her duty "to make proper observation of her own as to the approaching traffic in the outer lane which she was about to cross." See also, Howard v. Insurance Company of North America, 162 So.2d 165 (La. App. 1964).

The Fourth District cited Thompson and Devine v. Cook in support of its decision. These cases and the others cited above clearly disclose the following rule of law:

> The signaling driver assumes a duty to the driver who receives the signal not to move forward until that driver clears the signaler's lane. Where the signaler does not breach that duty, there is no jury question as to the signaler's liability and a directed verdict for the signaler is proper.

The plaintiff can not cite any three vehicle cases for support because there aren't any that support his position. Only in a situation where the signaling driver is clearly in a better position to observe traffic than the driver who receives the signal ---- only in this situation is it proper to send the issue of the signaler's negligence to the jury. This limited exception does not apply in the present case,

where each party was in a relatively equal position to view the traffic. In fact, Mr. Waychoff arguably was in the better position since he was facing the approaching motorcyclist.

The cases relied upon by the Plaintiff involve injuries to pedestrians, and have little to do with the facts of the present case. In Panitz v. Orenge, 10 Wash. App. 317, 518 P.2d 726 (1973), the plaintiff alighted from a city bus, and the bus driver apparently motioned for her to cross in front of the bus. She was then struck by a car which was passing the bus on the left. The trial court granted the defendant - bus driver's Motion to Dismiss, but the appellate court reversed. However this case is distinguishable for the following reasons. The bus driver in Panitz clearly had a better opportunity to observe traffic on the street than did the plaintiff, whose view of the street was blocked by the bus. In addition, it is submitted that a bus driver's duty of care towards his passengers, even to those who have gotten off the bus, is of a different nature than the duty of care owed by one motorist to another. A bus driver deals with pedestrians and traffic every day as a part of his job. Under these circumstances, the plaintiff's accident was readily foreseeable, and the bus driver should have been aware of his responsibility not to contribute to the occurrence of such accidents. See also, Miller v. Watkins,

355 S.W.2d 1 (Mo. 1962), where a school bus driver's signal to the driver of an approaching truck resulted in the death of a small boy who was running to catch the bus. The cases cited by the Plaintiff involving pedestrians and small children do not really address the facts of the present case.

Moreover, many courts have held that a driver who signals a pedestrian to cross in front of his vehicle is not liable for injuries caused when the pedestrian is struck by another vehicle. In Dix v. Spampinato, 378 Md. 34, 358 A.2d 237 (1976), the plaintiff got off a bus and crossed in front of the bus to the center of the road. Defendant stopped her vehicle and waited for the plaintiff to pass. She was then struck by another vehicle passing the defendant on the right. The court upheld a directed verdict for the signaling driver, finding "completely unacceptable the notion that a signal from Mrs. Horak can be taken to mean anything more than that Ms. Dix might, with safety, step in front of the vehicle which Mrs. Horak was operating." 358 A.2d at 239. Similarly in Gamet v. Janks, 38 Mich. App. 719, 197 N.W.2d 160 (1972), the defendant stopped his car and waved for the fifteen year old pedestrian to cross in front of him. The boy was struck by co-defendant's car which was passing the defendant on the right. The Michigan court upheld a summary judgment in favor of the defendant

who signaled the boy to cross.

In Hanks v. Melancon, 338 So.2d 1215 (La. App. 1976), the plaintiff was riding his bicycle on the side of the road. The defendant, driving her car in the same direction, slowed down and signaled for the plaintiff to pass in front of her. The plaintiff was then struck by another car which was passing the defendant on the left. The Court affirmed a trial court judgment for the signaling driver. "A signal from another motorist does not relieve a driver from a statutory duty to make his own independent observation of traffic conditions." See also, Trinity Universal Insurance Company v. Nicholson, 104 So.2d 244 (La. App. 1958).

In Harris v. Kansas City Public Service Co., 179 Kan. 120, 297 P. 718 (1931), a street car motorman waved for the plaintiff to cross in front of his car. The plaintiff was then struck by a street car coming from the opposite direction. The State Supreme Court reversed a trial court judgment for the plaintiff. The court held that a reasonably prudent person would not construe the motorman's signal to mean that the entire street was clear of traffic. "His signal to the plaintiff could mean no more than an assurance that he would not start his car and catch her while she was passing between his car and the one four feet in front of it." In addition, the court noted that the motorman was in no better position to observe the traffic

than the plaintiff was.

These cases indicate that even in pedestrian situations the signaling driver is generally not held liable, since the signal to the pedestrian does not relieve him of his obligation to exercise due care for his own safety.

PROXIMATE CAUSATION

The Plaintiff repeatedly asserts that the Defendant's signal caused the accident between the Plaintiff and Mr. Waychoff. However even if the signal can be characterized as a factual cause of the accident, Mr. Waychoff's intervening negligence certainly relieves the Defendant of liability as a matter of law. The requirement in negligence actions that the defendant's conduct be the proximate cause of the plaintiff's injuries is fully applicable in motor vehicle cases. 4 Fla.Jur.2d, Automobiles Section 224 (1978); see also, McClain v. McDermott, 232 So.2d 161 (Fla. 1970). Under the facts of this case, the Defendant's conduct in waving Mr. Waychoff to pass is certainly too remote an act to be considered the proximate cause of the accident. This is particularly so where Mr. Waychoff clearly violated his statutory duty not to turn into the path of oncoming traffic until it was safe to do so. Section 316.155 (1) F.S. (1983).

It is well settled in Florida that remote conduct which furnishes only the occasion for someone else's supervening

negligence is not a proximate cause of the result of the subsequent negligence. Matthews v. Williford, 318 So.2d 480 (Fla. 2d DCA 1975); Whitehead v. Linkous, 404 So.2d 377 (Fla. 1st DCA 1981). In Matthews the Court stated that conduct prior to an accident "is not legally significant unless it is a legal or proximate cause of the injury or death as opposed to a cause of the remote conditions or occasion for the later negligence." 318 So.2d at 483. It is submitted that the Defendant's act of signaling Mr. Waychoff is of no legal significance on the issue of proximate causation when compared to Mr. Waychoff's breach of his statutory duty of care.

In Dace v. Gilbert, 96 Ill. App. 3rd 199, 421 N.E.2d 377 (1981), the court affirmed a summary judgment for the signaling driver. The court held that "the gratuitous actions of the party who signals another party that traffic conditions are safe must be the proximate cause of the accident." Similarly in Howard v. Insurance Company of North America, supra, the court rejected the argument that the signaling driver's conduct was the sole proximate cause of the accident. The court held that the only negligent party was the driver who turned into the path of oncoming traffic without making certain that it was safe to cross.

SUMMARY

The Plaintiff mistakenly asserts that the "trend" in other jurisdictions is to impose liability on the signaling driver. Annot., 90 A.L.R.2d 1431 (1962). However a close reading of that article reveals no such trend. As the District Court noted in its opinion, this so called trend is limited only to those situations where "the approaching driver is not in as good a position to observe the situation as is the one signaling." On page 1433 of the Annotation, the author says:

> However, where the situation appears to be as much within the observation and estimation of the signaled driver as it is within that of the signaling one, and the signaled driver then proceeds without proper lookout and without exercising due care, it seems that the signaling driver will not be found guilty of negligence, on the theory that in such case he is only signaling his intention to wave his right of way.

It is submitted that the near unanimous rule of all jurisdictions is that there is no liability for the signaling driver as a matter of law. No reasonable driver would interpret such a signal as a guarantee that the entire roadway is safe. The reasonable interpretation is simply that the driver yields his right of way. There are limited exceptions to the rule, generally involving a bus driver's duty of care to pedestrians or a driver's duty of care to small children. However none of these exceptions apply in

the present case.

The Defendant respectfully requests this Court to answer the certified question in the negative.

CONCLUSION

THe overwhelming conclusion of the courts is that there is no jury question as to the signaling driver's liability in this situation since he has not breached any duty of care. This Honorable Court should therefore answer the certified question in the negative.

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By: Richard A. Sherman
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I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 4th day of September, 1985 to:

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