

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 67,303

RODNEY KERFOOT,

Petitioner,

vs.

(DCA-4 NO. 84-1218)

CHARLIE EARNEST WAYCHOFF,
et al.,

Respondents.

_____ /

ON CERTIFIED QUESTION FROM THE FOURTH DISTRICT
COURT OF APPEAL

PETITIONERS' S REPLY BRIEF ON THE MERITS

FILED
SEP 20 1985
CLERK, SUPREME COURT
Chief Deputy Clerk
pb

MATHISON & DECKERT
Suite 314, Law Building
315 Third Street
West Palm Beach, FL 33401
(305) 833-0803

and

JANE KREUSLER-WALSH, and
LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

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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?

On pages 3 and 4 of our main brief we set out the testimony of the defendant, the signaling driver. He testified he motioned Mr. Waychoff to proceed and when asked whether he could tell whether it was clear for Mr. Waychoff to proceed, he said:

Question: ... You motioned him to come ahead and make the turn?

Answer: Yes.

Question: And at that point were there any vehicles immediately to the right of you sitting in what would be the lane closest to the curb, heading north on U.S. 1?

Answer: Not for me to see, because I didn't notice. I have a mirror, but I didn't pay any particular attention. I just let him go. I figured if I cleared his way, he could go across. I just let him go.... (R 56).
[Emphasis Added]

The cases on which defendant primarily relies are cases in which the courts have held that no reasonable person could have interpreted the signal to mean it was safe to proceed. In the present case the defendant's testimony indicates that he could have looked in his mirror to see

whether the lane to the right of him was clear, but didn't bother. This defendant assumed Mr. Waychoff could make it. The jury could clearly have so found from his testimony, and that he simply did not care enough to make sure the way was clear.

The defendant's entire argument rests on the faulty premise that no reasonable person could have interpreted his signal to mean the way was clear. Certainly that conclusion cannot be drawn as a matter of law from the defendant's testimony.

Defendant says on page 5 that the "mere" waiving of another driver does not relieve the other driver to exercise reasonable care. No one is suggesting in the present case that the "other driver" did not also contribute to this accident. If, however, the signaling driver was guilty of 5% and the proceeding driver guilty of 95% of the cause of this accident, the signaling driver is still liable.

Nor do we argue, as defendant suggests on page 6, that the wave was a "guaranty that all lanes of traffic were clear." How it was to be interpreted, under all the circumstances, was a jury question.

In the primary case on which defendant relies, Nolde Brothers Inc. v. Ray, 221 Va. 25, 266 S.E.2d 882 (1980), the waving driver and the proceeding driver were each moving a few feet, stopping and waiting for the other to proceed. The waving driver denied ever giving a signal, testifying to the contrary that he simply threw up his hands in disgust and the other driver then attempted to go in front of him. In that case the court recognized that under certain circumstances the signaling driver can be held liable, but that under the facts of that case, the driver who proceeded should have known as a matter of law that the signaler was in no position to tell him that the way was clear.

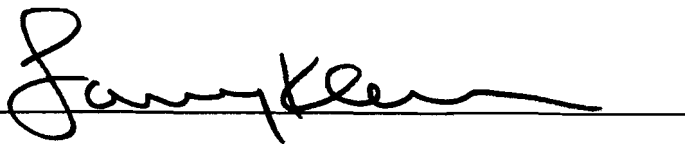
Beginning on page 8 the defendant has cited cases from Ohio, Louisiana, Maryland, Michigan, and Kansas. In each of those cases the injured plaintiff was the one who responded to the signal and it was held that the plaintiff was barred as a matter of law by contributory negligence. None of those states, at the time of those decisions, had comparative negligence, and thus any negligence would bar plaintiff from recovery.

In the present case all the signaling driver had to do to ascertain that the way was clear was to look in his mirror or turn his head and look back into the lane of

traffic on his right. He admitted signaling the driver to proceed. When asked were there any vehicles to the right he said he "didn't notice ... didn't pay any particular attention. I just let him go." Unlike Nolde, the Virginia case on which defendant relies, where the waving driver said he simply threw up his hands in disgust, the defendant in the present case admits signaling the plaintiff to proceed on the assumption "he could go across" (R 56). Whether he was negligent was for the jury.

MATHISON & DECKERT
Suite 314, Law Building
315 Third Street
West Palm Beach, FL 33401
(305) 833-0803

JANE KREUSLER-WALSH, and
LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

By 
LARRY KLEIN

CERTIFICATE OF SERVICE

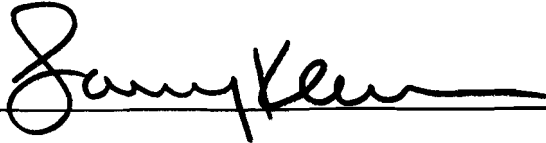
I HEREBY CERTIFY that copy of the foregoing has been furnished, by mail, this 26th day of September, 1985, to:

DAVID R. MANKIN
First Nationwide Savings Bldg.
450 N. Park Road - 4th Floor
Hollywood, FL 33021

RICHARD A. SHERMAN
102 North Justice Bldg.
524 South Andrews Avenue
Fort Lauderdale, FL 33301

SUSAN O'HARA
249 Peruvian Avenue
Palm Beach, FL 33480

WILLIAM J. BOSSO, JR.
2428 Broadway
Riviera Beach, FL 33404



LARRY KLEIN