IN THE SUPREME COURT OF FLORIDA

CASE NO: 80,574

BULLDOG LEASING COMPANY, INC.,
HEAVY MACHINERY AND TOOL
TRANSPORTERS, INC.,
SUWANNEE TRANSPORT COMPANY, INC.,
and CRAWFORD CATIA,

Petitioners,

v.

SUSAN A. CURTIS,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW
(CONFLICT JURISDICTION)
FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONERS

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INTRODUCTION

This appeal involves the seat belt defense in automobile accident cases and whether circumstantial evidence that the seat belt had been used in the past is sufficient to establish that it was operational. The Fourth District held such evidence insufficient and reversed the judgment. The District Court ruled that by improperly permitting the jury to consider the "seat belt defense" as recognized by the Court in Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984), the trial judge created confusion mandating a complete new trial on both the issues of damages and liability. As this opinion conflicts with Pasakarnis as well as decisions from all the other district courts of appeal, this Court accepted jurisdiction by its order of May 11, 1993.

This brief is submitted on behalf of Petitioners, Defendants/Appellees below. All Petitioners will be referred to collectively in the singular as Petitioner, Defendant or Bulldog. Petitioner, Catia, on occasion, will be referred to by proper name. Respondent will be referred to within by proper name, Plaintiff or as Respondent. Reference to the Record on Appeal will be by the symbol "R." Reference to the trial transcript will be by the symbol "T." The transcript is the first 722 pages of the record so that the page numbers of the transcript are the same as the record page citations. Unless otherwise indicated, all emphasis has been supplied by counsel.

STATEMENT OF THE CASE

This is an appeal by Bulldog, defendant/appellee below of an opinion by the Fourth District Court of Appeal reversing a final judgment in favor of Petitioner and remanding for a new trial on both liability and damages, Curtis v. Bulldog Leasing Company, Inc., 602 So.2d 611 (Fla. 4th DCA 1992).

Curtis filed her initial complaint for damages arising out of a June 5, 1981 automobile accident on January 20, 1982 (R. 723-29). Amended Complaints were filed in October, 1982 (R. 781-85) and April, 1983 (R. 796-98) naming the City of Boca Raton and the State of Florida, respectively. After this Court's decision in Pasakarnis, Petitioner amended its Answer and Affirmative Defenses to raise the seat belt defense (R. 852-54, 882). The City of Boca Raton moved for and obtained a final summary judgment (R. 989-90) which was affirmed by the Fourth District, Curtis v. Bulldog Leasing Company, 513 So.2d 238 (Fla. 4th DCA 1987). The State eventually also obtained a summary judgment. The matter slowly proceeded to trial with the trial court setting a February 12, 1990 trial date (R. 1139). In advance of trial Respondent filed motions for partial summary judgment on the seat belt defense (R. 1145-46, 1151-54). No order denying the motion appears in the record, though obviously these motions were either denied or never ruled upon.

Trial commenced on February 12, 1990, and concluded with a jury verdict on February 16, 1990 (R. 1-722). The jury found Bulldog 10% and Curtis 90% negligent in causing the accident. They

awarded damages of $275,000. The verdict form contained the Pasakarnis seat belt interrogatory questions. The jury found that Curtis failed to use the available and fully operationable seat belt and that such failure contributed to her damages. The jury found that 67.5% of her damages were the result of her failure to use the seat belt (R. 1198-1200). A final judgment, reflecting the verdict and noting that Curtis had previously received $15,000 in settlement from a joint tortfeasor which acted as a setoff, was entered for zero dollars in plaintiff's favor (R. 1343-47).[1]

Respondent timely appealed the final judgment to the Fourth District Court of Appeal (R. 1352), which over a dissenting opinion reversed, finding that the evidence to support the seat belt defense was insufficient and that permitting the jury to consider the defense confused them. The Court on authority of an earlier decision[2] remanded for a new trial on liability and damages. Curtis v. Bulldog Leasing Company, Inc., 602 So.2d 611 (Fla. 4th DCA 1992).

Petitioners thereafter filed a Notice to Invoke this Court's discretionary jurisdiction pursuant to Fla. R. App. P. 9.120. This Court issued its order on May 11, 1993, accepting jurisdiction and

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[1] The $275,000 damage award reduced by 90% comparative negligence results in a net verdict of $27,500. This figure reduced by 67.5% results in a net award of $8,937.50, which because of the setoff, resulted in a zero verdict for Respondent.

[2] Youngentob v. Allstate Insurance Co., 519 So.2d 636 (Fla. 4th DCA 1987). Youngentob, as well as both Curtis decisions and the Fourth District's opinion in Insurance Company of North America v. Pasakarnis, 425 So.2d 1141 (Fla. 4th DCA 1982), reversed 451 So.2d 447 (Fla. 1984), were all authored by Judge Letts.

setting forth the briefing schedule.

STATEMENT OF THE FACTS

A. THE ACCIDENT

On June 5, 1981 Susan Curtis plowed into the rear of Bulldog's eight-foot wide tractor trailer truck at 56 miles per hour. The truck, being driven by Catia, had come to a stop on the left shoulder of Interstate 95, just north of the Glades Road exit in Boca Raton. Six feet of the truck was on the shoulder with only two feet extending into the twelve foot, left-hand lane of the highway (T. 227). Moments earlier, Edward Artau, while traveling in the right hand lane of I-95, had skidded and begun to spin into the middle lane of the highway when the car in front of him slammed on its brakes. As he spun into the center lane perpendicular to traffic, he saw the truck bearing down on him. The truck grazed his vehicle before moving out of his lane and ultimately coming to a stop several hundred feet away (T. 469-70).

Due to the condition of the median strip, the truck driver could not pull the truck totally off the road as he was concerned that the truck, weighing some 90,000 pounds and carrying a large concrete sewer pipe, would tip over (T. 549, 576). He pulled off as far as he could, so that only two feet extended into the lane of traffic. Although a Greyhound bus had some difficulty staying in the left-hand lane of the road (R. 278-279), the record reflects that with ten feet of lane available, vehicles in the left lane were able to pass the truck without having to encroach upon the middle lane (T. 227-228, 318-319, 339-340, 504-505, 518, 520-522, 528-529). Indeed, when the ambulance arrived to take Curtis to the

hospital, it pulled up next to the truck in the left-hand lane, and did not block the center or right-hand lanes of traffic in any way (T. 519). Upon impact, Respondent's car was 80% off the road and into the median strip, actually having struck the left side of the truck (T. 477-478).

Curtis had entered onto I-95 at Linton Boulevard and was going to exit the Interstate at Glades Road, some five to six miles south. She described traffic as heavy rush hour traffic. Appellant was in the left fast lane, fifteen (15) to twenty (20) car lengths away from the truck, when she noticed it in front of her (T. 126-27, 139). The impact occurred on the shoulder of the speed lane one quarter mile before the Glades Road exit (T. 116-17, 122). Curtis admitted that she had looked away from the front, turning her head for a second or two (to see if she could change lanes to get into the right lane to exit at Glades Road) when she struck the truck (R. 141). There were no skid marks (R. 592). At 56 miles per hour, she traveled 164 feet in two seconds. Curtis' body was thrown forward in the impact. She hit the dashboard and steering wheel and ended up under the dashboard (T. 68).

The Highway Patrolman who investigated the accident testified that when he arrived at the scene he saw, and recognized, Sgt. Quinn of the Boca Raton Police Department. He was asked how Quinn looked and replied - "You know what a police uniform looks like?" Sergeant Quinn was wearing a yellow raincoat (T. 303). Quinn testified that the raincoat had the word "POLICE" written across the back (T. 531). Artau recognized the police uniform as well (T.

472).

Sergeant Quinn testified that he was on his way to work when he noticed the Artau vehicle skid and clip the truck. He parked his vehicle and went to render assistance (T. 527-28). Catia, the truck driver, asked him if he should move the truck. Sgt. Quinn, being of the opinion that the truck was sufficiently off the road, told the driver "don't move your truck, I am not investigating the accident, wait for the Highway Patrolman" (T. 529). This was confirmed by the Driver, Catia, who testified:

> On the way back to the scene of the first accident I saw the officer in uniform. I took it to be police and a full uniform and everything. I walked up to him and I asked him was my truck up there, was my truck all right and he immediately replied to me, he said, yes, it is, but he said, leave it there. I summoned the state trooper and he will be here.
> (T. 566).

Based upon these facts, the jury found Respondent 90% at fault in causing the accident.

B. THE SEAT BELT DEFENSE

During trial the following evidence was adduced to establish that the vehicle had available and operational seat belts, which if utilized would have lessened the severity of Curtis' injuries:

1. Respondent admitted, and photographs of the vehicle were introduced into evidence which showed that the vehicle was equipped with seat belts. She also admitted that she never used them, though she knew they were there for wrecks and fast stops to hold an occupant in position (T. 88, 147).

2. Respondent admitted that the car was new and that she had not owned it for very long before the accident (T. 144, 160).

3. Respondent's husband (her fiancee at the time of the accident in 1981) testified that the car, a 1979 or 1980 Toyota (R. 144), had been purchased three or four months before the accident and was equipped with a shoulder harness and seat belt. He testified that he knew a seat belt worked if he heard it click when he buckled the belt (T. 190, 194).

4. An excerpt of Respondent's deposition was read wherein she admitted that prior to the accident, her husband, had driven the car. She was asked, "Would he ever use the seat belt in the car?" and replied:

> He used it, the seat belt while he was driving the automobile. While he was sitting in it he would use the seat belt and sometimes, I guess, I don't know, he used the seat belt at different times, I mean, I don't use the seat belt, but he does. (T. 167).

At trial, when faced with this testimony, Appellant said that if she had testified that her husband used the seat belt, then she had lied under oath (T. 169).

5. Harry Meyerson, Petitioner's expert accident reconstructionist, testified that the use of the available seat belt would have lessened the severity of Respondent's injuries (T. 619-20).

Based upon this testimony, the jury found that the vehicle was equipped with an operational seat belt and the failure to use same contributed to Respondent's damages.

ISSUES ON APPEAL

ISSUE I

WHETHER THE DISTRICT COURT ERRED IN REVERSING THE JURY VERDICT AS THERE WAS SUFFICIENT COMPETENT EVIDENCE TO ESTABLISH THAT THE SEAT BELT WAS AVAILABLE AND OPERATIONABLE.

ISSUE II

WHETHER THE DISTRICT COURT ERRED IN ORDERING A NEW TRIAL. ASSUMING THAT THE SEAT BELT DEFENSE WAS IMPROPERLY SUBMITTED TO THE JURY, THE CASE SHOULD BE REMANDED FOR ENTRY OF JUDGMENT BASED UPON THE NET VERDICT, WITHOUT REDUCTION FOR RESPONDENT'S FAILURE TO WEAR THE AVAILABLE SEAT BELT.

SUMMARY OF ARGUMENT

In Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984), this Court adopted the "seat belt defense" for Florida. This Court placed the burden upon the defendant to plead and prove that the plaintiff did not use an available operational seat belt, and that the failure to use that seat belt was unreasonable under the circumstances, and that there was a causal relationship between the injuries sustained by the plaintiff and the failure to use the belt. Having established that evidence, it became a jury question of whether or not a plaintiff suffered damages as a result of the failure to use the seat belt. While earlier cases allow circumstantial evidence to be used to prove an operational seat belt, in the years since Pasakarnis the district courts of appeal in Florida have emasculated the rule. The burden has gone from evidence that the car was equipped with a seat belt (photographs) and expert testimony that an expert had never known if a seat belt had failed, to the requirement that there be evidence that the seat belt clicked; to evidence that it clicked and was anchored to the frame; to direct evidence that at the time of the accident that it was anchored and operational. The district courts of appeal have, in effect, eviscerated the rule of Pasakarnis.

The seat belt defense, like all other matters submitted to a jury, need not be established only by direct evidence, but can be established through circumstantial evidence. Here, the evidence was clear and sufficient to go to the jury on the issue of an

available and operational seat belt. Curtis' testimony that she never used it, but that her fiancee (now husband) used it, was sufficient to put the matter before the jury. This cause should be remanded to the Fourth District Court of Appeal with directions to affirm the verdict entered by the trial court.

The trial court in this cause gave the seat belt instruction propounded by this court in Pasakarnis. Inspite of this, the Fourth District Court of Appeal found that the jury was "confused" and remanded the cause for a new trial on all issues. Where, as here, an interrogatory verdict is propounded to prevent jury confusion and all of the evidence supports the finding that the jury was not confused on the issue of comparative negligence, it was error for the Fourth District Court of Appeal to remand for a trial on all issues. The other district courts of appeal, as well as panels of the Fourth District Court of Appeal, when addressing this issue have remanded for entry of the judgment disregarding the amount the jury has attributed to the seat belt defense. The jury's finding that the Respondent was 90% comparatively negligent is more than adequately supported by the record. She drove into the left rear of a truck which was parked three quarters of the way into the median strip. There were no skid marks. She admitted she had been looking away. The 90% comparative negligence finding is supported by competent substantial evidence and should not have been disturbed by the Fourth District Court of Appeal. The matter should be remanded for entry of judgment based upon the verdict without reduction for Respondent's failure to use the available

seat belt.

ARGUMENT

ISSUE I

THE DISTRICT COURT ERRED IN REVERSING THE FINAL JUDGMENT AS THERE WAS SUFFICIENT COMPETENT EVIDENCE TO ESTABLISH THAT THE SEAT BELT WAS AVAILABLE AND OPERATIONABLE.

In 1984 this Court, in a precedent setting opinion, held that the failure to wear an available and operational seat belt can be considered by a jury in assessing a plaintiff's damages. Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984) (hereinafter Pasakarnis). The Court placed the burden on the defendant to plead and prove that:

> the plaintiff did not use an available and operational seat belt, that plaintiff's failure to use the seat belt was unreasonable under the circumstances, and that there was a causal relationship between the injuries sustained by the plaintiff and the plaintiff's failure to buckle up. If there is competent evidence to prove the failure to use an available and operational seatbelt produced or contributed substantially to producing at least a portion of plaintiff's damages, then the jury should be permitted to consider this factor, along with all other facts in evidence, in deciding whether the damages for which defendant may otherwise be liable should be reduced.

Id. at 454.

This Court ennunciated three verdict interrogatories, specifically directing that the questions follow the damage interrogatory on the verdict form. In setting forth those interrogatories the opinion uses the term "fully operational seat belt." Pasakarnis nowhere discusses what this Court meant by either operational or fully operational.

The district courts, in attempting to define the term operational or fully operational, ignored an Eleventh Circuit decision, Baker v. Firestone Tire & Rubber Co., 793 F.2d 1196 (11th

Cir. 1986) which appears to be the first case decided after Pasakarnis, and instead have created unreasonable burdens on a defendant to prove the defense. At this point in time if a defendant cannot offer direct testimony that someone tested the seat belt either just before the accident or shortly thereafter, the defense is not available.

In Baker v. Firestone, the Eleventh Circuit affirmed the trial court's submission of the seat belt defense to the jury. In that case the evidence established that the car was equipped with a seat belt but that Baker never used it (these facts are identical to the facts in this case). Photographs of the vehicle showed the seat belt. An expert testified that he had never known of a seat belt to fail. Though there was no evidence that anyone had ever tested the belt to see if it functioned properly, that was not fatal to the defense. The court felt that though the point was not proved beyond a reasonable doubt, the testimony and evidence sufficiently raised a jury issue as to the belt's operative condition.

The Florida district courts have not been as tolerant in accepting the defense. The First District in American Automobile Association v. Tehrani, 508 So.2d 365 (Fla. 1st DCA 1987) did reverse a judgment for the plaintiff finding that it was error for the trial judge not to submit the seat belt defense to the jury. The evidence showed that the vehicle had been purchased eight months before the accident and was in good condition when purchased. At the time of the accident the car was between one and two years old and equipped with seat belts. Though the

driver/owner of the vehicle admitted to not using seat belts himself, and though he never specifically tested the belts to see if they worked, he did indicate that the belts did "click." The First District found these facts sufficient to have permitted the issue to go to the jury.

Decisions that followed have eviscerated the defense. In Youngentob v. Allstate Insurance Company, 519 So.2d 636 (Fla. 4th DCA 1987) the fourth district reversed a final judgment finding it error to have permitted the defense to go to the jury as the only fact to support operability of the seat belts was that the car was in good condition. The court attempted to reconcile their opinion with the first district's opinion in Tehrani noting that in that case there was evidence that the belt "clicked."

After Youngentob the "click" of the seat belt became a necessary condition precedent for the jury to consider the defense. In Devolder v. Sandage, 544 So.2d 1046 (Fla. 2d DCA 1989) the second district reversed the judgment finding it error to have permitted the jury to consider the seat belt defense. In that case the evidence established that the vehicle was equipped with a seat belt/shoulder harness; that it was the plaintiff's normal practice to wear it; and that she was not wearing it at the time of the accident. Additionally, an insurance adjuster testified that she inspected the vehicle stating, "I checked the seat belts, and I did not check the front seat." Id. at 1047. In reversing the judgment the district court reasoned:

> A common thread running through these cases [Pasakarnis, Youngentob, Tehrani] is the requirement of competent

> evidence to show that, at or near the time of the accident, the seat belt or belts in the vehicle were anchored to the vehicle body and contained buckles which close securely when utilized or tested. The evidence in this case does not reach that plateau. Id.

The Second District followed its Devolder opinion with its decision in DeLong v. The Wickes Company, 545 So.2d 362 (Fla. 2d DCA 1989) which also reversed a judgment for improperly permitting the jury to consider the seat belt defense. The evidence to support the seat belt defense in DeLong was testimony of the investigating officer that the vehicle had available seat belts; that the injured plaintiffs were not wearing the seat belts; photographs showed seat belts in the car; and the vehicle was purchased new four to five months before the accident. Since there was no evidence that the seat belts "clicked" the court found that the defendants had failed to meet their burden of proof.

The Third District in Knapp v. Shores, 550 So.2d 1155 (Fla. 3rd DCA 1989), on authority of the above cited cases, reversed a judgment. The court found that plaintiffs' testimony that they sometimes used the seat belts and sometimes they did not, and that the equipment in the car was in working order, was insufficient. Again, since there was no evidence that at or near the time of the accident the seat belts were anchored to the vehicle body and that the buckles closed securely when used or tested, the defense was found to be unavailable. See also, Smith v. Holy Temple Church of God in Christ, Inc., 566 So.2d 864 (Fla. 1st DCA 1990) (evidence did not show that seat belt anchored to body or that it clicked).

The present state of the law is that the defendant must prove

that the seat belts were anchored and clicked in order for the seat belt defense to be available. Even then, the defense may not be available. See, Barcello v. Rubin, 578 So.2d 58 (Fla 4th DCA 1991) (a seat belt's operability cannot be determined by a mere click). It has now become nearly impossible for a defendant to sustain its burden of proof to avail itself of this defense. Many times, as was the case here, the vehicle is destroyed in the accident. Or, by the time suit is filed, the vehicle has been disposed of. Under either scenario, the vehicle cannot be inspected to test for the telltale "click." Therefore, neither an expert nor other witness can testify as to operability. This Court in Pasakarnis never intended that in order for the defense to be available, direct, uncontroverted evidence, as the district courts are insisting on, be presented.

In civil cases an essential fact may be established by circumstantial evidence. The inference relied upon as pointing to the fact sought to be established must outweigh all reasonable inferences to the contrary. See, R. Hughes, Inc. v. Mitchell, ___So.2d___ (Fla. 1st DCA 1993), 18 FLW D1095 and cases cited therein. Though this doctrine is recognized in Florida, apparently it is not available to defendants attempting to prove the seat belt defense. It is illogical to expect that a driver of an automobile who never uses a seat belt, to have tested it so as to admit that it clicked and was anchored. Plaintiffs are being rewarded for never using the seat belt. The intent of Pasakarnis was to hold plaintiffs who do not use a seat belt responsible for their

conduct. The public policy of the State is to require occupants of motor vehicles to use a seat belt. This intent and policy has been totally frustrated by the lower appellate courts. Indeed, even Judge Letts in the decision below noted the difficulty a defendant has:

> The present state of the law perhaps is not completely satisfactory. As we see it, it cannot be easy for the defense to establish whether or not a seat belt is fully operational short of going to the accident vehicle and inspecting it or being fortunate enough to obtain a witness who has used it. Few drivers examined on the stand would know whether their seat belts were 'fully operational," Pasakarnis, 451 So.2d at 455, even if there was a "click" when the seat belt was inserted into the buckle.

Curtis v. Bulldog Leasing Company, 602 So.2d 611,612 (Fla. 4th DCA 1992). See also, Barcello v. Rubin, 578 So.2d 58 (Fla. 4th DCA 1991) (Stone, J. dissenting).

It is suggested that the problem faced by defendants has been created by the district courts and not by this Court's decision in Pasakarnis. A return to the basic rules of evidence as applied by the Eleventh Circuit in Baker v. Firestone Tire & Rubber Co., cures the problem. If there is evidence presented that the vehicle had a seat belt, whether through testimony of the owner/driver of the vehicle, or through testimony of some other witness such as an investigating officer, or through photographs of the vehicle; and there is evidence that the vehicle was either purchased new or is not that old (in Tehrani the car was less than two years old and had been purchased used eight months earlier); or that the seat belt had been utilized in the past by someone, then the reasonable inference has been established that there was an operational seat

belt available. To require a defendant to prove what cannot be proven - that a seat belt in a car that was never operated was operational, especially when the car, because of the passage of time is unavailable for inspection, totally defeats what the Court attempted to accomplish in Pasakarnis.

In the nine years since Pasakarnis the legislature has recognized the importance of wearing seat belts and has adopted F.S. § 316.614 (1991). Though the statute only applies to front seat passengers, and makes the failure to use a seat belt comparative negligence, the Pasakarnis test of available and operationable remains applicable to the statute as well.[3] Therefore, this court must address the problem that the lower courts have created. A defendant relying on the seat belt defense to establish a plaintiff's comparative negligence or under Pasakarnis, should not have to prove beyond a reasonable doubt, as is the situation now, that the seat belt clicked. Circumstantial evidence either through expert testimony as in Baker supra, or an admission from the plaintiff or someone else who had used that seat belt in the past that it had worked should suffice to satisfy the burden and permit the jury to resolve the issue. Anything more makes the defense available only in those situations where a

[3] § 316.614(4) has created a dichotomy in jury instructions as to front seat occupants of a vehicle and rear seat occupants of the same vehicle. Now front seat occupants who fail to use a seat belt are governed by the statute and the failure to use a seat belt is merged into comparative negligence while rear seat occupants are still governed by Pasakarnis and the Pasakarnis interrogatories are required. Although not addressed below or argued here this court may wish to resolve this legislatively created conflict.

defendant can post accident gain access to the vehicle. The right to rely on the defense should not be dependant of the fortuitous event of the plaintiff not disposing of the vehicle before suit is filed.

Under the facts here, Bulldog presented competent substantial evidence to satisfy its burden and the trial court properly permitted the issue to go to the jury. This Court has defined and explained competent substantial evidence:

> In the case of DeGroot v. Shefield this court defined the term 'competent substantial evidence'. 'Substantial evidence' was therein defined to be such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. Such 'substantial evidence' must be 'competent', and it is, if it is relevant and material to the issue or issues presented for determination.

Gainesville Bonded Warehouse Inc. v. Carter, 123 So.2d 336, 338 (Fla. 1960). See also, Duval Utility Company v. Florida Public Service Commission, 380 So.2d 1028 (Fla. 1980) (Competent substantial evidence is such evidence as will establish a substantial basis of fact from which the fact at issue can be inferred or such relevant evidence as a reasonable mind would accept as adequate to support a conclusion).

The facts here satisfy the three prong test of Pasakarnis. First, Respondent admitted, and photographs introduced into evidence showed, that the vehicle had seat belts, and that she was not wearing the belt at the time of the accident (T. 58). Second, there was expert testimony that had she been wearing the seat belt it would have lessened the severity of her injuries (R. 619-20). Respondent and her husband further admitted that the car was new

and that she only owned it for a few months before the accident occurred (R. 144, 168). Finally, operability was established by Respondent's testimony where she admitted that her now husband would use the seat belt when he drove the car:

> He used it, the seat belt while he was driving the automobile. While he was sitting in it he would use the seat belt and sometimes, I guess, I don't know, he used the seat belt at different times, I mean, I don't use the seat belt, but he does (R. 167).

Petitioner submits that under any fair, reasonable standard of introducing competent evidence to support the seat belt defense, they have met their burden. See, Allen v. Florida Power Corp., 253 So.2d 401 (Fla. 1971) (only where the record is devoid of any evidence from which a jury of reasonable men and women could find liability, may a judgment based on directed verdicts stand); Martin v. Stone, 51 So.2d 33 (Fla. 1951) (disputes and conflicts in testimony are jury questions and if evidence appears in the record to support verdict rendered, trial court is without authority to substitute its conclusions); Sears, Roebuck & Co. v. McKenzie, 502 So.2d 940 (Fla. 3d DCA 1987) review denied, 511 So.2d 299 (Fla. 1987) (directed verdict improper only where record conclusively shows absence of facts or inferences from facts to support a jury verdict); Telesphere International, Inc. v. Scollin, 489 So.2d 1152 (Fla. 3d DCA) review denied, 500 So.2d 546 (Fla. 1986) (directed verdict improper where there is any evidence to support the position of the party moved against); Cassisi v. Maytag Co., 396 So.2d 1140 (Fla. 1st DCA 1981) (proof of a defect can be established by reasonable inferences from circumstances that

product failed during ordinary use). Here, the evidence before the jury was surely enough to meet any of the above standards. The trial court was correct in submitting the defense to the jury for their determination. Only when it becomes necessary to prove that the seat belt was anchored and would have "clicked" if tested immediately after the accident does Petitioner fail to meet its burden. The district court's requirement to establish operability is overly burdensome, does not permit introduction of circumstantial evidence and should be quashed. The matter should be remanded to the Fourth District with directions to reinstate the verdict and judgment.

ISSUE II

THE DISTRICT COURT ERRED IN ORDERING A NEW TRIAL. ASSUMING THE SEAT BELT DEFENSE WAS IMPROPERLY SUBMITTED TO THE JURY, THE MATTER SHOULD BE REMANDED FOR ENTRY OF JUDGMENT BASED UPON THE VERDICT WITHOUT REDUCTION FOR THE SEAT BELT DEFENSE.

The district court in its decision below, after determining that the evidence was insufficient to support a jury finding that the seat belt was operational, reversed for a new trial for both damages and liability. In so doing, it failed to follow numerous cases decided by the four other district courts and two decisions from other panels of the Fourth District.[4]

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[4] Smith v. Holy Temple Church of God in Christ, Inc., 566 So.2d 864 (Fla. 1st DCA 1990); Delong v. The Wickes Co., 545 So.2d 362 (Fla. 2d DCA 1989); Devolder v. Sandage, 544 So.2d 1046 (Fla. 2d DCA 1989); Knapp v. Shores, 550 So.2d 1155 (Fla. 3d DCA 1989); Harding v. Harris Sanitation, Inc., 522 So.2d 86 (Fla. 5th DCA 1988); Barcello v. Rubin, 578 So.2d 58 (Fla. 4th DCA 1991); Booth v. Abbey Road Beef & Booze, Inc., 532 So.2d 1288 (Fla. 4th DCA 1988). Though the conflict in the District was brought to the Court's attention, Petitioner's Motion for Rehearing en banc was

The opinion acknowledged that the verdict form contained separate interrogatory questions concerning the seat belt. However, the majority felt that though they "had no way of knowing" they were "confident some of it [the comparative negligence finding] was attributable to the failure to wear a seat belt." 602 So.2d at 612. The opinion concluded as follows:

> As we see it, the circumstances under which this jury arrived at the percentages of negligence are so confusing that we cannot be sure with mathematical exactitude what the outcome would have been had the jury not considered the seat belt defense, as indeed it should not have done. That is why we conclude that a new trial should be held on liability as well as damages to insure the result here does not amount to double-dipping.

Id. at 613.

Petitioner respectfully submits that there was no confusion below; that the trial judge by submitting the Pasakarnis interrogatory questions to the jury followed this Court's decision which avoids confusion; that the district court improperly invaded the province of the jury; that there was sufficient competent evidence to support a finding of comparative negligence; and that the percentage of such negligence is solely one for a jury to determine. Finally, the decision to grant a new trial conflicts with all other district courts. The proper remedy, absent some other error to warrant a new trial, is that when a seat belt defense has been improperly presented to the jury, the matter should be remanded for entry of judgment based on the verdict, ignoring the seat belt interrogatories.

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denied.

It is difficult to justify how there could have been confusion on the part of the jury, and thus error at trial, when the trial judge followed the Court's instructions to do exactly what he did. In Pasakarnis, this Court stated:

> To avoid confusion on the part of the jury in arriving at its verdict where seat belt evidence has been introduced and in order to clearly define the distinction between one's negligent contribution to the accident, on the one hand, and to his damages on the other, we agree with Judge Schwartz's statement in his dissenting opinion that the obvious solution is simply to add interrogatories to the special verdict form to elicit this information. For this reason we authorize the trial courts in appropriate cases to add the following interrogatories to the typical verdict form in automobile cases: . . .

451 So.2d at 454.

The trial judge below added the three interrogatory questions as set forth in Pasakarnis to the verdict. How then can there be confusion when the trial judge did what the Court directed him to do? If the jury would have found against Petitioner in its affirmative defense, and concluded that Respondent used reasonable care under the circumstances in not using the seat belt, yet still found Curtis 90% comparative fault, would there have been the confusion to warrant a new trial that the appellate court concluded existed?

The court below's decision taken to its logical conclusion is that if a jury finds that a defendant did not meet its burden of proof and that a plaintiff did not fail to use reasonable care by not using the seat belt, yet was comparatively negligent, then the verdict is tainted and a new trial is necessary.

Obviously, as this Court noted in Pasakarnis, by setting forth

the interrogatories after the jury has considered the negligence of the parties and awarded damages, the very confusion the Fourth District perceived to have occurred has in fact been avoided. Indeed, the determination below of confusion is a visceral one and without any factual support. By following Pasakarnis there cannot be, as a matter of law, any confusion because the jury first found substantial comparative negligence and then that the seat belt defense applied.

Long ago the Court in Tyrus v. Apalachicola Northern Railroad Company, 130 So.2d 580, 583 (Fla. 1961), stated the function of a jury in comparative negligence cases:

> [W]hether, if there be conflicting testimony on the question of the defendant's negligence in a tort action, particularly wherein the comparative negligence rule is applicable, is such question for the jury or may it be determined by the court as a matter of law. Not only is this question in this jurisdiction absolutely within the province of the jury to determine, but such is the universal rule.

Since Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), the appellate courts have adhered to this rule. See, Hancock v. Department of Corrections, 585 So.2d 1068 (Fla. 1st DCA 1991) (degree to which a plaintiff may have caused his own injuries because of his awareness of his dangerous or hazardous condition or his own actions is to be determined by the jury); Ferber v. Orange Blossom Center, 388 So.2d 1074 (Fla. 5th DCA 1980).

In South Florida Beverage Corporation v. San Pedro, 499 So.2d 915, 916 (Fla. 3d DCA 1986), the court reversed a judgment not withstanding verdict for the defendant after the jury found plaintiff 52% at fault holding that, "Where evidence is in conflict

and the verdict thereon is not manifestly against weight of the evidence, [a] court should not interfere and set aside a jury verdict. The questioning of apportioning negligence between the plaintiff and defendant is judicially within the province of the jury."

The evidence submitted to the jury clearly supports their determination that Respondent was the overwhelming cause of her own accident. A 90% finding of fault is not against the manifest weight of the evidence. Curtis ran into the back of a parked truck at 56 miles per hour. The truck was 75% off the road, so that only two feet of a twelve foot lane of traffic was blocked (T. 227). Indeed, when the ambulance came to transport Curtis to the hospital, it was able to stop in the left-hand lane of the highway without causing traffic to detour. Other than a Greyhound bus, all other traffic in the left lane was able to stay in the lane while going past the truck (T. 519). In fact, the Curtis vehicle hit the left side of the truck, which was off the road and on the shoulder. It was her testimony that she had turned her head to the right to see if she could change lanes when the accident occurred (T. 66). Obviously, the jury found that she was not watching where she was going, and that she drifted to the left onto the median strip and hit the parked truck. Based upon these facts they apportioned fault 90% to Plaintiff, and 10% to the driver for the way he parked the truck after the first accident, after having asked the police officer on the scene if his truck should be moved.

The mere fact that evidence of the seat belt defense may have

been insufficient to warrant its submission to the jury does not mandate a new trial. Defenses are often raised during trial and the court subsequently rules the evidence insufficient to permit its consideration by the jury. In those cases, a directed verdict on the defense is granted to plaintiff. Another example is found in cases where punitive damages are sought and certain facts presented, but at the conclusion of plaintiff's case, or all the evidence, the court rules the evidence to be insufficient to permit the issue to go to the jury. A new trial is not ordered, even though certain facts tending to support the issue, and creating a negative inference for the defendant was presented to the jury. In those situations, the court does not declare a mistrial, impanel a new jury and start anew. So too here, there is no evidence that the plaintiff was prejudiced because the seat belt defense was presented and went to the jury. The mere fact that the evidence was presented does not create prejudicial error.

All other district courts as well as two panels of the Fourth District have uniformly held that when the reviewing court determines that the seat belt defense was unavailable to the defendant, a new trial is not required. Rather, the case is remanded for entry of a judgment based upon the verdict, unreduced by the failure to use the seat belt. See, Smith v. Holy Temple Church of God in Christ, Inc., 566 So.2d 864 (Fla. 1st DCA 1990); Delong v. The Wickes Co., 545 So.2d 362 (Fla. 2d DCA 1989); Devolder v. Sandage, 544 So.2d 1046 (Fla. 2d DCA 1989); Knapp v. Shores, 550 So.2d 1155 (Fla. 3d DCA 1989); Harding v. Harris

Sanitation, Inc., 522 So.2d 86 (Fla. 5th DCA 1988); Barcello v. Rubin, 578 So.2d 58 (Fla. 4th DCA 1991); Booth v. Abbey Road Beef & Booze, Inc., 532 So.2d 1288 (Fla. 4th DCA 1988).

It is only the Fourth District's decisions in Youngentob v. Allstate Ins. Co., 519 So.2d 636 (Fla. 4th DCA 1987) and in this case, both opinions authored by Judge Letts, with Judge Anstead dissenting, that have held that it is reversible error to give the seat belt instruction. These cases stand alone for the proposition that a new trial is required when the seat belt defense is improperly given. There were no facts in Youngentob, nor are there any facts here demonstrating reversible error. In Youngentob the court found "absolutely no evidence as to the operability of the belts other than the fact that the automobile was in good condition." 519 So.2d 636. Here, even if there was not sufficient competent evidence to support a finding of availability and operatability of the belt, there is no reason to hold a new trial.

The decisions by the other district courts, and the other two panels of the Fourth District found that there was insufficient evidence to support the defense, yet no new trial was granted. In the Barcello case, and in DeLong, the juries had also found comparative negligence yet the district courts did not find any confusion to warrant a new trial.

It is obvious a conflict exists in the law on this issue. This Court must resolve the conflict and determine if the other district courts are correct, and if Youngentob and Curtis were wrongly decided. If a trial judge improperly permits a jury to

answer the Pasakarnis interrogatories, after they have determined fault and damages, there is no confusion and no reason to hold a new trial. The approach of the other districts is the better reasoned one and should be acknowledged as such. Therefore, this Court, even if it agrees with the majority decision below that the seat belt defense should not have been submitted to the jury, should disapprove the decision to award a new trial, and remand with directions that judgment be entered for Respondent based on the verdict, unreduced by her failure to use the available seat belt.

CONCLUSION

Based upon the foregoing reasons and citations of authority, it is respectfully submitted that the district court erred in reversing the judgment as there was substantial competent evidence at trial to support the jury's finding that the seat belt was available and operational. The requirement that the seat belt must be shown to have been anchored and clicked is unreasonable and defeats what this Court sought to accomplish in Pasakarnis. Therefore, the district court's opinion should be quashed and the matter remanded to reinstate the judgment.

If the Court agrees that the seat belt defense was improperly submitted to the jury, the Court still should conclude that there was no confusion on the jury's part to warrant a new trial. The Court should accept the reasoning of the other district courts, quash the decision of the Fourth District, and hold that if the seat belt defense is improperly submitted to the jury, the matter should be returned to the trial court for entry of judgment based upon the jury verdict unreduced by the plaintiff's failure to use the seat belt.

Respectfully Submitted,

MARLOW, CONNELL, VALERIUS, ABRAMS, LOWE & ADLER

by _____
JOSEPH H. LOWE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 7th day of June, 1993, to Thomas A. Hoadley, Esq., Hoadley & Noska, P.A., 320 Fern Street, West Palm Beach, FL 33401.

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