045 w/app

1-1-93

IN THE SUPREME COURT OF FLORIDA

CASE NO: 80,574

Florida Bar #273716

FILED
SID J. WHITE
DEC 8 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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

Defendants/Petitioners,

v.

SUSAN A. CURTIS,

Plaintiff/Respondent.
_____/

PETITIONERS' JURISDICTIONAL BRIEF

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INTRODUCTION

This brief is submitted on behalf of Petitioners, Defendants/Appellees below. Petitioners will be referred to as such. Respondent, SUSAN A. CURTIS, will be referred to as Respondent or CURTIS. Reference to the Appendix accompanying this brief will be by the symbol "A." Unless otherwise indicated, all emphasis has been supplied by counsel.

STATEMENT OF THE CASE AND FACTS

This is a proceeding to invoke this Court's discretionary jurisdiction to review a decision of the Fourth District Court of Appeal (A. 1-7). This Court has jurisdiction pursuant to Article V, Section 3(b)(3), Fla. Const. (1990). The decision expressly and directly conflicts with decisions of this Court and the other district courts of appeal on the same question of law.

Respondent was injured on June 5, 1981, when she plowed into the rear of an 8-foot wide tractor trailer truck at 56 miles per hour. The truck had come to a stop on the left shoulder of Interstate 95 in Palm Beach County with six feet of the truck on the shoulder and only two feet extending into the 12-foot left hand lane of the highway. The truck had come to a stop at that point as a result of a prior accident involving another vehicle which had lost control and skidded into the truck's lane of traffic. The truck had moved into the left hand lane to avoid that vehicle and then came to a stop several hundred feet further south.

Due to the conditions of the median strip, the driver was unable to pull his truck totally off the road. He pulled it off as far as he could leaving two feet of his truck extending into the

lane of traffic. The record below amply demonstrated that there was some 10 feet of lane still available and vehicles were still able to travel in the left lane without any difficulty. Indeed, when the ambulance arrived to take Respondent to the hospital, it was able to pull up next to the truck in the left hand lane and it did not block the center or right hand lanes of traffic. There was testimony that after the truck driver parked his car he approached an off-duty Boca Raton police sergeant and asked the sergeant if his truck was parked properly, and was told that it was. Based upon this factual situation, the jury returned a verdict finding the Appellant ninety (90%) percent at fault in causing the accident and awarding $275,000 in damages.

Curtis admitted during the trial that the vehicle she was operating had seat belts and that she did not use them. She also testified that her boyfriend at the time (now her husband) had driven the car prior to the accident and had used the seat belts. The trial court deemed this testimony sufficient to permit the seat belt defense to be decided by the jury and the jury answered the Pasakarnis interrogatory questions affirmatively and reduced her damage award by sixty-seven and one-half (67.5%) percent. (A copy of the jury verdict appears in the Appendix, A. 8-12).

Respondent timely filed a notice of appeal to the Fourth District Court of Appeal. The court in a majority decision determined that there was insufficient evidence to permit the seat belt defense to have been presented to the jury. It then further determined that a new trial on both damages and liability was required as the circumstances under which the jury arrived at the

percentage of negligence was confusing since the seat belt defense had been presented to them.

Petitioners moved for a re-hearing and/or certification and rehearing en banc. The basis for the motion for re-hearing was that the trial judge followed this court's decision in Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984) and, therefore, by following this court's directions could not have created confusion by permitting the seat belt defense to go to the jury.

Additionally, Petitioners advised the Fourth District that all other district courts of appeal which have ruled that a seat belt defense had been improperly submitted to a jury had merely vacated that portion of the verdict and remanded the matter to the trial court for entry of judgment based upon the jury verdict without considering the seat belt mitigation. In addition, another panel from the Fourth District in the case of Barcello v. Rubin, 578 So.2d 58 (Fla. 4th DCA), review denied 589 So.2d. 292 (Fla. 1991), had joined the other district courts under identical circumstances. Petitioners' motions were denied and this petition follows.

POINTS ON APPEAL

I. THE DECISION OF THE FOURTH DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN INSURANCE COMPANY OF NORTH AMERICA v. PASAKARNIS, 451 SO.2d 447 (Fla. 1984)

II. THE DECISION OF THE FOURTH DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE OTHER FOUR DISTRICT COURTS OF APPEAL WHO HAVE UNIFORMLY HELD THAT WHERE A SEATBELT DEFENSE HAS BEEN IMPROPERLY PRESENTED TO THE JURY THE MATTER IS TO BE REMANDED TO THE LOWER COURT

TO RECOMPUTE THE NET DAMAGES WITHOUT THE NECESSITY OF A NEW TRIAL.

SUMMARY OF ARGUMENT

The opinion of the Fourth District Court of Appeal in Susan Curtis v. Bulldog Leasing Company, Inc. conflicts with this Court's opinion in Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984) because the Fourth District Court of Appeal held that the trial court's use of the instructions and verdict form propounded by this Court in Pasakarnis were such that it "confused" the jury. The Fourth District, in conflict with this Court, reversed and remanded for a new trial on issues of liability and damages.

The decision of the Fourth District Court of Appeal expressly and directly conflicts with decisions of other district courts of appeal. These courts have uniformly held that when the seat belt defense has improperly gone to the jury, the matter is merely to be remanded to the lower court for recomputation with the net damages to the plaintiff. Here the Fourth District Court of Appeal reversed and remanded for a new trial on all issues.

ARGUMENT

Preliminary Statement

This Court has identified two basic forms of decisional conflict which will trigger the exercise of its jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution. A conflict will exist when either an announced rule of law conflicts with other appellate expressions of law or where a rule of law is applied to produce a different result in a case which involves substantially the same controlling facts as a prior case, Nielsen

v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960); City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So.2d 632 (Fla. 1976).

In the case of Ansin v. Thurston, 101 So.2d 808 (Fla. 1958) this court established the jurisdictional test which it will apply when conflict certiorari is alleged.

The test is that a conflict of decisions exist when a decision resolves a question of law such that one decision would overrule the other if both were rendered by the same court.

Under this test, it is clear that the district court's decision is in conflict with this court's decision in Pasakarnis and decisions of the other district courts of appeal in Smith v. Holy Temple Church of God and Christ, Inc., 566 So.2d 864 (Fla. 1st DCA 1990); Knapp v. Shores, 550 So.2d 1155 (Fla. 3d DCA 1989), review denied 563 So.2d 634 (Fla. 1990); Devolder v. Sandage, 544 So.2d 1046 (Fla. 2d DCA 1989); DeLong v. Wicks Co., 545 So.2d 362 (Fla. 2d DCA 1989); Harding v. Harris Sanitation, Inc., 522 So.2d 86 (Fla. 5th DCA 1988).

POINT I

The Fourth District in its decision relied almost exclusively on Pasakarnis. 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 Court then sets forth the interrogatories that were in fact used in this case.

Here, the trial court used the procedure set out in Pasakarnis "to avoid confusion on the part of the jury" and was found to have therefore confused the jury. In Pasakarnis, the Court set forth the appropriate procedure for submitting a seat belt defense to the jury. The Court specifically set forth the interrogatory questions to be asked of a juror and also noted:

> "These additional interrogatories [the seat belt defense interrogatories] should follow the interrogatory in the verdict which asks the jury to give the total amount of any damages sustained by the plaintiff and caused by the incident in question. If the jury returns their verdict for the plaintiff, finds that plaintiff's negligence was a contributing cause of the accident and finds that plaintiff's failure to wear an available and fully operational seat belt produced or contributed substantially to producing at least a portion of plaintiff's damages, the trial court in its final judgment should first reduce the total amount of damages by the percentage of the plaintiff's contributory negligence and then reduce this amount by the percentage attributable to the plaintiff's failure to wear the seat belt." Id. 451.

The Fourth District's decision misconstrues and conflicts with the holding of Pasakarnis. Here, the trial court used an interrogatory verdict mandated by this Court in Pasakarnis. This Court was well aware that a jury would first consider the negligence issue and then the seat belt issue. It did not find such analysis by a jury inappropriate or "confusing."

It is submitted that the decision is in direct conflict with Pasakarnis in that it reverses the trial court which followed Pasakarnis and submitted a verdict form to the jury containing the interrogatory questions set forth in Pasakarnis. It is submitted that to reverse the trial judge for following the mandates of this Court creates conflict with this Court's decision in Pasakarnis.

POINT II

The Fourth District here (as well as the Fourth District's earlier decision in the case of Youngentob v. Allstate Insurance Company, 519 So.2d 636 (Fla. 4th DCA 1987) stands alone in Florida in holding that when a trial court has improperly permitted the seat belt defense to be submitted to a jury, a new trial on both liability and damages is required. All other district courts of appeal (and indeed even another panel of the Fourth District in Barcello v. Rubin, 578 So.2d 58 (Fla. 4th DCA, review denied 589 So.2d 292 (Fla. 1991)) have uniformly held that when the seat belt defense has improperly gone to the jury the matter is merely to be remanded to the lower court for recomputation of the net damages to be awarded the plaintiff. None of the other district courts require that a new trial be granted. See: Smith v. Holy Temple Church of God and Christ, Inc., 566 So.2d 864 (Fla. 1st DCA 1990); Knapp v. Shores, 550 So.2d 1155 (Fla. 3d DCA 1989), rev. denied, 563 So.2d 634 (Fla. 1990); Devolder v. Sandage, 544 So.2d 1046 (Fla. 2d DCA 1989); DeLong v. Wickes Co., 545 So.2d 362 (Fla. 2d DCA 1989); Harding v. Harris Sanitation, Inc., 522 So.2d 86 (Fla. 5th DCA 1988).

The facts here are legally indistinguishable from the facts of

these other decisions. In each of these decisions, the trial judge had improperly permitted the seat belt defense to be considered by the jury and the appellate court reversed. In each of these decisions, the jury had considered the negligence of the parties, determined fault and damages and then considered the seat belt interrogatory questions and made its findings. None of these decisions, however, found that there was any confusion created by the Pasakarnis verdict form and instructions such that the appellate court could not "be sure with mathematical exactitude" what the outcome would have been had the jury not considered the seat belt defense.

As Judge Anstead points out in his dissent, there is no necessity for a new trial and the case should be remanded with instructions that the damage reduction be stricken (citing all cases set forth above).

Four of the five district courts of appeal of this state uniformly hold that a new trial is not required when the seat belt defense has improperly gone to the jury. Only in the Fourth District is a defendant subjected to the risk that if a reviewing court determines that a seat belt defense should not have been submitted to the jury, the matter is reversed for a new trial on liability and damages. This conflict among the district courts should be resolved and uniformity established.

CONCLUSION

The decision of the Fourth District conflicts with decisions of each of the other district court as well as with this Court's decision in Pasakarnis. This court should accept jurisdiction to

resolve the conflict and correct the erroneous precedent the case creates. Though the legislature has adopted a statute, F.S. §316.614 (1991), requiring that seat belts be utilized, the failure of which is comparative negligence, the Statute only applies to front seat passengers. Pasakarnis remains the law for rear-seat passengers. Therefore, the issue has not been mooted by the Statute. This serious conflict should be resolved by this Court.

For the foregoing reasons, Petitioners respectfully request that this court accept jurisdiction of this case.

Certificate of Service

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 7th day of December, 1992 to: THOMAS A. HOADLEY, ESQUIRE, Hoadley & Noska, P.A., 320 Fern Street, West Palm Beach, Florida 33401.

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By: _____
JOSEPH H. LOWE

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1992

SUSAN A. CURTIS,

Appellant,

v.

BULLDOG LEASING COMPANY, INC., et al.,

Appellees.

CASE NO. 90-2134.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed July 1, 1992

Appeal from the Circuit Court for Palm Beach County; Edward H. Fine, Judge.

Thomas A. Hoadley of Hoadley & Noska, P.A., West Palm Beach, for appellant.

Joseph H. Lowe of Marlow, Connell, Valerius, Abrams, Lowe & Adler, Miami, for appellees.

LETTS, J.

In an automobile accident case, the trial judge permitted the defendant to present the seat belt defense to the jury although there was no evidence that the seat belt in the injured plaintiff's vehicle was fully operational. We reverse.

We have already had this case before us on a different issue, Curtis v. Bulldog Leasing Co., 513 So.2d 238 (Fla. 4th DCA 1987). It now returns on the question of the seat belt defense, the defendant having established that the injured plaintiff was not wearing her seat belt at the time of impact.

As we said in Youngentob v. Allstate Insurance Co., 519 So.2d 636 (Fla. 4th DCA 1987), the outcome is controlled by the supreme court's decision in Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984). Pasakarnis made it absolutely clear that there must be proof that the seat belt was fully operational. We have scoured the record in the case now before us and conclude, as we did in Youngentob, that there is no credible proof that the belt was fully operational. There is evidence that the accident vehicle was equipped with an available seat belt, but nothing to show that this particular seat belt was operational upon the occasion of the accident or at any time reasonably close thereto. See Knapp v. Shores, 550 So.2d 1155 (Fla. 3d DCA 1989), rev. denied, 563 So.2d 634 (Fla. 1990).

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. See Youngentob. Instead, the question is: would the belt restrain the driver or passenger upon impact? Moreover, when Pasakarnis was written in 1984, the court specifically noted that it rejected the thought that failure to wear a seat belt might be negligence per se "because Florida does not, by statute,

require the use of available seat belts." It is not necessary here to address this tantalizing latter thought, now that Florida does have a mandatory seat belt restraint statute, because, the instant accident occurred back in 1981. §316.614, Fla. Stat. (1991).

In conclusion, we reverse and remand for a new trial both on the question of liability and damages. The verdict form contained an actual interrogatory on the question of whether the failure to use the seat belt contributed to the plaintiff's damages, but the jury found the plaintiff responsible for ninety percent of the negligence which was the legal cause of the accident. How much of that allocation was attributable to her striking the tractor-trailer parked on the shoulder rather than on the road[1] we have no way of knowing, but we are confident some of it was attributable to the failure to wear a seat belt.

We obviously are aware of Judge Anstead's dissent and his footnote on the seat belt issue, but there is more to the verdict form than that. Preceding the seat belt interrogatory were three others that we deem important to our conclusion. They were:

> 2. Was there negligence on the part of the Plaintiff, Susan Curtis which was a legal cause of the accident?
>
> Yes X NO_____
>
> If your answer to question 2 is YES, please answer question 3. If your answer

[1] Factual support on where the tractor-trailer was parked was not enunciated in this decision but it was in our previous opinion when last this matter was before the court.

to question 2 is NO, do not answer question 3 but answer question 4.

3. State the percentage of any negligence, which is a legal cause of the accident that you charge to:

Plaintiff, Susan Curtis 90 %

Defendants, Crawford Catia and Suwannee Transfer Company, Inc. 10 %

Total must be 100%

Your answer to question 3 must total 100%. Please answer question 4.

4. What is the total amount (100%) of any damages sustained by Plaintiff, Susan Curtis and caused by the incident in question?

Total damages of Susan Curtis $275,000.00

In determining the total amount of damages, do not make any reduction because of negligence, if any, of Plaintiff, Susan Curtis. If you have found Plaintiff, Susan Curtis, negligent in any degree, the Court in entering judgment will reduce Plaintiff's total amount of damages (100%) by the percentage of negligence which you found is chargeable to Plaintiff.

The final judgment in favor of the plaintiff was for zero dollars. This figure came about because the $275,000 total verdict was reduced by 90% to $27,500 and then further reduced by 67.5% from $27,500 to $8,938. Meanwhile, the plaintiff had settled with a joint tort feasor for $15,000, thus explaining the zero verdict.

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.

We find no other reversible error.

REVERSED AND REMANDED.

DELL, J., concurs.
ANSTEAD, J., dissents with opinion.

ANSTEAD, J., dissenting.

In my view the record contains sufficient evidence to permit the jury to consider the seat belt issue. Even if that finding is reversed, however, there is no necessity for a new trial. Rather, the case should be remanded with instructions that the damage reduction related to the seat belt issue be stricken.[2]

---

[2] The verdict form contained specific interrogatories on the seat belt issue:

> 6. Did the Plaintiff, Susan Curtis' failure to use the seat belt produce or contribute substantially to producing any of the Plaintiff, Susan Curtis' damages?
>
> YES X NO
>
> If your answer to question is NO, you should not proceed further. Return your verdict to the courtroom. If your answer to question 6 is YES, please answer question 7.
>
> 7. What percentage of Plaintiff, Susan Curtis' total damages were caused by her failure to use an available and fully operational seat belt?

We have conflicting rulings on this issue. In Barcello v. Rubin, 578 So.2d 58 (Fla. 4th DCA), rev. denied, 589 So.2d 292 (Fla. 1991), we remanded with directions to simply correct any reduction occasioned by an erroneous submission of the seat belt issue. Previously, in Youngentraub we ruled just the opposite. Other districts have ruled that a simple remand to recompute the net damages is sufficient, without requiring a new trial. See Smith v. Holy Temple Church of God in Christ, Inc., 566 So.2d 864 (Fla. 1st DCA 1990); Knapp v. Shores, 550 So.2d 1155 (Fla. 3d DCA 1989), rev. denied, 563 So.2d 634 (Fla. 1990); Devolder v. Sandage, 544 So.2d 1046 (Fla. 2d DCA 1989); DeLong v. Wickes Co., 545 So.2d 362 (Fla. 2d DCA 1989).

In deviating from the holding in Barcello, the majority apparently relies on the fact that there was also an issue of comparative negligence submitted here. In fact, that was also the situation in Barcello, where we held:

> We find no error in the remaining points on appeal. We therefore affirm in part and reverse in part and direct that on remand that judgment be entered in favor of appellant for the amount of the verdict less the percentage attributable to appellant's comparative negligence but that no reduction

---

> 67.5 %
>
> Do not make any reduction of total damages because of Susan Curtis' failure to wear a seat belt. The Court in entering judgment will make the appropriate reduction.

So say we all.

> be allowed for appellant's unproved failure to wear her seat belt.

Id. at 59. Our holding today obviously conflicts with the holding in Barcello.

IN THE CIRCUIT COURT OF THE
15th JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 82-307 CA (L) N

Fla. Bar No: 165755

SUSAN A. CURTIS

Plaintiff

vs

FINAL JUDGMENT

BULLDOG LEASING CO., INC. et. al.

Defendant

_____/

THIS ACTION having been tried before a duly empaneled jury which was sworn to try issues involved. The evidence was submitted and after hearing argument of counsel and the Court's instructions, the jury retired, deliberated and rendered their Verdict in words and figures as follows:

"

SPECIAL VERDICT INTERROGATORIES

1. Was there negligence on the part of the Defendants, Crawford Catia and Suwannee Transfer Company, Inc., which was a legal cause of damage to Plaintiff, Susan Curtis?

YES X NO _____

If your answer to question 1 is NO, your verdict is for the

Defendants, and you should not proceed further except. Return your verdict to the courtroom. If your answer to question 1 is YES, please answer question 2.

2. Was there negligence on the part of the Plaintiff, Susan Curtis which was a legal cause of the accident?

YES ___X___ NO_____

If your answer to question 2 is YES, please answer question 3. If your answer to question 2 is NO, do not answer question 3 but answer question 4.

3. State the percentage of any negligence, which is a legal cause of the accident that you charge to:

Plaintiff, Susan Curtis	90 %
Defendants, Crawford Catia and Suwannee Transfer Company, Inc.	10 %
Total must be 100%	

Your answer to question 3 must total 100%. Please answer question 4.

4. What is the total amount (100%) of any damages sustained by Plaintiff, Susan Curtis and caused by the incident in question?

Total damages of Susan Curtis $275,000.00

In determining the total amount of damages, do not make

any reduction because of negligence, if any, of Plaintiff, Susan Curtis. If you have found Plaintiff, Susan Curtis, negligent in any degree, the Court in entering judgment will reduce Plaintiff's total amount of damages (100%) by the percentage of negligence which you found is chargeable to Plaintiff.

5. Did Plaintiff, Susan Curtis, fail to use reasonable care under the circumstances by failing to use an available and fully operational seat belt?

YES __X__ NO _____

If your answer to question 5 is NO, you should not proceed further. Return your verdict to the courtroom. If your answer to question 5 is YES, please answer question 6.

6. Did the Plaintiff, Susan Curtis' failure to use the seat belt produce or contribute substantially to producing any of the Plaintiff, Susan Curtis' damages?

YES __X__ NO _____

If your answer to question 6 is NO, you should not proceed further. Return your verdict to the courtroom. If your answer to question 6 is YES, please answer question 7.

7. What percentage of Plaintiff, Susan Curtis' total damages were caused by her failure to use an available and fully operational seat belt?

67.5 %

Do not make any reduction of total damages because of Susan Curtis' failure to wear a seat belt. The Court in entering judgment will make the appropriate reduction.

So say we all.

/s/ JOSEPH W. WOOLF
Foreperson

Dated: 2/16/90"

and further the Court being informed by all parties that the plaintiff, SUSAN CURTIS, had received a sum of Fifteen Thousand ($15,000.00) Dollars from a joint tort feasor, who was released and did not participate in the trial of this matter, and after hearing argument of counsel on the Motion to Enter Judgment, it is therefore

ORDERED and ADJUDGED that Judgment is hereby entered in favor of the plaintiff, SUSAN CURTIS and against the Defendants, CRAWFORD CATIA and SUWANNEE TRANSFER COMPANY, INC. in the sum of

zero dollars and the Plaintiff, SUSAN CURTIS DeGROVE shall take nothing by her suit against the Defendants and the said Defendants shall go hence without day with costs, if any, to be hereinafter taxed by this Court.

DONE and ORDERED in Chambers at Miami, Dade County, Florida this day of June, 1990.

JUL 9 1990

JUDGE, CIRCUIT COURT

Copies furnished:

Thomas F. Valerius, Esquire
Thomas Hoadley, Esquire