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SUPREME COURT OF FLORIDA

BULLDOG LEASING COMPANY, INC., et al.,

Petitioners,

v. CASE NO.: 80,574

SUSAN A. CURTIS,

Respondent.
_____/

RESPONDENT'S JURISDICTIONAL ANSWER BRIEF

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POINTS ON APPEAL

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INTRODUCTION

This brief is submitted on behalf of Respondent, Plaintiff/Appellant 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 "AMB" for the attached Appellant's Main Brief and "ARB" for the attached Appellant's Reply Brief Unless otherwise indicated, all emphasis has been supplied by counsel.

STATEMENT OF THE CASE AND FACTS

Respondent was injured on June 5, 1981, when she assumed that a tractor/trailer six feet into the fast lane on I-95 was moving rather than parked and collided with this illegally parked vehicle. Although the defense was well aware that there was absolutely no evidence available to the defense that the seat belt in the Respondent's vehicle was operational, it was stressed time and time again that the failure to use the seat belt was comparative negligence. The manner in which the case progressed and the facts of the case were very complicated and are contained in 19 pages of the Appellant's Main Brief attached, AMB 1-19.

There was no instruction given to this jury that the failure to use a seat belt should not be factored into the general charge on comparative negligence prior to reaching a decision on the special inter-rogatory verdict related to the seat belt defense. This allowed the jury to make two reductions; one under comparative negligence, and again under the special interrogatory verdict.

POINTS ON APPEAL

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

II. DOES THE DECISION OF THE FOURTH DISTRICT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THE OTHER DISTRICT COURTS OF APPEAL.

SUMMARY OF ARGUMENT

Although the Court may have expressed an opinion as to interrogatory type verdict questions related to the seat belt defense, this decision did not address how and whether the jury should be instructed as to whether the seat belt defense could be factored into the first decision on the question of comparative negligence. Although in Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984) the Court set forth the appropriate procedure for submitting a seat belt defense to the jury by interrogatory questions, it made no provision for insuring that a jury would not "double dip" and utilize the comparative negligence in a failure to use a seat belt in both a general comparative negligence computation and again in the seat belt defense computation. It is obvious this was causing confusion for the Florida legislature who would not have passed special legislation to correct this confusion and possible inequity in the law.

ARGUMENT

1. There is no conflict as shown in the judicial decisions referred to by counsel for the Petitioners. Although it is clear in this case from the record that the trial court did not instruct the jury to not consider the question of Plaintiff's failure to use the seat belt in making a decision on the comparative negligence issue, there is no way to determine whether the Judges in the case of Barcello v. Rubin, 578 So.2d 58 (Fla. 4th DCA) or any other case in other District Courts of Appeal did or didn't so instruct. The problem and possible confusion that can arise from the verdict form suggested by the Supreme Court is not intrinsic to the verdict form, but occurs because a jury is not fully instructed that it should not consider the seat belt defense in the initial decision on comparative negligence. It is obvious that there was quite a lot of confusion involving this because the matter came before the Florida Legislature almost immediately. The Legislature corrected the situation by placing the seat belt defense in the general category of comparative negligence. There was obviously a reason that the Florida legislature passed this specific legislation aimed at this specific problem; and it should be obvious to all concerned that it was to correct the confusion concerning this type of verdict.

2. Therefore, when Judge Letts states that the circumstances under which this jury arrived at the percentage of negligence are confusing, he is only mirroring what trial attorneys throughout Florida and the Florida Legislature believed at the time this verdict was rendered.

3. The Respondent would hope that any other reviewing Judge that held the case should go back for the entry of a final judgment only on a reduction of the verdict in accordance with a seat belt verdict would have found in the record sufficient instruction on the part of the trial judge that would lead the reviewing Judges to believe that there was no confusion on the part of the jury, as in this case.

4. The above is true in this case, particularly since the Plaintiff's failure to wear her seat belt was repeatedly dramatized throughout this trial by defense counsel and references to the seat belt were made in opening and closing arguments as well as during the examination and cross-examination of witnesses. It was stressed that the Plaintiff's failure to wear a seat belt was, in fact, negligence; and nowhere during this trial was there any instruction that the failure of the Plaintiff to wear a seat belt could not be additionally factored into the general defense claim of comparative negligence.

5. This decision is also fair in that defense counsel at the trial continually stressed that there was evidence in the testimony that there was, in fact, an operational seat belt available to the Plaintiff, and thusly convinced the Judge to erroneously give this

charge. The record is very clear that there was not one scintilla of evidence that these seat belts were operational in accordance with current case law. See Appellant's Reply Brief, ARB 1-6.

6. The Respondent attaches its Main Brief as filed in the District Court of Appeal for the Fourth District as Exhibit "A" and the Reply Brief filed in the District Court of Appeal for the Fourth District as Exhibit "B" as her Appendix.

CONCLUSION

The Respondent does not believe that the Petitioners have demonstrated a clear conflict with other cases and states that the decision in this case is in line with generally held law that instructions which tend to confuse rather than enlighten, and which are calculated to and might mislead a jury and cause them to arrive at conclusions that otherwise would not have been reached by them is cause for reversal of the judgment. Florida Motor Lines v. Bradley, 121 Fla 591, 164 So. 360 (1985). Marley v. Saunders, 249 So.2d 30 (1972) conformed 251 So.2d 892.

RESPECTFULLY SUBMITTED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail/hand delivery to: JOSEPH H. LOWE, Esquire, MARLOW, CONNELL, VALERIUS, ABRAMS, LOWE & ADLER, P.O. Box 339075, Miami, FL 33233-9075, this 18 day of December, 1992.

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH
DISTRICT

L.T. CASE NO: 82-307-CA (L) 01 G

4DCA CASE NO: 90-02134

SUSAN A. CURTIS,

Plaintiff,

vs.

BULLDOG LEASING COMPANY, INC., HEAVY MACHINERY AND TOOL TRANSPORTERS, INC., SUWANNEE TRANSFER COMPANY, INC., CARRIERS INSURANCE COMPANY, and CRAWFORD CATIA,

Defendants.
_____/

APPEAL FROM CIRCUIT COURT FOR PALM BEACH COUNTY

APPELLANT'S MAIN BRIEF

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PREFACE

The Appellant is the Plaintiff and the Appellee is the Defendant. The parties will be referred to as the Plaintiff and Defendant.

The following symbols will be used:

R -- Record

TR -- Transcript

POINTS OF APPEAL

1. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO CONSIDER PLAINTIFF'S FAILURE TO USE A SEAT BELT WHEN THE RECORD CONTAINS NO EVIDENCE INDICATING THE SEAT BELT WAS OPERATIONAL.

2. THE TRIAL COURT ERRED IN ALLOWING THE ISSUE OF PLAINTIFF'S FAILURE TO USE A SEAT BELT TO SO PERMEATE THE PROCEEDINGS THAT THIS WAS A FUNDAMENTAL ERROR NECESSITATING A NEW TRIAL.

3. THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY THAT OFFICER QUINN WAS A POLICE OFFICER IN THE COURSE AND SCOPE OF HIS EMPLOYMENT AND HAD AUTHORITY TO ISSUE ORDERS TO THE DEFENDANT/ DRIVER.

STATEMENT OF THE CASE AND THE FACTS

A Complaint For Negligence was filed in this case on January 20, 1982, stating generally that the Defendants' truck had been parked illegally on I-95 in the travelled portion of the highway without either emergency flashers, red flares or emergency reflectors. (R--723-729).

An Answer and Affirmative Defenses was filed by a Defendant not involved in this lawsuit, Julio C. Artau. (R--730-734). The remaining Defendants filed their Answer. (R--747).

There was a Voluntary Dismissal of a claim against Julio C. Artau. (R--780). An Amended Complaint was filed on October 14, 1982 (R--781-785) adding the City of Boca Raton and Answer and Affirmative Defenses were filed by that Defendant. (R--789-790). Another Amended Complaint was filed adding the State of Florida on April 11, 1983, (R--799) and various Motions were filed by that Defendant. (R--805-806). Various pleadings by the City of Boca Raton, State of Florida and other Defendants were filed up through 1983 and 1984. On May 10, 1985 Summary Judgments were granted in favor of the State of Florida and the City of Boca Raton. (R--974-976).

The Plaintiff then filed a Notice of Appeal on June 14, 1985 as to the granting of these two Summary Judgments. (R--991-992), and there was an Order granting a Motion To Stay for the remainder of the case. (R--1000).

A mandate came from the Fourth District Court of Appeal

in their Case Number 85-1432 on October 20, 1987, affirming the Summary Judgments. (R--1030-1037). Various routine discovery pleadings were then filed and on April 4, 1989, a Pretrial Stipulation was filed. (R--1099-1110).

On July 24, 1989, the Trial Court set this case for a jury trial beginning February 12, 1990. Then, various discovery matters and other pleadings were filed and on August 23, 1989, the Court ordered a Summary Jury Trial. (R--1142). The Plaintiff then filed a Motion For Partial Summary Judgment (R--1145-1146) and an Amended Motion For Partial Summary Judgment on November 21, 1989, on the question of the seat belt defense and attached an Affidavit of James DeGrove, the husband of the Plaintiff. (R--1151-1154). On January 12, 1990, another Pretrial Stipulation was filed. (R--1157-1164).

The trial started on February 12, 1990, and the jury returned a verdict on February 16, 1990. (R--1198-1200). The jury was instructed on the seat belt defense over the objection of the Plaintiff. (R--1174-1193). The Motion of the Plaintiff for a new trial was denied on February 23, 1990. (R--1304).

The Defendant filed a Motion For Taxing Costs, and an Order Taxing Costs was entered on June 6, 1990. (R--1342). The Final Judgment was entered on July 9, 1990, and recorded in Book 6517, Page 1715. (R--1343-1347). The Plaintiff's Notice Of Appeal recorded in Book 6545, Page 229, was on August 7, 1990. (R--1352). The designation by Plaintiff to

reporter was filed (R--1353) and the Directions to the Clerk were filed on August 20, 1990. (R--1354).

The facts as contained in the transcript are summarized as follows:

Defense counsel stated in opening argument as follows: "She will tell you she didn't wear a seat belt that morning. She will tell you she didn't wear a seat belt any morning. She will tell you, however, that her boyfriend, and now husband, did wear a seat belt in the very car in which the incident took place in. (TR-33). And further stated our position is that the cause of the accident was wholly, overwhelmingly her responsibility and the injuries she suffered as a result of that were her own oversight, and additionally, with the fact she chose not to wear a seat belt. (TR. 34)."

The first witness to testify was Annette Abbey, the mother of the Plaintiff. (TR-35). This witness testified basically concerning the past personal history of her daughter, her daughter's injuries, and how her daughter's injuries affected her. (TR-51).

The next witness was the Plaintiff, Susan A. DeGrove, who testified she was 28-years-old, was married in June of 1983 and had two (2) children. (TR-51). She testified about her personal history. (TR-52-58). At the time of the accident, she was driving a Toyota Celica and when asked whether or not she ever used seat belts in 1981, she said that she did not. When asked the question whether or not

the car had seat belts in it, she stated "no, no idea." She then stated "to be honest with you, I don't know the answer you want. I need to give honest answers and that is my answer. (TR-59).

She testified that she entered I-95 from Linton Boulevard, Delray Beach (TR-59) and it wasn't totally daylight, it was like a quarter of seven (a.m.) and medium rush hour traffic. (TR-60). She was in the fast lane and not looking at her speedometer. (TR-61). She saw the truck one hundred and seventy five feet or one second away from the point of the collision. (TR-62). I-95 at this point has a slight curve and it was kind of deceiving. (TR-64). On observing the truck, it was her opinion that the truck was in the fast lane driving slowly and she tried to get in the middle lane, but there was a car coming up beside her faster than she was traveling. (TR-65). She did not see any flags or reflectors or Fuzees in her lane of traffic. (TR-65). She was looking to the right in an attempt to turn to the right when she ran into the rear of the truck. (TR-66). At the time of the impact, her body went forward and hit the dashboard and the steering wheel and then she went under the dashboard. (TR-67-68). The medics and the fire department came and the hood was pulled off and two sets of jaws of life were used to remove her from her vehicle and she was then taken to Boca Raton Community Hospital. (TR-80).

The Plaintiff then testified on direct examination

about her injuries. (TR-80-104). On cross examination the Plaintiff testified that she had traveled roughly five to six miles as she went down I-95 and that she was going about fifty six miles an hour. (TR-120). It was a rainy day and it was raining when she got on I-95 going south and she had on her windshield wipers. (TR-131).

Defense counsel cross examined the Plaintiff concerning what happened in her vehicle before and at the time of the accident. (TR-111-144). She observed that the truck looked to her like it was in the fast lane so she went to get around the truck (TR-143) and she thought it was probably going fifty or something like that so she didn't slam on her brakes (TR-144) and she had no idea it would be sitting there. (TR-144).

The defense counsel then asked her if she knew that the 1979 Toyota Celica was equipped with seat belts and she replied "I am not positive, no." (TR-144). She was then shown photographs 3 and 4 and she identified in photograph 3 a seat belt (TR-144) and a seat belt in photograph 4 (TR-145). These photographs were then shown to the jury. She did not know the type of seat belt that the car was equipped with as was shown in the photograph that the jury was looking at, and it appeared to be a seat belt that comes across the shoulder and there is a belt where the waist is. (TR-145). The seat belt had a clicking device, and said that after reviewing photographs 1 and 2, it looked like there was a lap and shoulder belt device. (TR-146). She

then stated that her automobile did not have a seat belt. (TR-146). She had an idea that Toyota and other manufacturers installed seat belts in cars in 1981. (TR-147). It is her understanding that they are in the car for car wrecks for fast stops to hold you. (TR-147). At the time of the impact, the bottom of the steering wheel was broken and pushed forward and photograph 2 showed a torn up dashboard and her abdomen and ribs smacked up against the steering wheel at the time of the impact. (TR-148).

She did not recall if her body was thrust because of the sudden stopping underneath the dashboard where she bumped her knees. (TR-149). At the time of the impact, her car was probably three-quarters in the fast lane. (TR-161). After the accident, they pulled glass out of her face for a couple of years and the steering wheel did not have glass on it. (TR-165). When asked the question whether or not wearing a seat belt would have allowed her to move forward into the windshield, she testified "no", that the hood came through. (TR-165). She was asked the direct question as to whether or not she knew if the seat belt worked and her answer was "I don't know if that worked." She had never seen anyone in her vehicle use a seat belt, including her husband, Jim. (TR-165). Her husband, Jim, as a rule, did not wear the seat belt unless it was bad weather and since she had only owned the car two months, she had never seen him put the seat belt on in that car. (TR-167). Although she couldn't swear that he never wears a seat belt in the

car, she had a serious doubt that he ever did because she didn't have the car that long and he wouldn't have driven it that often. Ordinarily, her husband didn't use the seat belt, only in heavy traffic sometimes, in bad weather on a bad road, but not as a rule. (TR-169). The Plaintiff was reminded that there was glass on the highway, it was raining on I-95, it was rush hour, heavy traffic, bad weather and bad conditions and she was then asked whether or not she could tell the jury why she didn't use the seat belt and her answer was "at 20-years-old, she did alot of things that she couldn't tell you why she did them, only that she did not wear a seat belt as a rule and she didn't think alot of other people did." (TR-169-170).

On redirect examination a question was attempted that since 1986 when the legislature passed the statute, but there was an objection (TR-170) and the Court in response to the question related to a rule in 1989, which required the use of seat belts, the answer was "it wasn't a law." (TR-171). When referring to her deposition, she stated that she had replied in this deposition on page 9, line 25, that she didn't know whether her husband used his seat belts while he was driving her automobile. (TR-171).

On recross examination, the above answer was expanded and the question was asked that she had replied in that deposition that her husband may have used the seat belts some times "I guess, I guess, I don't know, he used a seat belt at different times"; but this would have been in 1985

at the time of the deposition when everything was totally different. (TR-172). She testified that when she was 20-years-old, they were kids and none of the kids were using seat belts. (TR-172). She stated that she did not use a seat belt faithfully after the accident, but she uses one now. (TR-173).

James DeGrove then testified that he is 31-years-old (TR-173), attended Palm Beach Junior College, and worked for a millwright company. (TR-174). He then testified about his relationship with his wife and how the accident had affected his wife, the Plaintiff. (TR-173-188). At the time of the accident, his company had furnished him a vehicle to drive on a usual basis and he and the Plaintiff did own another vehicle, a 1978 or 1979 Toyota Celica. (TR-189). He was shown photographs 3 and 4, and testified that in his opinion, the vehicle was equipped with a seat belt, a lap belt and a shoulder harness. (TR-190). When asked if he had ever used a seat belt driving "any" vehicle, he answered that he was sure that he did use one of them. (TR-190). When asked the question as to whether or not he had ever used a type similar to the one in the photograph, he first testified that he basically did, then stated that he did not remember a seat belt similar to the one shown in the photographs. (TR-191). He further stated that he didn't wear them very often, only in bad weather conditions, heavy traffic, rough roads. (TR-191). With respect to a seat belt that this witness occasionally wore, he determined

that it was functioning by feeling a little click across the body.

In 1981 he understood that the function of the seat belting in the Plaintiff's car was for safety. (TR-192-193). He went with the Plaintiff to buy this car. (TR-193). It was about three or four months before the accident. (TR-194). It was purchased from a gentleman who lived in the same apartment that he and his wife lived in. Prior to the purchase, he took it for a test drive. (TR-194). He didn't remember if he pulled on the seat belt. (TR-195).

John Strippoli then testified that he was a fire fighter/paramedic and had been for fourteen (14) years. (TR-199). When he arrived at the scene of the accident, the Plaintiff was still in the car with her legs pinned up under the dashboard. (TR-203). She was off of the seat sitting on the floor of the car with her legs underneath the dashboard and they couldn't see her legs. (TR-205). They suspected that she probably had some internal injuries, her blood pressure was low, she was going into shock, and she had alot of nasty cuts on her knees. (TR-206). Her movement was elacerated, she had springs in her knee, which were removed in the emergency room and she had a rather large cut on her face. (TR-208). He did not recall releasing a seat belt around this woman and did not recall her body being tangled in the seat belt as she sat on the floor and did not see any seat belt engaged. (TR-212). He

was shown a photograph and recognized that there was a seat belt in the vehicle. (TR-213). The steering wheel was broken on the bottom and in his opinion, that could mostly be done by her coming forward hitting her abdomen and her liver. (TR-214).

William F. Pearson then testified that he had been with the Boca Raton Fire Department twenty five (25) years and was a fire company officer. (TR-217). He testified generally about what he found at the scene of the accident after he arrived. (TR-217-231).

The next witness was Julia Waxia Reynolds Ferel who was a high school biology and chemistry teacher. (TR-232). In 1981, she had travelled down I-95 from her home to her job teaching school in Broward County and she remembered passing the first accident. (TR-232). She was traveling south on I-95 around 7:00 a.m., on her way to school, and there was a little bit of rain and she put on her windshield wipers as automobiles wheels were spraying up on her windshield. (TR-233). She was passing the truck when she heard a sound like a clunk and heard screeching and the truck started towards her so she went into the median. (TR-235). There must have been a collision between the truck and the little yellow car as the yellow car lost its windshield. (TR-236). The truck parked probably one block down the road. (TR-236). The driver of the truck walked back to where this witness' car was in the median and everyone at the scene of this accident rocked her car to get her out of the median so

that she could go on to school. (TR-240). Traffic was light at the time and her left fender ended up missing the truck by about one foot. (TR-241). It was not raining at this time and she does not recall that the truck's blinkers were on. (TR-242).

The next witness was Floyd Jackson Griffin, Jr., who lived in Delray Beach and became a State Trooper in 1977 and quitting in 1985. (TR-254). In June of 1981 he was working the midnight shift. (TR-258). A few minutes before 7:00 a.m., he was northbound on the exit ramp from I-95 to Atlantic Avenue and heard a radio transmission concerning the accident. (TR-260). The first accident happened some time before 6:47 a.m. (TR-273). He arrived at the scene of the first accident and saw two vehicles, a policeman, and a couple of civilians and he rolled to a stop. (TR-276). He observed a greyhound bus go by and saw it come up to the parked truck and the bus skidded slightly, slowed down, almost to a stop and then eased out into the center lane to get around the truck and that is when this Trooper realized the truck was in the road. (TR-279). He realized that this was going to be a problem and he picked up his microphone and ordered the driver to run down to the truck because it could be a life or death situation and as the driver started lumbering towards his truck, he saw an explosion of smoke an debris and the rear of the car coming down from the accident at the back of the truck. (TR-280). This accident was at 6:58 a.m. (TR-282). There were no barricades, flags,

reflectors or flares on the road. (TR-282-283). He did not see any lights on the rear of the truck and cannot remember seeing blinking lights on the rear of the truck. (TR-283). He went immediately to the scene of the accident and found the vehicle smashed against the rear of the truck and the Plaintiff was in the vehicle and she was sitting slumped back against the seat with a terrible gash on the side of her face on the left. (TR-284). Her leg was up against the steering column and dashboard and a piece of steel shot right through the right leg and it was sticking in the other one so her legs were pinned in with solid steel. (TR-285). She was not sitting on the floor, but was sitting on the seat, but very slumped down in the seat. (TR-286). The damage of the vehicle had stopped her from sliding farther forward. (TR-287).

Miles Moss testified that he was a transportation consulting engineer and gave the jury the benefit of his qualifications. (TR-346). He testified that he had reviewed all of the documents related to this accident and visited the scene of the accident on April 12, 1989, taking various measurements and observations. (TR-353). It was his opinion that one-half of the truck was on the paved area and one-half of the truck was in the fast lane. (TR-356). He testified that certain necessary safety equipment was required by statute to be carried by the truck including lighted lamps, two red flags, stands to support the flags, and two red portable emergency reflectors. (TR-365).

Since the vehicle had been parked in the road more than ten (10) minutes, it was a statutory requirement to activate simple emergency flashers and to place emergency warning devices down the road from the parked truck. (TR-367). It was this witness' conclusion that the truck should not have been out in the roadway blocking traffic and the fact that there were no emergency flashers or other warning signs, would be the proximate cause of the accident because the Plaintiff would not have been warned that the truck was parked as opposed to moving. (TR-381-391).

This witness testified about the usage of seat belts in 1981 and according to the Automobile Association of American, only one person in eleven used seat belts in 1981. (TR-391-393). In 1981, there was not much publicity about seat belts and at the present, the statistics are that around sixty (60%) percent of all drivers use seat belts. (TR-393). This expert then testified at length as to whether or not it would be safer or not safer to have used the seat belts in that particular car at the time of the accident. (TR-394-400). It was his conclusion that if the seat belt was working properly, she may well have suffered worse injuries if she had used a seat belt. (TR-400).

On cross examination, the defense brought out that this witness didn't see any damage to the supportive structure to the right and left of the vehicle windows indicating that the support structure had not been damaged. (TR-423).

Further, on cross examination, it was brought out that in 1981, only sixty six (66%) percent of all motor vehicles were equipped with seat belts and of those vehicles, only nine (9%) percent of the driver's of those vehicles having seat belts used them at the time of an accident. (TR-425). In 1981, of the 1,824 persons killed who had seat belts available, only four (4%) percent were using them. (TR-425). This expert further testified on cross examination that seat belts are becoming a very personal item (TR-425), and that seat belts are usually beneficial in accidents, but that this was not a known factor and people were not responding to it in 1981. (TR-426). He stated that in 1981, most people realized seat belts were in the car and that they were there for a reason, but very few people felt that it was important. (TR-426). As relates to the Plaintiff's situation, if she had had her seat belt on and if there had been an intrusion into her compartment from the override of the vehicle, having a seat belt on might have made her injuries worse, but from the standpoint of the injuries she received, he could not give an opinion. (TR-427). If she had her seat belt on, her buttocks would not have been on the floor and her knees bent under the dashboard as the lap belt would have held her from going under. (TR-428).

The expert's cross examination was concluded with another discussion about whether her injuries would have become worse in using the seat belt and this expert admitted

that he did not know that she had fallen out of the seat on to the floor, that her knees were being impelled beneath her, and based on this, he did not know one way or the other. (TR-460). The expert could not say whether it was safer to use seat belts in 1981, only that the public did not recognize the safety benefits. He further testified that the Plaintiff had testified she recognized the safety benefit in 1981. (TR-461).

The defense then called Edward Artau out of turn on the defense side of the case. This witness, Edward Artau, is presently an attorney, but in June of 1981, he was a high school student on his way to Boca Raton Community High School on June 5, 1981. (TR-467). He was headed to school and it had been raining and the road was wet and the car ahead of him slammed on his brakes and stopped and he had to hit his brakes (TR-468), and he then spun into the middle lane and saw a truck coming right at his door (TR-469) and the truck hit his car and then moved from the middle lane into the median strip and traveled several hundred feet on down the road. (TR-471). Some time later, he heard the crash of the Plaintiff hitting the truck and went down to the scene of the accident, but there was nothing from the truck intruding into the passenger capsule. (TR-479). He testified that the front windshield had to be broken by the paramedics to get her out of the vehicle. (TR-479).

The driver of the truck, Crawford K. Catia, then testified he was 58-years-old, married and had been a truck

driver since 1954, mostly driving semi-trailers. (TR-494). He admitted that he had seen a sign prior to this accident in Miami stating that if your vehicle is disabled, the driver should get it off the travel lane of the highway. (TR-499). He was also taught that if you are going to be stopping more than ten (10) minutes, you put out flares. (TR-499). He then parked his truck six feet into the travel portion of I-95, he did not have a feeling that it might or could have struck traffic more than was necessary. (TR-501). He did not notice if cars had to pull around his truck parked in the travel lane of I-95 because he was not paying any attention how the cars were going by. (TR-504). At the time he parked his truck, he did not think that he would be there more than five or six minutes. (TR-506). If he would have stayed longer, then he would have gone back to his truck to put up his flares. (TR-508). He described where he would have put his flares. (TR-509-510).

William Erhardt then testified for the defense that he was employed by the City of Boca Raton as a police officer in June of 1981, as a patrol officer. (TR-513). He received a radio message through Officer Quinn and arrived at the scene of the accident and at that time, the Florida Highway Patrol were there. (TR-514). He observed the flat bed truck and the two cars that were north of it. (TR-515). He heard Trooper Griffin tell the truck driver to go move the truck and this witness turned his back and was walking back to his patrol unit when he heard a "whoom, kaboom" and

he saw the car buried under the back of the truck. (TR-517). He remembered that an ambulance pulled up right along the side of the truck (TR-519), and vehicular traffic were then using the middle and slow lane to get by. (TR-519).

On cross examination, he stated that if a truck was parked in the fast lane, rush hour traffic six feet into the lane, he would have activated his blue lights and tried to get it out of the roadway as quickly as possible because the truck would be obstructing the traffic way, which would be a violation of the law. (TR-521).

Clarence Quinn was then called as a witness for the Defendant and stated that he is retired from the Boca Raton Police Department after twenty-seven years. (TR-524). He recalled the accident on June 5, 1981 and that the traffic was moderate. (TR-526). He stated that about 7:00 a.m., just south of Yamato, a small yellow vehicle spun out because of the rain and a large truck in the center lane sounded his airhorn, went southeast, clipped the vehicle lightly and continued about one hundred yards south and pulled it on the side of the road in the emergency parking lane and he started to walk back to me. (TR-528). He remembers the highway patrolman coming up who told the truck driver to move the truck, but the truck driver said he could not run because he had a heart condition or was hypertensive. (TR-532). Then, the Plaintiff's car collided with the back of the truck. (TR-532).

On cross examination, the retired Sgt. Quinn stated that if he had known the truck was six feet into the travel portion of the highway, that he would have had the truck driver put out some flares or something stating that the truck should not be moved until the highway patrol gets there because they are investigating the accident. (TR-539).

Crawford Catia then testified on behalf of the defense and stated that he was the driver of the truck involved in this accident. (TR-548). He stated that the tractor he drove weighed approximately fifteen thousand pounds and the trailer weighed approximately thirteen or fourteen thousand pounds. (TR-549). He stated that his truck carried safety devices such as flares and triangles inside a little door on the right hand side. (TR-552).

Harry Meyersohn testified for the defense by video-tape that he was a full-time consultant in the analysis and reconstruction of automobile accidents and gave his qualifications. (TR-578). He stated that he had read all of the material in connection with the case and had formulated seven opinions related to the accident. (TR-584). He then related these opinions to the jury. (TR-585-619). His sixth opinion was that the Plaintiff was not wearing a seat belt and that she did not wear a seat belt as a matter of habit. (TR-619). He stated that if she had used a seat belt and shoulder harness, this would have mitigated her injuries and lessened the severity of her injuries even at

the speed that she was traveling. He stated that the rear of the trailer did not penetrate into the compartment of the vehicle. (TR-620).

On cross examination, he stated that part of his opinion was based upon the fact that the truck had it's rear flashers on even though two independent eyewitnesses and a Trooper at the scene stated that there were no flashers or that they did not see any flashers on. (TR-629). He stated that it would not make any difference whether or not the flashers were on because it was daylight and that it is not necessary to depend on flashers in daytime situations. (TR-629).

He stated that the requirement for either emergency flashers, red flares or portable emergency reflectors must be placed at intervals of one hundred, two hundred, and three hundred yards. (TR-638).

The closing argument of counsel is contained in Volume VI. The attorney for the Plaintiff mentioned the seat belt defense, stating that a reasonable driver in 1981 did not use seat belts. (TR-671-672).

The argument by counsel for the defense started at TR-679. He discussed the seat belt question in his closing argument as follows:

"Think of what Mr. Moss said. I don't deny, and for clarity's sake what he said was repetitive but I don't have the opinion one way or the other. How about the seat belt, would it have helped her? I really don't know. I don't know if it would. I don't know if it would have mitigated. I don't know about that, that's nice to know, Mr. Moss said I don't think about that until afterwards. You sit in a seat belt, lap belt with a shoulder and you pull it at the shoulder and it freezes that shoulder and does not stop when the brakes are applied. It stops you from moving forward. It is true with Mr. Moss' 1981 picture, and we are going to paint a different picture, in fairness to her and to him but if he came along and said to you in 1981 I knew people used to not wear them and they would say if I was in an accident it would not help - I mean, I know it would help but I don't wear them.

When you think about Susan's injury would the seat belt have helped? Well, regrettably as I think you know, well, it doesn't take an encyclopedic genius to realize that if Susan was strapped in the seat she wouldn't have would up on the floor of the car. Her knees were impaled and they went into the dashboard.

Tom would have you believe the injuries Susan has to her face was from the windshield. May I see the photograph, please? The woman's face is scarred. You can see that and I can see that. Looking at the results of a glass shear cut. It's almost like the surgeon cutting through the nerve. Lower section around the mouth, now, I don't deny a lot of stress you can get from your face in positions like that. I asked the question, in light of the physical damage we know exists in the car, could that injury to Susan's face have been caused by broken and ripped interior of the car, broken steering wheel and her face was down in this area. Would the seat belt have held her in position? Folks, respectfully, there ain't no guarantees. We do have

probability here.

Harry Meyersohn had, in fact, and had the evidence that he put on the board and says it would have helped. I don't know that. The law says that you can take it upon yourself as the judges of the facts to determine whether or not that seat belt would have assisted her in light of her injuries. We have given a form to Tom and I have agreed on the form to the Court. The Court will give it to you and on the verdict form there is a series of questions almost like a program length thing. You go from when the question follows the circumstances to the next question and the next question and the next question. Initially, the initial series of questions deals with the negligence and who was at fault. The first question: Is Mr. Catia at fault. Says check yes or no and the next question: Is Susan at fault? And the next question is what are their percentages and the last question is dealing with the seat belt. In terms of reasonableness, had she been wearing the seat belt, would it have helped, have limited or lessened her, her injuries. We can test that. You must give the answer to that test. "

Defense counsel then went into the argument that Officer Quinn appeared to be a police officer and that the driver of the truck had every right to follow Officer Quinn's instructions stating:

"The bottom line is he's upset. He gets out and he's walking back and he runs into a fellow named Quinn, forget his name, ignore his name. He runs into a guy who is dressed kind of like an officer. I know he only has a gun and only has a uniform and only has a walkie talkie and a raincoat with the word police on the back. What he perceives is that this man is an officer. And you see people that are marked like this with radios and ticket markers and thinks like that when they come in the courtroom. Why would you think he was an officer? They are not masquerading in the form of an officer. Now, I don't know. I was not there. But I know in 1982 when we took Sergeant Quinn's deposition, Sergeant Quinn admitted that Catia had said to him. I don't know if I brought the deposition. I'd probably be a more effective speaker -- her we go -- he asked me is my truck far enough off the road, should I move it and Quinn not saying, this is Quinn talking, not Valerius. That is, this is 1982 and I agree that the gentleman says looks okay. Don't move it. I am not here investigation, not investigation, that's true. Wait until the state highway patrol gets there. That's their function. Quinn took down the names, took down Judy Reynolds' name. She left before the highway patrolman came.

Her name appears on the report. He assures him to leave his vehicle there until the highway patrol comes. Bad judgment, its just judgment.

On discussing judgment on whose part, on the gentleman who's addressing this man that is masquerading as a policeman with police on his back. You are to leave your vehicle there.

Let me tell you I think it is reasonable to respond to an officer dressed in a uniform when you are from a different community. He is from Jacksonville, not one of our locals, doesn't live in Boca or Delray or even in my home of Miami. God forbid. But the bottom line is he reacted as you, I, every rational person would react and it's reasonable, is it failure to use reasonable care, failure to do what is reasonable under the circumstances, like circumstances, circumstances of a police officer."

After the closing argument and at the charge conference, the Plaintiff renewed the objection to the use of the seat belt defense and objected to an instruction on the seat belt defense as follows:

> "I want to renew my objection to the seat belt defense as far as I can. The only evidence in the record was the deposition testimony of Susan A. Curtis taken May 8, 1985, in which she said would he ever use the seat belt in this car and referring to her husband and the answer at line 22 was he used the seat belt. His testimony was he didn't remember and her testimony in the trial was that she didn't remember and my recollection of the law is you can't use a prior inconsistent statement as primary evidence. She may have said that in the deposition but it was used to be impeachment, impeach the testimony and it wasn't direct testimony and if it was direct testimony it would fall exactly on point with the

case of -- what is the name of the case -- Papp, P-a-p-p versus Shores or Napp, N-a-p-p versus Shores or something like that which the District Court or Jeffrey Napp, the subject automobile was in -quote - working order - end quote - does not establish that Dana Napp's seat belt was fully operational and Dana Napp testified we use the seat belt sometimes and sometimes not constitutes sufficient evidence to establish the seat belt was fully operational.

THE COURT: Anything, Mr. Valerius?

MR. VALERIUS: I understand you have already ruled. Is there any need to proceed with the question?

THE COURT: I think it is a legitimate question and not an easy clear-cut answer but the best I can tell is that I'm going to instruct the Jury if it is requested for the seat belt defense.

ARGUMENT

POINT ON APPEAL

1. THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER THE PLAINTIFF'S FAILURE TO USE A SEAT BELT WHEN ABSOLUTELY NO EVIDENCE IS IN THE RECORD CONCERNING WHETHER THE SEAT BELT WAS OPERATIONAL.

In the case at bar, there is absolutely no evidence as to the operability of the seat belts.

The seminal case about seat belt defenses is Insurance Company of North America vs. Pasakarnis, 451 So. 2d 447, 454 (Fla. 1984), which unequivocally places the burden of proof on the defense to establish not only that a car is equipped with seat belts, but that they are "operational". Pasakarnis continues by stating:

> "Defendant has the burden of pleading and proving that the Plaintiff did not use an available and operational seat belt, that the 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 that the failure to use an available and operational seat belt 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."

In the case at bar, Defendant did not meet its burden of proving through competent evidence the seat belt in Plaintiff's car was operational.

The Plaintiff argues that the Appellate decision most closely in point is Judge Lett's opinion in the case of Youngentob vs. Allstate Insurance Company, 519 So. 2d 636 (Fla. 4th DCA 1987). This case relied on Pasakarnis, and extended the finding that there was absolutely no evidence as to the operability of the seat belts other than the fact that the automobile was in "good condition". Despite the fact that the automobile was in good condition, the Court in Youngentob held that this is insufficient proof that the seat belt was operational. As the lower Court's instruction on the seat belt defense was incomplete and contrary to prevailing law, this case was reversed and remanded for a new trial on all issues. The exact finding was as follows:

> "In the case at bar, there is absolutely no evidence as to the operability of the belts other than the fact that the automobile was in good condition. Undoubtedly that is so, but we are of the opinion that an essential element of proof to support the Pasakarnis requirement that the seat belts are operational, is absent. As a consequence, it was reversible error to give such an instruction."
>
> "It is clear from Pasakarnis that the burden to establish the seat belt defense is upon the party asserting it. In this case, Wickes Lumber did not meet its burden of presenting evidence that the seat belts were operational by the testimony and photographs establishing that the De Long vehicle was purchased new a few months earlier and contained seat belts. The defense is not entitled to a seat belt defense instruction to the jury where there is no evidence as to the operability of the seat belts other than the fact that the automobile was in good condition. Youngentob vs. Allstate Insurance Company, 519 So. 2d 636 (Fla. 4th DCA 1987).

No admission that Plaintiff used to use the seat belts sometimes, does not constitute sufficient evidence to

establish that the seat belt was fully operational, Knapp vs. Shores, 550 So. 2d 1155 (Fla. 3rd DCA 1989).

> "Nor does Dina Knapp's testimony that "we used to use (the seat belts) sometimes and sometimes not" constitute sufficient evidence to establish that the seat belt was fully operational. Devolder vs Sandage, 544 So. 2d 1046 (Fla. 2nd DCA 1989).

Therefore, in the case of DeVolder vs. Sandage, 544 So. 2d 1046 (Fla. 2d DCA 1989), Defendant in a negligence action arising out of an automobile accident to assert a seat belt defense, a showing is required that the seat belt or belts in the vehicle were anchored to the vehicle body and contained buckles which close securely when utilized or tested.

> "A common thread running through these cases 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. The motion to strike the seat belt defense therefore should have been granted."
>
> "The evidence did not establish that appellant's seat belt "clicked," nor was it shown that the belt was anchored to the vehicle body. Consequently, it was error to instruct the jury on the seat belt defense."

In DeLong vs. Wickes Company, 545 So. 2d 362 (Fla. App. 2 Dist., 1989), Defendant again failed to meet its burden of presenting evidence that the seat belts were operational. The Court stated that the testimony that the vehicle was purchased new a few months earlier, and contained seat belts, was still not enough concerning the operability of the seat belts.

The record in the case at bar clearly indicates that the Defendant did not meet the burden of proof in showing that the seat belts were operational, particularly by not showing that the seat belts were anchored to the vehicle body and contained buckles which closed securely when utilized or tested.

In light of the failure of the defense to present evidence that Plaintiff's seat belt was operational, the Trial Court erred in allowing the jury to assert the seat belt defense, determining that Plaintiff was ninety (90%) percent at fault in general, and sixty five and one-half (65-1/2%) percent at fault just for the failure to use a seat belt. Florida courts have consistently required a Defendant to prove that seat belts are operable in order to assert the seat belt defense and the case at bar lacks such a showing, thus this judgment should be reversed and remanded for a new trial as per Youngentob.

WHEREFORE, the Plaintiff requests that the jury verdict and Judgment in this case be reversed and that the Plaintiff be granted a complete new trial on the question of liability and damages.

2. THE TRIAL COURT ERRED IN ALLOWING THE ISSUE OF PLAINTIFF'S FAILURE TO USE A SEAT BELT TO SO PERMEATE THE PROCEEDINGS RESULTING IN PREJUDICIAL ERROR, WARRANTING A NEW TRIAL.

As illustrated in the Statement Of Case And Facts, the issue of whether Plaintiff's failure to wear her seat belt was repeatedly dramatized throughout this trial by defense counsel. References to the seat belt were made in opening and closing arguments, as well as during the examination and cross-examination of witnesses. The repeated reference to a defense, which was not available to Defendants under applicable law without evidence as to the seat belts operability amounts to prejudicial error. This fact is particularly illustrated by the large percentage of negligence assigned to Plaintiff by the jury in general, for the seat belt in particular, and by the low damage award to Plaintiff in light of the severity of her injuries.

Youngentob vs. Allstate Insurance Company, 519 So. 2d 636 (Fla. 4th DCA 1987) held in facts similar to this that a complete new trial was warranted if the defense does not meet its burden of proving operability of the seat belt in question. In awarding a complete new trial, the Court in Youngentob must have determined that the error was prejudicial or a "miscarriage of justice" per Florida Statute Section 59.041, although the Court's Opinion in this case does not state the precise rationale.

Furthermore, the jury was misled by not only the repeated reference to the Plaintiff's non-use of a seat

belt, but additionally by the erroneous seat belt instruction given by the Judge. It is impossible to determine whether the rest of the verdict resulted from the error, thus the error is reversible. L.L. Crosby vs. Ashley, 291 So. 2d 12 (Fla. 3rd DCA 1974). Moreover in 5 Am Jur 2d, Section 801, it is stated as follows:

> "However, if the evidence has a tendency to arouse the sympathy or passions of the jury, its admission may be reversible error despite its lack of materiality to the actual issues. Where the evidence erroneously admitted was material, some courts have assumed that it influenced the jury to the full extent of its tendency, and so constituted prejudicial error. The fact that the evidence admitted relates to a vital or principal point in the case or to an important and closely contested issue, or to a material fact has been treated as being an important factor in determining prejudice."

WHEREFORE, the Plaintiff requests that the jury verdict and Judgment in this case be reversed and that the Plaintiff be granted a complete new trial on the question of liability and damages.

3. THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY THAT OFFICER QUINN WAS A POLICE OFFICER IN THE COURSE AND SCOPE OF HIS EMPLOYMENT AND HAD AUTHORITY TO ISSUE ORDERS TO THE DEFENDANT/ DRIVER.

The Plaintiff was put in an impossible situation when the Court ruled in Curtis vs. Bulldog Leasing Company, Inc., 513 So. 2d 238, that Officer Quinn was not a policeman at the scene of this accident only a "GOOD SAMARITAN". This particular point had never been raised by either the Plaintiff or Defendant in the 1987 Appeal as to whether the City of Boca Raton would be liable, or that the matter would at least be a jury question. This was based on belief of counsel that the case of Garner vs. Saunders, 282 So. 2d 392 would apply that police officers are "....always on duty, although periodically relieved from their routine performance of it." At an earlier hearing prior to the trial, the Plaintiff argued that it would be unfair to refer to Officer Quinn as a police officer, but there was no way to control the testimony in general concerning the "appearance" of Officer Quinn. Therefore in final argument, the attorney for the Defendant was able to argue that Officer Quinn had a gun, had a uniform, had a walkie-talkie had a raincoat with the word "POLICE" on the back, had a ticket marker and implied that a person would be a fool not to recognize that this was in fact a police officer. Then there followed a logical sequence in the argument, a question to the jury as to whether or not they thought it would be reasonable to respond to an officer dressed in a

uniform. This was a highly effective argument against the Plaintiff that the Defendant was merely replying to a command of a police officer and there was no way to advise the jury that this Court had formerly ruled that Officer Quinn was not in fact, a police officer. That is why this Plaintiff argues that this Court by its decision in the 1987 decision, found at 513 So. 2d 238, that Officer Quinn was not a police officer, which was then coupled with the Plaintiff's ability to describe Officer Quinn as in fact, a police officer (issuing orders that necessarily had to be obeyed) was completely prejudicial to any kind of fair trial the Plaintiff might have received in this case. Every person who is ordered to do something by a police officer will quite naturally do that. It is obvious that a jury would believe this, and it is obvious that the jury would have relied upon this testimony used so effectively at the trial and during closing argument. The Plaintiff states that the above was a fundamental error.

Because of the unique circumstances of this claim by the Plaintiff that there was fundamental error committed at the trial, the Plaintiff is able to cite no cases exactly in point. The only law felt applicable to the issues involved is found at 3 Fla. Jur. 2d, Page 364 quoted as follows:

> "The Courts have not undertaken to give an all-inclusive definition of fundamental error, but it has been held that error going to the foundation of the case or to the merits of the action (Sanford vs. Rubin, 1970 Fla., 237 So. 2d 134, conformed to Fla. App. D3, 239 So. 2d 49), and which would result in a miscarriage of justice if not considered (American

Surety Co. vs. Coblentz, 1967, 381 F2d 185, later app. CA5 Fla, 416 F2d 1059) is a fundamental error.

WHEREFORE, the Plaintiff requests that the jury verdict and Judgment in this case be reversed and that the Plaintiff be granted a complete new trial on the question of liability and damages.

CONCLUSION

The Plaintiff requests that she receive a new trial on all issues because of prejudicial and fundamental error at her trial based upon a continuing reference to the seat belt defense when it was not warranted, and secondly, the ability of the defense to characterize Officer Quinn as a police officer when in fact, he was judicially and specifically held not to be a police officer.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to, THOMAS F. VALERIUS, ESQUIRE, 2950 Southwest 27th Avenue, #200, Miami, Florida, 33133, by U.S. Mail, this 8 day of August, 1991.

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IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA, FOURTH DISTRICT

L. T. CASE NO.: 82-307-CA (L) 01 G

4DCA CASE NO: 90-02134

SUSAN A. CURTIS,

Plaintiff,

vs.

BULLDOG LEASING COMPANY, INC., HEAVY MACHINERY AND TOOL TRANSPORTERS, INC., SUWANNEE TRANSFER COMPANY, INC., CARRIERS INSURANCE COMPANY, and CRAWFORD CATIA,

Defendants.
_____/

APPEAL FROM CIRCUIT COURT FOR PALM BEACH COUNTY

APPELLANT'S REPLY BRIEF

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ARGUMENT

POINT I

WHETHER THERE WAS SUBSTANTIAL COMPETENT EVIDENCE TO ALLOW THE JURY TO CONSIDER THE SEAT BELT DEFENSE.

It is obvious from a reading of the Defendant/Appellee's Answer Brief that they were completely unable to find anyplace in the record that these seat belts were operational. The best they were able to come up with was that there was deposition testimony that the Plaintiff/Appellant's boyfriend had driven the car that was in the accident and that he used the seat belt at different times. This is completely erroneous for four reasons, as follows:

1. There was no deposition testimony introduced into evidence along those lines. The Plaintiff/Appellant denied this statement as was vividly pointed out by the Defendant/Appellee. The applicable rule is very clear, as follows:

> "If the witness does not distinctly admit making the prior inconsistent statement, counsel may offer evidence of the statement. If the witness testifies that he did not make the prior statement, counsel, when it is next his turn to offer evidence, may offer a properly authenticated written statement and testimony of individuals who were present when the statement was made." Florida Evidence, Second Edition, by Ehrhardt.

At the trial, defense counsel did not offer evidence of this deposition statement. It may have been read or paraphrased to the witness, but she denied it. It was then Defense counsel's obligation to offer evidence such as properly authenticated deposition testimony, testimony of individuals who were present at the time of the deposition, or the court reporter who took the

deposition. Defense counsel never took the time or trouble to introduce such evidence into the record; therefore, it is not part of the record; and therefore, counsel for the Defendant/Appellee cannot claim that it was evidence in the record.

2. Even if it was in the record, it would have no force and effect in relation to the issue because it would then place the fact squarely in the same factual pattern as Knapp v. Shores, 550 So.2d 1155, in which testimony by a party that the seat belt was in working order and that the seat belt was sometimes worn did not establish that the seat belt was fully operational. The case of Knapp v. Shores was not discussed by the Defendant/Appellee in the Reply Brief and explained away, distinguished, or criticized. Since this case is still the law in the state of Florida, it should be followed. The case of Devolder v. Sandage, 544 So.2d 1046, goes even further and requires testimony that the seat belt in the vehicle was anchored to the body and contained buckles which closed securely when utilized or tested. The evidence is clear that there was no testimony related to buckles which closed securely and it obvious from the record that the seat belt was not tested either from an anchor standpoint or whether the buckles worked.

3. The former boyfriend of the Plaintiff/Appellant, who is now her husband, did not testify on examination or cross-examination that the seat belts on this particular vehicle were operational.

4. The Plaintiff/Appellant never testified that the seat belts on this vehicle were operational either at a deposition or

at the trial. At the attempted impeachment of the Plaintiff/ Appellant at the trial related to deposition testimony concerning her boyfriend, now husband, in reply to a question that her husband may have used the seat belt sometimes, and she clearly stated, "I guess, I guess, I don't know, he used a seat belt at different times." Therefore, there is no categorical statement that he used seat belts. She opined that, "I guess" which is surely not a clear, affirmative answer. She then flatly stated "I don't know," and this certainly should be taken at face value that she didn't know whether or not he had used seat belts.

Lastly, in her deposition, she may have said, "He used a seat belt at different times" which is clearly different from stating that he used the seat belt in this particular vehicle. It was this particular line, "He used a seat belt at different times" that the defense attorney used time and time again in various arguments prior to the trial, during the trial, and at the charge conference, in which it was stated that she had admitted in a deposition that her husband had used the seat belts at different times in the vehicle. This is a far cry, not the same thing as using a seat belt in this vehicle at different times because her husband had a vehicle of his own and may have driven other vehicles and he may have used a seat belt on other occasions. There is no specific testimony that he used the seat belt in this particular vehicle at different times. Although it is not thought necessary to argue this because this

deposition testimony was never introduced into evidence and is not part of the record, nevertheless, it is important to understand what was actually said in the deposition.

In conclusion, the discussion by counsel for the Defendant/ Appellee about perjury is completely inappropriate. First of all, her perhaps unfortunate comment to the jury that "if" she had said that it would have been a lie was, in fact, true because stated very simply, she never stated that her boyfriend, now husband, had used the seat belt at different times. It is very clever cross-examination to misstate a fact and convince the party if they had said it before that their present testimony would be untrue. Just as defense counsel attempted to arouse the passion of the jury at the trial by the use of an obviously inappropriate seat belt defense, counsel for the Defendant/Appellee now attempts to arouse the passion of this Court by inappropriate remarks.

POINT II

THE TRIAL COURT ERRED IN ALLOWING THE ISSUE OF PLAINTIFF'S FAILURE TO US A SEAT BELT TO SO PERMEATE THE PROCEEDINGS THAT THIS WAS A FUNDAMENTAL ERROR NECESSITATING A NEW TRIAL.

Winning a trial should not be an end in itself. Counsel should be wary of pursuing a defense from the start of a case through closing arguments that they know they have no evidence to support. From an Affidavit filed by the boyfriend, now husband, of the Plaintiff/Appellant, in support of a Motion for Partial Summary Judgment that he had never utilized the seat belts in that particular automobile, and the defense's knowledge that the Plaintiff/Appellant would testify that she had never seen her boyfriend, now husband, use the seat belts in that vehicle, nevertheless, the Defendant/Appellee presented this seat belt defense to the jury on opening statement, argued it vociferously through every aspect of the trial, convinced the judge to give the seat belt instruction, and then argued at length before the jury that she would not be entitled to a verdict in her favor because she failed to use the seat belt.

This was a very unfortunate accident in which the Plaintiff/Appellant ran into the rear of a very large truck illegally parked six feet into the travel portion of I-95 on a rainy day without displaying any warning signs. It was clear from all the evidence that at the impact she slid under the dash and the bulk of her injuries had occurred because of her failure to use a seat belt.

Therefore, the seat belt problem ran as a common element through the complete trial from opening statement to closing arguments. The Defendant/Appellee knew it was an invalid defense and introduced absolutely no evidence at all that the seat belts were operational, which evidence would have been compatible with the recent cases that came out just before the trial started.

As a result of all of this, it is obvious that this improvident evidence had a tendency to rouse the sympathy and passions of the jury. It was a material issue which obviously influenced the jury to the full extent and therefore constituted fundamental and prejudicial error. Just striking the seat belt portion of the comparative negligence would not offer full justice to Plaintiff/Appellant. The only way to obtain full justice in this case would be to grant a complete new trial on the question of liability and also damages. As an alternative proposition, if this Court feels like the damage award was adequate and that it would serve no useful purpose to re-try the issue of damages, then the Plaintiff/Appellant would suggest that a complete new trial be granted on the issue of liability.

POINT III

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY THAT OFFICER QUINN WAS A POLICE OFFICER IN THE COURSE AND SCOPE OF HIS EMPLOYMENT AND HAD AUTHORITY TO ISSUE ORDERS TO THE DEFENDANT DRIVER.

There has been and presently is a strong belief by several people connected with this case that part of the blame for this particular unfortunate accident was because of the actions of a police officer, Officer Quinn, of the Boca Raton Police Department. He was at the scene of this accident and noticed that a large truck was parked six feet into the fast lane of I-95 on a curve in a light drizzle with absolutely no markers, and no warning signs of any kind; and he told the driver it wasn't necessary to move his truck. With this in mind, the Plaintiff/Appellant joined the City of Boca Raton as a Defendant based on the actions of one of its police officers. But in the former Curtis opinion, this Court clearly stated that Officer Quinn may have been an off-duty policeman but he was not a "policeman" as such at the scene of the accident, otherwise the City of Boca Raton would have been responsible for his conduct. Therefore, you have this Court not allowing Plaintiff/Appellant to categorize Officer Quinn as a police officer for purposes of suing Boca Raton for his actions, then later the trial judge allows defense counsel to categorize him as a police officer on the question of negligence.

We, therefore, end up with having two courts in the State of Florida take diametrically opposing positions in relation to the same set of facts. Because of this, the Plaintiff/Appellant suffered a fundamental injustice. The Plaintiff/Appellant takes the position that this was a miscarriage of justice and therefore a fundamental error.

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail/hand delivery to: JOSEPH H. LOWE, Esquire, MARLOW, CONNELL, VALERIUS, ABRAMS, LOWE & ADLER, P.O. Box 339075, Miami, FL 33233-9075, this 16th day of Qctober, 1991.

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