IN THE SUPREME COURT OF FLORIDA

CASE NO: 80,574

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

Defendants/Petitioners,

v.

SUSAN A. CURTIS,

Plaintiff/Respondent.
_____/

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

REPLY BRIEF OF PETITIONERS

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ARGUMENT

Respondent misconstrues Bulldog's argument in Issue One of its initial brief. Petitioner's argument is not that it met the requirements of *Knapp v. Shores*, 550 So.2d 115 (Fla. 3d DCA 1989); *Devolder v. Sandage*, 544 So.2d 1046 (Fla. 2d DCA 1989); *DeLong v. Wickes Company*, 545 So.2d 362 (Fla. 2d DCA 1989); and *Youngentob v. Allstate Insurance Company*, 519 So.2d 636 (Fla. 4th DCA 1987), but that those decisions have eviscerated the seat belt defense in Florida and place a nearly insurmountable burden of proof upon defendants relying on the seat belt defense; and that Petitioner developed sufficient competent evidence to satisfy their burden for the seat belt defense to be submitted to the jury.

Respondent argues that her deposition testimony does not constitute evidence on the issue of the availability of an operable seat belt. Respondent's argument is flawed.

Florida Rule of Civil Procedure 1.330 states in part:

> "(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice of it so far as admissible under the rules of evidence applied as though the witness were then present and testifying in accordance with any of the following provisions:
>
> (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness."
>
> (2) The deposition of a party . . . may be used by an adverse party for any purpose.

Rather than denying having made the statement she admitted

making the statement and then tried to explain it away. Thus, it is clear that the deposition testimony was correctly before the jury and the implications to be drawn from that testimony were for the jury.[1]

Respondent argues, in her answer brief, that her statements should be taken at face value; that she did not know whether or not she had used the seat belt. This was in the face of impeachment by defense counsel. Her deposition testimony, which she admitted making, was that her husband had used the seat belt at various

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[1] "Q: I asked you to see if you remember back on May 8th, '85, you and your lawyer and I met at a deposition. Do you remember these questions and answers?

Mr. Valerius: Would you like a copy of this?

The Court: No.

By Mr. Valerius:

Q (Reading:)
"At any time before the accident, did your boyfriend, who is now your husband, ever use your car?"
And you said, "Sure, it was our car."
"Would you be sitting in the car while he was driving it?"
And you said, "All the time."
"Would he ever use the seat belt in the car?"
And you said, "He used it, the seat belt while he was driving the automobile. While he was sitting in it he would use the seat belt and sometimes, I guess, I don't know, he used the seat belt at different times, I mean, I don't use the seat belt but he does."

Is that your recollection of your testimony back in '85?

A Yeah, but see, he never, that was my car and if he went out at night for dinner or something like that he would get right in the car; Jim, as a rule, did not wear the seat belt unless it was bad weather. Had only owned the car a few months and I never saw him put the seat belt on in that car. It wouldn't have been any good."

(T. 166-167).

times. Petitioner argues that her husband had his own vehicle and may have driven other vehicles and may have used a seat belt on other occasions. She also argues that the husband had used the seat belt in this particular vehicle at different times. It is submitted that both of those issues are questions of fact to be determined by the trier of fact, the jury. Here the jury found that the Petitioner lied during her trial testimony when she recanted her prior testimony. To accept Respondent's assertion here would merely sanction perjury.

With or without Petitioner's testimony, there was sufficient evidence for the issue of an operational seat belt to go to the jury. The Plaintiff admitted that the vehicle had seat belts. Photographs of the vehicle were introduced into evidence that showed that the vehicle was equipped with seat belts. The car was new. She had only owned it for a few months before the accident. The car was a 1979 or 1980 Toyota, which was required by federal code to have seat belts. The accident was in 1981. This alone is sufficient for a jury to infer that the seat belt was fully operational.

The law in Florida is that if the circumstances established by the evidence are susceptible of a reasonable inference or inferences which would support a finding, a jury question is presented. *Voelker v. Combined Insurance Company of America*, 73 So.2d 403 (Fla. 1954). It is the jury's duty to weigh all reasonable inferences warranted by evidence in determining which of them preponderates.

On appeal an appellate court cannot substitute its judgment for that of the jury or say that an inference gleaned by the jury is not reasonable, unless the inference utterly fails to accord with logic and reason, or human experience. Clearly here, the inference the jury deduced from the evidence was one which was within the bounds of human experience and should not have been reversed by the appellate court. See *Streeter v. Boundarant*, 563 So.2d 729 (Fla. 1st DCA 1990); *Goode v. Walt Disney World Company*, 425 So.2d 1151 (5th Dist. 1982), review denied, 436 So.2d 101 (Fla. 1983); *Tillery v. Standard Sand and Silica Co.*, 226 So. 2d 842 (Fla. 2d DCA 1969).

In her response to the second issue on appeal, the Respondent argues that there is no conflict between the decision below and decisions of other district courts of appeal, Brief of Respondent at 13-17. This argument goes to the issue of jurisdiction of this Court over this cause. The issue of this Court's jurisdiction was addressed on the Briefs of Jurisdiction. Consequently, Respondent's second issue is moot.

If Respondent's argument is an attack on the sufficiency of the evidence, it is misplaced. Respondent resorts to misrepresentation of the evidence in seeking to disuade this Court from looking at the issues. Plaintiff did not, as she now contends, run into the rear of a truck which was illegally parked six feet into the travel portion of I-95. Plaintiff ran into the rear of a truck which was six feet <u>off</u> the road with only two feet in the travel portion of I-95 (R. 278-79). 80% of the truck was

off the road (T. 477-78). In fact, the impact occurred on the shoulder of the road such that the Plaintiff was significantly off of the travel portion of I-95 when she rear ended the truck (T. 478).

The sufficiency of the evidence is one of the issues before this Court. Plaintiff's assertions that the mention of the seat belts in opening and closing arguments and during trial was so prejudicial as to require a new trial on all issues is not supported by case law. Where, as here, a jury is properly instructed, it is presumed that it followed those instructions. If the evidence did not support the Pasakarnis instruction, the correct remedy is to delete that portion of the verdict form and award the damages reduced by the comparative negligence found. It is, of course, Petitioner's argument that not only was the evidence sufficient to go to the jury but that it should have been affirmed by the Fourth District Court of Appeal.

In her conclusion, Respondent argues that it is clear from the record that the trial court failed to properly instruct the jury not to consider the question of plaintiff's failure to use the seat belt in deciding the issue of comparative negligence:

> "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 the jury is not fully instructed that it should not consider the seat belt defense in the initial decision on comparative negligence."

Brief of Respondent at 16.

What is clear from the record is that we do not know what the jury instructions were. Respondent, the appellant below, did not

request that the jury instructions be made part of the record on appeal (R. 1354), therefore, the transcript submitted as part of the record does not include the judge's charges to the jury. Consequently, Respondent cannot now argue before this Court that the jury was confused by the trial court's instruction because this Court does not know what those instructions were.

An Appellant bears the burden of demonstrating error. Part of that duty is to ensure that the record is prepared and transmitted to the reviewing court. See Fla. R. App. Pr. 9.200(e); *Tesher & Tesher, P.A. v. Rothfield*, 387 So.2d 499 (Fla. 4th DCA 1980); *Donatello v. Kent*, 297 So.2d 581 (Fla. 2d DCA 1974).

Case law is legion that when an Appellant has failed to furnish a record of trial proceedings necessary for the reviewing court to draw conclusions then the trial court must be affirmed because the record, as a matter of law, is inadequate to demonstrate error. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979). Here, Respondent, as appellant below, chose not to include the jury charge in the transcript. She cannot now as Respondent before this Court argue in support of the District Court's decision that the jury instruction created confusion. This Court must resolve the conflict based upon the record and should approve the decisions of the other district courts that have found that when the seat belt defense was improperly submitted to the jury the case is merely remanded for entry of judgment based upon the verdict, without the seat belt defense reduction.

CONCLUSION

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

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

Respectfully Submitted,

MARLOW, CONNELL, VALERIUS,
ABRAMS, LOWE & ADLER

by _____
JOSEPH H. LOWE

Certificate of Service

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 13th day of July, to Thomas A. Hoadley, Esquire, Hoadley & Noska, P.A., 320 Fern Street, West Palm Beach, Florida 33401.

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