IN THE SUPREME COURT OF FLORIDA

HAROLD RIDLEY and KATHY RIDLEY, his wife,

Petitioners,

v.

Case No.: 86,280

SAFETY KLEEN CORPORATION, a foreign corporation,

Respondent,

BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION, AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Pages**

STATUTES:

MISCELLANEOUS:

PRELIMINARY STATEMENT

In this brief, the parties will generally be referred to by name. References to the appendix to this brief will be by the symbol "A ."

Florida Defense Lawyers Association has requested leave to file a brief as amicus curiae in this case solely with regard to the proper interpretation of Section 316.614(10), Florida Statutes (1990). Accordingly, we will not address any other issue raised by the parties.

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

For purposes of the issue addressed by this Brief, the significant facts are that Harold and Tabitha Ridley were involved in an automobile accident with a Safety Kleen company truck, that Mr. Ridley was not wearing his available and fully operational seat belt at the time, that Safety Kleen raised, as an affirmative defense, the non-use of that seat belt, and that non-use of the seat belt did not cause or contribute to causing the accident.

SUMMARY OF ARGUMENT

This Court should answer to the certified question as follows: As to drivers and front seat passengers in accidents occurring after the effective date of the 1990 amendment to Section 316.614(10), Florida Statutes, where there is evidence that a plaintiff's failure to use an available and fully operational seat belt contributed to the injuries suffered by the plaintiff, but

there is no evidence that plaintiff's seat belt non-use contributed to causing the accident, the jury should be instructed either with Florida Standard Jury Instruction 4.11 or with Florida Standard Jury Instruction 6.14, but not with both instructions.

The 1990 amendment to Section 316.614(10), Florida Statutes, prohibited the introduction of evidence of a violation of the seat-belt statute on the issue of mitigation of damages, but expressly provided that such evidence was admissible as to comparative negligence. A question has arisen as to whether the effect of this amendment is to preclude evidence that plaintiff failed to use an available and fully-operational seat belt unless non-use of the seat belt somehow contributed to causing the accident. That narrow construction of the statute should be rejected for several reasons.

The common law seat belt defense, by precluding the recovery of that portion of plaintiff's damages which results from plaintiff's fault in not using a seat belt, gives legal recognition to the fact that the failure to use an available and fully operational seat belt can cause otherwise-avoidable injuries in a motor vehicle collision. That defense is consistent with, if not mandated by, Florida's fundamental public policy of equating each entity's extent of liability with its extent of fault and holding a defendant liable only for those damages caused by that defendant's fault, not for damages caused by the fault of others. Any construction of the statute which subverts that fundamental public policy should be carefully scrutinized.

The strained construction urged by the plaintiff's bar is not justified by the statutory language. Unlike analogous statutes, the prohibition of Section 316.614(10), Florida Statutes (1990), is directed to evidentiary use of a "violation of the provisions of this section," not to evidence of "failure to use" an available seat belt. Thus, what the statute prescribes is introduction of evidence, on the issue of mitigation of damages, that plaintiff was in violation of the law; it does not proscribe introduction of evidence of the facts which constitute that violation.

Even if the statute were interpreted to include evidentiary use of the underlying fact of non-use of an available and fully operational seat belt, limitation of the seat belt defense to situations in which non-use caused the accident still does not follow. Clearly, the legislature intended that seat belt non-use by a driver or front seat passenger should be admissible on the issue of comparative negligence, rather than on the issue of mitigation of damages. That approach makes eminently good sense. It avoids the danger of "double-dipping" by clearly confining seat belt evidence to a single issue. It does so in a context which lessens the burdens on the jury of allocating fault among the entities involved. It is also consistent with the underlying principle that comparative negligence deals with the pre-accident fault of the parties contributing to the damages sustained, while mitigation of damages deals with the reasonableness of plaintiff's post-accident conduct.

It is perhaps for this reason that the courts of this state have, on several occasions, analyzed the effect of a plaintiff's failure to use an available safety device in terms of comparative negligence, rather than in terms of mitigation of damages. Indeed, one District Court has specifically held that the mitigation of damages defense has been subsumed within the doctrine of comparative negligence. Treating seat belt non-use as comparative negligence is fully consistent with the purposes of comparative negligence as set forth in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), which delineated comparative negligence in terms of allocating liability in accordance with the parties' relative degrees of responsibility for the damages sustained.

In amending Section 316.614(10), Florida Statutes, the legislature has not eviscerated the seat belt defense (as to those in the front seat) by confining it to those highly-unusual cases in which seat belt non-use contributed to causing the accident. Instead, the legislature has realigned the statutory seat belt defense to where it makes the most jurisprudential sense -- as one aspect of comparative negligence.

Moreover, even if the effect of the 1990 amendment were to constrict the scope of the statutory seat belt defense to those rare situations in which seat belt non-use contributed to causing the accident itself, there is no reason to similarly constrict the common law seat belt defense which this Court had recognized several years prior to the passage of a statute requiring the use of seat belts. Indeed, such a construction results in a para-

doxical situation in which the seat belt defense is not available as to the driver and front seat passenger (who are required by law to wear seat belts), but is available as to rear seat passengers (who are not required to wear seat belts). The legislature could not have intended so absurd a result.

The lower tribunal correctly held that the seat belt defense remains viable notwithstanding the 1990 statutory amendment, and should be affirmed on this issue.

ARGUMENT

THE SEAT BELT DEFENSE REMAINS VIABLE NOTWITHSTANDING THE 1990 AMENDMENTS TO SECTION 316.614, FLORIDA STATUTES, AND IS NOT LIMITED TO THOSE RARE INSTANCES IN WHICH SEAT BELT NON-USE CONTRIBUTES TO CAUSING THE AUTOMOBILE ACCIDENT.

The First District has certified to this Court the following question as being of great public importance:

> If evidence is presented concerning a violation of Section 316.614, Florida Statutes, "The Florida Safety Belt Law," and there is evidence that the violation contributed to the injures suffered by the plaintiff, should Florida Standard Jury Instruction 4.11 (violation of traffic regulation as evidence of negligence) be given?

For the reasons set forth below, we submit that this Court should answer that question as follows (as to accidents occurring after the effective date of the 1990 amendment to Section 316.614(10), Florida Statutes):

> Where there is evidence that a plaintiff's failure to use an available and fully operational seat belt contributed to the injuries suffered by the plaintiff, but there is no evidence that plaintiff's seat belt non-use caused or contributed to causing the accident itself, the jury should be instructed either with Florida Standard Jury Instruction 4.11 (violation of traffic regulation as evidence of negligence) or with Florida Standard Jury Instruction 6.14 (seat belt non-use and mitigation of damages), but not with both instructions.

That ruling would give full effect to the legislative intent in enacting and subsequently amending Section 316.614(10), Florida Statutes, and would be fully consistent with fundamental public policy of this State.

Sections 316.614(4) and (5), Florida Statutes, require the driver of a motor vehicle and each front seat passenger to wear a

seat belt.[1] Prior to 1990, Section 316.614(10), Florida Statutes, provided that:

> A violation of the provisions of this section shall not constitute negligence per se, nor shall such violation be used as prima facie evidence of negligence in any civil action.

In 1990, Section 316.614(10), Florida Statutes, was amended by Chapter 90-119, Section 24, Laws of Florida. In its current form, the statute provides (amendatory language underlined):

> A violation of the provisions of this section shall not constitute negligence per se, nor shall such violation be used a prima facie evidence of negligence or be considered in mitigation of damages, but such violation may be considered as evidence of comparative negligence, in any civil action.

In Bulldog Leasing Co., Inc. v. Curtis, 630 So.2d 1060, 1063 (Fla. 1994), this Court noted the passage of the seat belt law but did not have to decide what effect it had. So far as we are aware, the First District's decision in the instant case is the only reported appellate decision dealing with the effect of the 1990 amendment of Section 316.614(10), Florida Statutes.[2] Trial courts around the state have reached differing results. Some circuit judges have held that the effect of the 1990 amendment is to preclude use of the seat belt defense except in those extremely

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[1]If the front seat passenger is young enough, a child restraint device may be required instead.

[2]We are advised that a trial court decision allowing the seat belt defense to be used as an aspect of comparative negligence, even though seat belt non-use did not contribute to causing the accident, was affirmed per curiam by the Second District in Traylor v. Losh, Second District Case Number 94-368 (1994). The issue is also presently pending in another Second District case, Gauvain v. Wardwell, Case Number 94-3022.

rare situations where the non-use of a seat belt caused or contributed to causing the accident, rather than causing all or part of the plaintiff's damages.[3] Other circuit judges and at least one federal district court judge have ruled to the contrary.[4] For the reasons set forth below, we submit that the seat belt defense remains viable where non-use of an available and fully operational seat belt caused at least some part of plaintiff's injuries, even if it did not contribute in any way to causation of the accident. In the course of this brief, we will address arguments that have been made both by individual plaintiffs and by the organized plaintiff's bar (The Academy of Florida Trial Lawyers) in various cases in support of their claim that the 1990 amendment to Section 316.614(10), Florida Statutes, restricts the seat belt defense to those rare situations in which seat belt non-use causes, or contributes to causing, the initial accident itself.

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[3]It is unclear to what extent Petitioner is asserting this position. Other than referring to this case as an opportunity to answer the question left open in Bulldog Leasing Co., Inc. v. Curtis, 630 So.2d 1060 (Fla 1994), Ridley does not seem to take this position. However, Ridly apparently took that position in the District Court, since its decision recites that Ridley "asserts that the failure to wear the seat belt cannot constitute comparative negligence if the failure to wear the seat belt was not an actual cause of the initial accident" (20 FLW at D1710). Moreover, we believe that this contention must be analyzed in order to properly answer the question certified by the District Court. Since the issue was addressed by the District Court decision and since the trial courts of this state have reached conflicting decisions on this point, we will address the issue.

[4]For the Court's convenient reference, a copy of that federal district court decision and a number of Florida circuit court decisions reaching the same result are included in the appendix to this brief. (A:2-20, 39-40).

Section 316.614, Florida Statutes, requires drivers and front seat passengers - - but not back seat passengers - - to use seat belts. Thus, seat belt non-use by a back seat passegenger does not violate the statute, and Florida Standard Jury Instruction 4.11 (violation of traffic regulation as evidence of negligence) does not apply to rear seat passengers. In cases brought by rear seat passengers, Florida Standard Jury Instruction 6.14 should be given. For the balance of this brief, we will address the situation as to plaintiff who was a driver or front seat passenger.

A. The Historic Background

Some historic background helps put the issue in proper perspective. Initially, the seat belt defense was rejected in Brown v. Kendrick, 192 So.2d 49 (Fla. 1st DCA 1966). In that case, decided while contributory negligence was still a complete defense and a guest passenger had to prove gross negligence, the defendant sought to assert that the minor plaintiff's non-use of a seat belt constituted contributory negligence barring her cause of action against the driver for gross negligence. The District Court rejected that defense, noting that the efficacy of seat belts was still controversial and that there was no statutory requirement to use seat belts. The court further pointed out that the plaintiff's failure to fasten her seat belt had not contributed to causing the accident. In those circumstances, the First District declined to

recognize non-use of a seat belt as an affirmative defense which would have completely barred the minor plaintiff's claim.

The issue came before this Court eighteen years later in Insurance Co. of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984). In that case, the driver of a jeep had been ejected from the vehicle during a collision, landing on his posterior and sustaining a compression-type injury to his lower back. His treating physician testified that the injury was caused by his impacting on the pavement. Defendants proffered testimony that, had plaintiff properly utilized his seat belt, he would not have been ejected and, indeed, probably would not have sustained any injury whatsoever.

The trial court struck the seat belt defense and the District Court affirmed. This Court quashed and remanded for a new trial on the sole issue of the extent to which the verdict should be reduced as a result of plaintiff's failure to wear an available and fully operational seat belt. The Court rejected a contention that it should not recognize a seat belt defense in the absence of a statute requiring the use of seat belts, commenting (451 So.2d at 451) that:

> To abstain from acting responsibly in the present case on the basis of legislative deference would be to consciously ignore a limited area where decisions by the lower courts of this state have created an illogical exception to the doctrine of comparative negligence adopted in Hoffman and the underlying philosophy of individual responsibility upon which the decisions of this Court succeeding Hoffman have been predicated.

The Court pointed out that historically it had acted to discard outmoded common law doctrines where present-day conditions made those doctrines unjust, citing Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) (replacing contributory negligence with comparative negligence); Licenberg v. Issen, 318 So.2d 386 (Fla. 1975) (abolishing the rule against contribution among joint tortfeasors); and Auburn Machine Works Co. v. Jones, 366 So.2d 1167 (Fla. 1979) (rejecting the "patent danger" doctrine).

The Pasakarnis Court further noted its prior decision in Ford Motor Co. v. Evancho, 327 So.2d 201 (Fla. 1976), in which it had held that automobile manufacturers could be liable for design or manufacturing flaws that caused injury even though they did not cause the primary collision, since, although automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use was collision and injury-producing impacts.[5] The Court noted that the statistically-proven hazard of injury-producing impacts was "just as relevant to the question before us as it was to our decision in Evancho" (451 So.2d at 452), and held that logic and consistency required applying the same principles in considering the seat belt defense. The Court observed that seat belts had been proven to afford the occupant a means to minimize personal injuries prior to occurrence

[5]Indeed, the Court in Ford Motor Co. v. Evancho, supra, obliquely referred to the analogy between its holding and a seat belt defense when it specifically noted (fn 4, p. 204) that it had not considered the appropriateness of defenses concerning lack of use of safety devices within the vehicle, since the issue had been neither raised nor briefed in that case.

of the accident, reiterating that "second collisions" with the interior of the automobile were reasonably foreseeable.

The Pasakarnis Court noted that jurisdictions adopting the seat belt defense had considered three different approaches: negligence per se; contributory negligence; and mitigation of damages. The Court rejected a negligence per se approach because Florida did not (then) have a statute requiring the use of available seat belts. Contributory negligence[6] was rejected on the basis that that doctrine applied only if the plaintiff's failure to exercise due care caused (in whole or in part) the accident, rather than enhancing the severity of the injuries. Instead, the Court adopted the mitigation of damages approach. Pasakarnis thus established the common law seat belt defense.

Two years later, the Legislature adopted a statutory requirement that drivers and front seat passengers use seat belts. Chapter 86-49, Section 2, Laws of Florida. Perhaps in recognition of Pasakarnis' statement that the negligence per se approach was rejected because (at the time Pasakarnis was decided) there was no statutory requirement for the use of seat belts, the new statute specifically provided that a violation of its provisions was not to constitute negligence per se, nor be used as prima facie

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[6] Although Pasakarnis spoke in terms of contributory negligence, the reference presumably was to comparative negligence as well.

evidence of negligence in any civil action. Section 316.614(10), Florida Statutes (1987).[7]

Absent such a provision, a violation of Section 316.614, Florida Statutes, would have been negligence per se, since Section 316.614(7), Florida Statutes, provided a fine for not wearing a seat belt when required. The violation of a penal statute, other than a penal ordinance or a traffic statute, is negligence per se. Hoskins v. Jackson Grain Co., 63 So.2d 514 (Fla. 1953); Hines v. Reichhold Chemicals, Inc., 383 So.2d 948 (Fla. 1st DCA 1980); Bryant v. Jax Liquors, 352 So.2d 542 (Fla. 1st DCA 1977), cert. den., 365 So.2d 710 (Fla. 1978).

Even if Section 316.614, Florida Statutes, were considered a traffic statute, a violation of its requirements would nonetheless still (but for subsection (10)) be negligence per se. The violation of a statute which establishes a duty to take precautions to protect a particular class of persons from a particular type of injuries is negligence per se. deJesus v. Seaboard Coast Line Railroad Co., 281 So.2d 198 (Fla. 1973); Tamiami Gun Shop v. Klein, 116 So.2d 421 (Fla. 1959); Schulte v. Gold, 360 So.2d 428 (Fla. 3d DCA 1978).

In Rex Utilities, Inc. v. Gaddy, 413 So.2d 1232 (Fla. 3d DCA 1982), defendant in a negligence action arising out of a motorcycle

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[7]Thus, evidence of a violation of the statute could be admitted on the issue of mitigation of damages. The statutory and common law seat belt defenses both went to the same issue. The differences between, and the interaction of, the statutory and common law seat belt defenses are discussed infra.

accident sought to raise a comparative negligence defense based on plaintiff's decedent's failure to wear protective headgear as required by Section 316.211(1), Florida Statutes (1977). The Third District pointed out[8] that this statute established a duty to take precautions to protect a particular class of persons from a particular injury or type of injury since its purpose was to protect the motorcyclist from head injury. Hence, the court reasoned, violation of the statute would be negligence per se or, where plaintiff violated the statute, comparative negligence per se.

Generally, the violation of a statute is negligence per se if it is shown that the intent of the statute was to protect the interest that was invaded, the interest was that of being protected from that particular harm, and the injured party was within the class the statute seeks to protect. deJesus v. Seaboard Coast Line Railroad Co., supra; Lewis v. City of Miami, 127 Fla. 426, 173 So.150 (1937); Bryant v. Jax Liquor Stores, Inc., supra. Clearly, Section 316.614, Florida Statutes, meets that test.

Like the motorcycle helmet requirement under Section 316.211, Florida Statutes, in Rex Utilities, Section 316.614, Florida Statutes, establishes a duty to take precautions to protect a particular class of persons (those in the front seat of a moving automobile) from a particular type of injury (second collisions or ejections). The intent of this statute was to protect drivers and

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[8]The trial court's refusal to submit the issue to the jury was upheld, but on the basis that defendant had not adduced evidence that the statutory violation was a proximate cause of decedent's injury.

front seat passengers from second collisions and ejections, and such a plaintiff who sustains injury as a result of a second collision or an ejection is clearly within the class the statute seeks to protect. Thus, were it not for the provisions of Section 316.614(10), Florida Statutes, a violation of the statutory seat belt requirement would constitute negligence per se. At issue in the present case is whether Section 316.614(10), Florida Statutes (1990), goes far beyond the limited role of prohibiting the violation of the statute from being negligence per se, and completely precludes introduction of any evidence that plaintiff failed to use an available and fully operational seat belt, thus causing additional injury, if non-use of the seat belt did not cause the accident itself.

B. The Public Policy Background

The common law seat belt defense, which precludes a plaintiff from recovering that portion of the damages which plaintiff could have avoided by the simple expedient of using an available and fully operational seat belt, is fully consistent with the public policy of this state, exemplified both by legislative enactments and Supreme Court decisions, toward fully equating liability with fault and with holding a defendant liable for only that portion of plaintiff's damages which that particular defendant caused.

In Hoffman v. Jones, supra, this Court discarded contributory negligence in favor of comparative negligence, pointing out (280 So.2d at 436) that if fault is to remain the test of liability, the

doctrine of comparative negligence, which involves apportionment of loss among those whose fault contributed to the occurrence, is more consistent with liability based on a fault premise. In the field of tort law, the Court said (280 So.2d at 438), the most equitable result that can ever be reached is the equation of liability with fault.

Especially pertinent to the present case is the Court's observation (280 So.2d at 436) that:

> The 'contributory negligence' theory, of course, completely bars recovery, while the 'comparative negligence' theory is that a plaintiff is prevented from recovering only that proportion of his damages for which he is responsible. (Initial emphasis in original).

The point that the Hoffman Court was making is simply this: comparative negligence precludes plaintiff from recovering that portion of the damages which resulted from plaintiff's own fault.

Two years after Hoffman, this Court in Licenberg v. Issen, supra, abolished the rule against contribution among joint tortfeasors, recognizing that it was inconsistent with the purposes of comparative negligence. In its place, the Court adopted the principle of pro rata contribution, consistent with the legislature's then-recent enactment of Section 768.31, Florida Statutes. The legislature thereafter amended the contribution statute so as to provide that in determining the pro rata shares of tortfeasors, their relative degrees of fault would be the basis for the allocation of liability.

A dozen years after Licenberg's abolition of the rule against contribution, a 4-3 decision of this Court in Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987), retained the doctrine of joint and several liability, but in doing so specifically noted that the provisions of Section 768.81, Florida Statutes, were not applicable to the facts before it. That statute, of course, abolishes joint and several liability in many (though not all) tort cases, replacing it with a plan in which each defendant's liability is measured by the extent of his or her own fault. Section 768.81, Florida Statutes, was authoritatively construed in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993). In that case, the Court held that the statutory expression "percentage of fault" (to be used as the basis for allocation of liability for plaintiff's damages) referred to the fault of all participants in the incident, regardless of whether or not they happened to be parties to the action at the time of the jury's verdict.

As observed in Smith v. Department of Insurance, 507 So.2d 1080, 1091 (Fla. 1987), the doctrine of joint and several liability was originally based on the assumption that injuries were not divisible and that there was no means available to apportion fault. With the advent of comparative negligence under Hoffman and proportionate liability under Section 768.81, Florida Statutes, any remaining vestige of that rationale has been completely eroded. Modern Florida law clearly calls for a defendant to be held liable only for those damages caused by his own conduct, and not those

which plaintiff, by the exercise of reasonable case, could have avoided.[9]

In holding that the fault of the non-parties must be included in the allocation of fault under Section 768.81, Florida Statutes, the Court in Fabre noted that the statute was consistent with Florida's public policy of equating the defendant's extent of liability with the proportion of the plaintiff's damages which had been caused by that particular defendant. Any interpretation of Section 316.614(10), Florida Statutes (1990), which conflicts with that clear and longstanding public policy should be closely scrutinized before being accepted. Examination of the wording of the seat belt statute, as it currently stands, makes it clear that no such interpretation is required.

C. The Statute Precludes Evidence of Statutory Violation, Not Evidence of Underlying Facts

Initially, a reading of the statute makes it plain that the legislative restriction is limited to evidentiary use of "violation of the provisions of this section" -- not to evidence of the facts which constitute the violation. Thus, the statute prohibits the introduction, on the issue of mitigation of damages, of evidence that a (driver or front seat passenger) plaintiff's non-use of a seat belt violated the law, but does not, on its face, preclude the

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[9]As this Court observed in Smith v. Department of Insurance, supra, at 1091, and reiterated in Fabre v. Marin, supra, at 1185, the right of access to the courts does not include the right to recover for injuries beyond those caused by the particular defendant.

introduction of evidence of the facts which constitute that violation. In short, a defendant is permitted to show, as to any occupant of the vehicle, that seat belt non-use caused all or part of the injuries, but is permitted to adduce evidence that the non-use violated a statute only as to the comparative negligence of the driver and front seat passengers. As discussed infra, the common law seat belt defense recognized in Pasakarnis is largely unaffected by the subsequently-created statutory seat belt defense."

The legislature is conclusively presumed to have a working knowledge of the English language, and when a statute has been drafted in such a manner as to clearly convey a specific meaning, the only proper function of the court is to effectuate the intent of the legislature. Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958); State v. Greco, 479 So.2d 786 (Fla. 2d DCA 1985). While legislative intent controls construction of statutes in Florida, that intent is determined primarily from the language of the statute; the plain meaning of the statutory language is the first consideration. St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982). Where the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of

[10]As discussed infra, the statutory seat belt defense applies only to the driver and front seat passengers, while the common law defense applies to all occupants of the vehicle. As we will discuss infra, a defendant should not be permitted to assert the seat belt defense against a driver or front seat passenger on both comparative negligence and mitigation of damages unless that party's non-use of a seat belt both contributed to causing the accident and also exacerbated that party's injuries.

statutory construction; the statute must be given its plain and obvious meaning. Holly v. Auld, 450 So.2d 217 (Fla. 1984).

Courts will look to the legislative history when construing a statute only where necessary to resolve ambiguity in the statute. Department of Legal Affairs v. Sanford-Orlando Kennel Club. Inc., 434 So.2d 879 (Fla. 1983). In the present case, the legislative history demonstrates (A:33) that the legislature was concerned that a University of Kentucky study showed that non-belted automobile passengers, on average, more than quadrupled the cost of their treatment and extended their hospital stay by over 500%, and that 98% of belted persons were treated and released, in contrast to unbelted persons, 21% of whom were admitted to the hospital. This hardly appears to be a legislative history sympathetic to those who fail to use their seat belts. How, then, can it reasonably be said that the legislative intent was to eviscerate the seat belt defense by limiting it to those extremely rare cases in which non-use of a seat belt caused or contributed to causing the accident itself? We submit that such a reconciliation is impossible.

The distinction between evidence of a statutory violation and evidence of the underlying facts, and its importance, is perhaps made clearer by examining an analogous statute. Section 316.613, Florida Statutes, requires anyone transporting a child five years of age or younger in a motor vehicle to use an approved child restraint device. Subsection (3) of that statute provides:

> The failure to provide and use a child passenger restraint shallnotbe considered comparative negligence, nor shall such failure be admissible as evidence in the trial of any civil action with regard to negligence.

Thus, as to child restraint devices, the legislature clearly specified that evidence of the "failure to provide and use" such a device was prohibited. In Section 316.614, Florida Statutes, in contrast, the legislature instead prohibited introduction of evidence of "a violation of the provisions of this section."

The use by the legislature of certain language in one instance and wholly different language in another indicates that different results were intended. Department of Professional Regulation v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984); Ocasio v. Bureau of Crimes Compensation, 408 So.2d 751 (Fla. 3d DCA 1982).

Significantly, an attempt was made to introduce precisely the type of language found in the child restraint statute into Section 316.614(10), Florida Statutes. Senate Bill 1770 (A:36-37) provided, in Section 2, for an amendment of that language so that the statute would have provided:

> A violation of the provisions of this section or a person's failure to use a seat belt does not constitute negligence per se, nor may such violation be used as prima facie evidence of negligence or considered in mitigation of damages in any civil action.

Senate Bill 1770 died in committee. (A:38). When the legislature amended Section 316.614(10), Florida Statutes, it did not include "a person's failure to use a seat belt," but instead retained the prior narrow prohibition against evidentiary'use of a violation of the statute. Thus, regardless of whether or not the statutory provisions applies to cases in which seat belt non-use contributed to causing the accident, it only precludes evidence that plaintiff

was in violation of the statute -- not evidence of the facts which comprise that violation.

D. The Statute Permits the Seat Belt Defense as to Comparative Negligence; Limiting it to Situations in which Seat Belt Non-Use Caused the Accident is an Absurd Interpretation

Even if the Court were to determine that the legislature intended the statutory prohibition to extend beyond the fact of violation of the seat belt law, and to also encompass the underlying facts constituting that violation, the statute's language plainly permits the statutory seat belt defense to be used in a comparative negligence context -- and that context includes comparative negligence which causes the "second collision," even if it does not cause or contribute to causing the first. In its current form, the statute provides that "such violation may be considered as evidence of comparative negligence . . ."

In treating failure to utilize an available and fully operational seat belt as not involving comparative negligence unless non-use caused the accident, a few circuit courts have overlooked the teaching of the seminal Florida case involving comparative negligence, Hoffman v. Jones. In that case, this Court stated (at 438):

> A plaintiff is barred from recovering damages for loss or injury caused by the negligence of another only when the plaintiff's negligence is the sole legal cause of the damage, or the negligence of the plaintiff and some person or persons other than the defendant or defendants was the sole legal cause of the damase.
>
> If plaintiff and defendant are both at fault, the former may recover, but the amount of his recovery may be only such proportion of the entire damages plaintiff

sustained as the defendant's negligence bears to the combined neslisence of both the plaintiff and the defendant.

In explaining the reasons that comparative negligence was the preferable rule, the Hoffman Court stated (at 437):

> When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party.

In explaining how comparative negligence worked, the Court said (at 438):

> The jury in assessing damages would in that event award to the plaintiff such damages as in the jury's judsment the negligence of the defendant caused to the plaintiff.

The Hoffman Court summarized (at 439) its purposes for adopting comparative negligence as:

> (1) To allow a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury; and
>
> (2) To apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.

In order for there to be actionable negligence, it is not sufficient that the defendant's negligence caused an accident; it must also cause damage, for without damage there is no cause of action. If, by using an available and fully operational seat belt, a plaintiff could have avoided any injury whatsoever, there simply would be no actionable negligence (since there was no damage); hence, the plaintiff's comparative fault in not using the seat belt is properly analyzed in terms of comparative negligence. Similarly, if plaintiff's use of a seat belt would have prevented a part

of his injuries, or lessened their severity, the appropriate analysis is one of comparative negligence, since Florida has established a clear public policy that a party should be liable for damages which are the result of his or her acts or omissions, but should not be liable for damages which that party has not caused.

The point is demonstrated by Florida Standard Jury Instruction (Civil) 5.1a, which states:

> Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such rlossl [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.

The focus is not on causation of the accident, but on causation of the injuries. Where failure to use a seat belt has exacerbated plaintiff's injuries, the increased injuries were caused by plaintiff's comparative negligence in not wearing a seat belt. Thus, even if the effect of the 1990 amendment were to restrict seat belt evidence to comparative negligence issues, that evidence is admissible to show that plaintiff's comparative negligence (in not wearing a seat belt) was the legal cause of at least part of plaintiff's injuries -- those caused in the "second collision."

It defies logic that the legislature would eliminate the Pasakarnis rule applying a mitigation of damages principle but, at the same time, adopt the statement in Pasakarnis that seat belt non-use is not comparative negligence unless it caused the accident. If nothing else, the statute plainly indicates that the legislature intended for the seat belt defense to be available on

comparative negligence issues. The only question is how broad or narrow the scope of the statute is.

In cases around this state, courts have been urged to adopt a construction of Section 316.614(10), Florida Statutes (1990), which would wholly eviscerate the seat belt defense (at least as to the driver and front seat passengers) by limiting its use only to those exceedingly rare cases in which non-use of a seat belt caused or contributed to causing the accident itself. Especially given the historic trend in both the courts and the legislature towards equating extent of liability with extent of fault, and limiting a defendant's responsibility for plaintiff's damages to that portion of the damages which the particular defendant has caused, that would be an absurd result.

Statutes are construed so as to effectuate the intent of the legislature in light of public policy. White v. Pepsico, Inc., 568 So.2d 886 (Fla. 1990). Any uncertainty as to legislative intent should be resolved by an interpretation that best accords with the public interest. Rhoades v. Southwest Florida Regional Medical Center, 554 So.2d 1188 (Fla. 2d DCA 1989).

Section 316.614(8), Florida Statutes, sets forth the legislative intent that there be a continuing public safety and awareness campaign as to the magnitude of the problem of fatalities and injuries attributed to unrestrained occupants of motor vehicles. When Section 316.614(10), Florida Statutes, was amended in 1990, there had been a law on the books in Florida for four years requiring seat belt use, and seat belts had been a standard

feature on automobiles for some time. The legislative history pointedly includes reference to a study noting the strong increase in severe injuries when seat belts are not used. It makes no sense whatsoever to think that the legislature would, at that point in time, reward motorists for **not** using their seat belts by limiting the defense to those extremely unusual cases in which non-use of a seat belt **caused** or contributed to causing the accident itself.

A court should not construe a statute in such a manner as to reach an illogical or ineffective conclusion when another construction is possible. Gracie v. Deming, 213 So.2d 294 (Fla. 2d DCA 1968). A statute will not be so construed as to lead to absurd results. Williams v. State, 492 So.2d 1051 (Fla. 1986); State ex rel. Florida Industrial Commission v. Willis, 124 So.2d 48 (Fla. 1st DCA 1960), cert. den., 133 So.2d 323 (Fla. 1961).

If, in fact, the legislature intended the statutory prohibition to go beyond the fact of violation of the section, **and** to include the underlying facts which comprise that violation (and we will make that assumption for the balance of this brief), the question becomes that of ascertaining the legislative intent in

prohibiting the use"' of that evidence in mitigation of damages but expressly permitting it on comparative negligence issues.

The primary guide to statutory interpretation is the intent and purpose of the legislature. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963); Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958). The legislative intent is the polestar by which the courts must be guided, since it is the essence and vital force behind the law. Deltona Corp. v. Florida Public Service Commission, 220 So.2d 905 (Fla. 1969); Mikos v. Rinslins Bros.-Barnum & Bailey Combined Shows, Inc., 475 So.2d 292 (Fla. 2d DCA 1985); Dade Federal Savinss and Loan Assoc. v. Miami Title & Abstract Division, 217 So.2d 873 (Fla. 3d DCA 1969).

The purpose for which a statute is enacted is of primary importance in its interpretation. Florida Industrial Commission v. Manpower, Inc. of Miami, 91 So.2d 197 (Fla. 1956); Sunshine State News Co. v. State, 121 So.2d 705 (Fla. 3d DCA 1960). Any construction of a statute which would operate to impair, pervert, nullify or defeat the object of the statute should be avoided.

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[11] More precisely, prohibiting its use as to the driver and front seat passengers. The statute does not require rear seat passengers to use seat belts. As discussed infra, the common law seat belt defense (in mitigation of damages) does apply to rear seat passengers. In short, construing the statute to prohibit the seat belt defense except where non-use caused the accident would result in the anomalous situation of permitting evidence of seat belt non-use by persons whom the law does not require to wear seat belts, but prohibiting evidence of seat belt non-use by persons whom the law does require to wear seat belts. A statutory construction requiring such an absurd result should be rejected out of hand.

Becker v. Amos, 105 Fla. 231, 141 So. 136 (1932); Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918).

When the wording of a statute, taken literally, conflicts with the plain legislative intent, the wording must yield to the legislative purpose. State v. Greco, 479 So.2d 786 (Fla. 2d DCA 1985). We submit that the legislative intent behind the 1990 amendment to Section 316.614(10), Florida Statutes, was to further the long-standing public policy trend of equating liability with fault and holding a defendant responsible for only those portions of plaintiff's damages caused by a particular defendant, while simultaneously avoiding any possibility of "double dipping" by ensuring that plaintiff's fault in not wearing an available and fully operational seat belt was only counted one time, not twice.

Dealing with the second point first, the danger always existed that a jury might become confused and, after concluding that non-use of an available and fully operational seat belt had caused 10% of plaintiff's damages, find 10% comparative negligence on plaintiff's part (for not using a seat belt) as well as indicating that 10% of the damages were caused by non-use of the seat belt.[12] Having the jury provide a single fault percentage for all compara-

[12]The fact that the legislature was concerned with this point is demonstrated by Senator Johnson's comments concerning a prior bill to amend Section 316.614(10), Florida Statutes. (A:1). Likewise, Senator Langley, sponsor of the bill which became the current statute, said (A:52-53): "In the seat belt language, it provides that seat belts, the lack of seat belts can no longer be used twice against the plaintiff. It is either used as mitigation or comparative negligence. Now it can only be used in the comparative negligence."

tive negligence, including that involved in not using an available and fully operational seat belt, avoids that possibility. Section 316.614(10), Florida Statutes (1990), accomplishes that objective by permitting non-use of a seat belt to be considered in connection with comparative negligence, but not in connection with mitigation of damages.[13]

By having non-use of an available and fully operational seat belt considered as a comparative negligence issue, rather than a mitigation of damages issue, the legislature has also furthered the public policy of equating liability with fault and of holding a defendant liable only for that portion of the plaintiff's damages caused by that particular defendant. Regardless of whether seat belt non-use is deemed a comparative negligence issue or a mitigation of damages issue, it is plain that plaintiff's non-use of an available and fully operational seat belt constitutes "fault" on plaintiff's part, and that plaintiff should not be permitted to recover the portion of his or her damages which resulted from that fault. That portion of plaintiff's damages was not caused by defendant's fault, but by plaintiff's own fault in not acting reasonably to use an available safety device which could have

[13]Consistent with that legislative intent, we submit, a defendant should not be permitted (except in the unique situation in which seat belt non-use both contributes to causing the accident and increases the severity of plaintiff's injuries) to decrease plaintiff's recovery under both comparative negligence and mitigation of damages. In any other case in which both seat belt defenses are asserted against a particular plaintiff, defendant should be required to elect, at the appropriate time, whether to use the seat belt defense on comparative negligence or in mitigation of damages.

minimized or even eliminated plaintiff's injury. Thus, the issue is logically one of fault, rather than of damages, and it is most logically viewed as a comparative fault issue.

The fallacy of precluding introduction of seat belt evidence is more apparent in cases in which non-use did not cause the accident itself but was 100% of the cause of the personal injuries which plaintiff sustained. In this situation, the plaintiff's own fault (in failing to use the seat belt) was the sole cause of his or her damages; but for plaintiff's failure to use the seat belt, plaintiff would have sustained no injury whatsoever due to defendant's negligence -- and hence would have no cause of action against defendant. **All** of the injuries were due to plaintiff's own fault, and under comparative negligence the plaintiff should recover nothing. Under the reading of the statute proposed by the organized plaintiff's bar, however, defendant would be liable for all of plaintiff's injuries (unless plaintiff was also partially at fault in causing the accident), even though those injuries were totally caused by the fault of plaintiff in not using a seat belt. The absurdity and injustice of such a result seems apparent.

In Ford Motor Co. v. Evancho, supra, this Court held that, because collisions were a statistically foreseeable risk of auto travel, car manufacturers could be liable for negligence when defects caused or exacerbated the effects of the "second collision" -- that between the passenger and the interior of the car. By like token, plaintiff's failure to utilize an available and fully operational seat belt, although not (except in the most unusual

circumstances) the cause of the primary collision itself, is, in many instances, the cause of the "second collision" and the injuries which result from that second collision.

Just as car manufacturers have a duty to exercise reasonable care to avoid flaws which will cause or exacerbate damages in such second collisions, drivers and passengers have a duty to exercise reasonable care to wear seat belts to avoid or minimize the same foreseeable dangers from second collisions, and the additional injuries caused thereby. If automobile manufacturers can be held liable, on grounds of negligence, for the extent to which a plaintiff's injuries were increased by virtue of some design or manufacturing flaw, there is no apparent reason why the injuries caused solely by plaintiff's failure to use an available safety device cannot be analyzed in those same terms -- those of negligence.

Moreover, since the partial abolition of joint and several liability under Section 768.81, Florida Statutes, and in light of this Court's holding in Fabre v. Marin, supra, that the fault to be considered in apportioning liability includes the fault of non-parties, the proper method of calculating what a plaintiff is entitled to recover can become extremely complicated if seat belt non-use is considered a wholly separate category.

For example, consider the following situation: a plaintiff is 20% at fault in causing the accident, with Defendant A 30% at fault and Defendant B 50% at fault in causing the accident. Plaintiff incurs $60,000 in economic damages and $40,000 in non-economic

damages, with 5% of the economic damages and 10% of the non-economic damages having been avoidable if an available seat belt had been worn. Applying the formulations called for by Pasakarnis and Fabre in this situation (in which economic damages are governed by joint and several liability but non-economic damages are not) calls for three separate sets of calculations: one for defendant A's liability for 30% of the non-economic damages, thereafter reduced by 10% to reflect the proportion of those damages attributable to non-use of a seat belt;[14] a second set of calculations for the same purpose as to B's 50% liability for non-economic damages (again reduced by 10%);[15] and a third set of calculations for the joint and several liability of the two defendants for economic damages (reduced by 5%).[16] Judgment would then be entered against each defendant by totalling its liability for economic and for non-economic damages.

Such a procedure requires that the jury not only apportion liability among all parties (and, in many instances, some non-parties), but also that the jury make a separate assessment of the proportion to which non-use of the seat belt contributed to plaintiff's economic damages and the proportion to which it contributed

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[14]In this hypothetical, A's liability for non-economic damages would be ($40,000 times 30% = $12,000, less 10%) $10,800.

[15]In this hypothetical, B's liability for non-economic damages would be ($40,000 times 50% = $20,000, less 10%) $18,000.

[16]In this hypothetical, A and B would be jointly and severally liable for economic damages of ($60,000 times 80% = $48,000, less 5%) $45,600.

to plaintiff's non-economic damages. That assessment would have to be made in every case in which more than one entity (other than plaintiff) contributed to causing the accident." We submit that the legislature wisely decided that it was asking too much of a jury to reach that level of complexity and precision in what is inherently an imprecise area, and instead concluded that it simply made more sense to treat the extent to which plaintiff's damages could have been avoided by use of an available and fully operational seat belt as one more aspect of comparative negligence.

There is considerable logic in, as well as precedent for, treating the seat belt defense (and analogous defenses) as comparative negligence, rather than as a mitigation of damages issue. Indeed, if the Pasakarnis Court had not considered that

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[17] As can be seen by reversing the fault percentages of plaintiff and Defendant B in this hypothetical, the same types of calculations would have to be made if there was no joint and several liability; in fact, one extra set of calculations would be required in that instance, since the two defendants' liability for economic damages would not be governed by joint and several liability (neither defendant having been more at fault than plaintiff). As the number of at-fault entities increases, so too does the number of required calculations. Simply because an at-fault entity is not a party does not permit that entity to be excluded from the allocation of fault and the resulting required calculations. Fabre v. Marin, supra. Including the plaintiff's fault in failing to use a seat belt as part of the plaintiff's proportionate fault (i.e., comparative negligence), on the other hand, greatly simplifies the jury's task (by eliminating the need to determine separate percentages for the extent to which plaintiff's failure to use a seat belt increased economic damages and the extent to which plaintiff's failure to use a seat belt increased non-economic damages). Concomitantly, the use of a single figure representing all of plaintiff's fault percentages would reduce the likelihood that there would be reversible error; the evidence would have to support fewer allocations. This would decrease the burden both on appellate courts and on trial courts.

comparative negligence applied only to causation of the initial accident, rather than causation of the damases (or, for that matter, causation of the "second collision"), it would be most reasonable to treat the common law seat belt defense as being one of comparative negligence. suppose, for instance, that a construction worker failed to wear his hard hat, and was seriously injured when a hammer fell from above, striking him on the head. Failure to wear the hard hat did not cause the accident, since the hammer would have fallen at the same time and place in any event, but failure to wear the hard hat is certainly likely to have contributed to the severity of the plaintiff's injuries in this hypothetical. We sincerely doubt that anyone would question the proposition that the construction worker in this hypothetical had been at fault in failing to wear a safety device (the hard hat) when doing something that involved the particular risk of harm which in fact occurred (something falling from above at a construction site) and which the safety device was clearly intended to protect against. In short, the construction worker in this hypothetical would have been comparatively negligent.

Precisely the same is true in the context of the seat belt defense. Although failure to wear a seat belt does not (except in the most unusual circumstances) cause or contribute to causing the accident, a seat belt is a safety device which is specifically designed to minimize or prevent harm that is reasonably to be statistically expected at some point. Just as the construction worker's failure to wear a hard hat in the hypothetical above is

logically viewed as comparative negligence, so too should failure to wear a seat belt be viewed as comparative negligence. Indeed, in Knapp v. Shores, 550 So.2d 1155 (Fla. 3d DCA 1989), rev. den., 563 So.2d 634 (Fla. 1990), the Third District referred to the seat belt defense as "comparative negligence" (550 So.2d at 1156), notwithstanding Pasakarnis.

The logic of treating the failure to utilize available safety equipment (such as a seat belt) as comparative negligence even though it does not cause the accident, but instead causes additional damages, is seen in two decisions involving the failure of a motorcyclist to wear protective headgear and in still another decision involving the failure to use a child restraint device.

In Rex Utilities, Inc. v. Gaddy, supra, and again in Nationwide Mut. Fire Ins. Co. v. Vosbursh, 480 So.2d 140 (Fla. 4th DCA 1985), the courts were faced with claims that plaintiff had been comparatively negligent by failing to wear protective headgear while on a motorcycle, as required by Section 316.211, Florida Statutes. In both cases, the District Court held that defendant had failed to produce sufficient evidence to take the issue to the jury -- in Rex Utilities because of the lack of evidence of proximate causation, and in Vosburgh because defendant did not introduce evidence tending to prove that plaintiff (who was wearing a helmet which flew off at the point of impact) failed to securely fasten the helmet or to prove that it would not have come off had it been securely fastened. Of significance to the present case, however, is the fact that both the Third District in Rex Utilities and the

Fourth District in Vosburgh analyzed the issue in terms of comparative negligence, not in terms of mitigation of damages."

Even more instructive is the First District's decision in Parker v. Montgomery, 529 So.2d 1145 (Fla. 1st DCA 1988), rev. den., 531 So.2d 1354 (Fla. 1988), a case involving the seat belt statute and the child restraint statute. In Parker, the plaintiff's automobile was struck by an unoccupied semitractor-trailer, causing severe damage to the area where the decedent child had been seated (on his uncle's lap); the uncle was not wearing a seat belt and the child was not secured in a child restraint device. Defendant initially raised the affirmative defense of comparative negligence based on failure to use a child restraint device as required by Section 316.613(1)(a), Florida Statutes, but that defense was stricken based on the statutory prohibition against using the failure to provide and use a child restraint device as comparative negligence. Thereafter, defendant attempted to add non-use of a child restraint device as an affirmative defense in mitigation of damages. This defense was also stricken, although defendants were permitted to proffer expert testimony to the effect that, had the child been placed in an approved child restraint seat, he would have completely escaped injury.

On appeal, defendants took the position that Section 316.613(3), Florida Statutes, expressly forbade evidence regarding failure to place the child in a restraint device only for negli-

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"Admittedly, Rex Utilities predated Pasakarnis. Vosbursh however, like Knapp, was decided subsequent to Pasakarnis.

gence or comparative negligence purposes, and hence that it was permissible to introduce such evidence for purposes of mitigation of damages. The First District disagreed, and explained its reasoning in some detail. The First District stated (529 So.2d at 1146):

> In our judgment the doctrine of comparative negligence subsumes within it the concept of mitigation of damages, as applied to a case involving as a defense an injured person's failure to use an available seat belt or child restraint device. In so saying, we observe that it is possible that the question certified to the Florida Supreme Court in Insurance Co. of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984), may have influenced appellants' belief that the two terms, comparative negligence and mitigation of damages, involve disparate theories . . . . As we will undertake to explain, the above doctrines, as applied to an issue raising the seat belt defense, involve essentially the same principles of law; therefore the statutory preclusion of evidence relating to comparative negligence precludes as well evidence pertaining to mitigation of damages.

In analyzing the issue before it, the District Court noted (at 1147) that a plaintiff's contributory [comparative] negligence occurs either before or at the time of the defendant's wrongful act or omission, whereas the plaintiff's fault in failing to mitigate damages generally arises after the wrongful act of the defendant. That differentiation demonstrates, we submit, that failure to use an available seat belt (or other safety device) should be viewed as comparative negligence, rather than as mitigation of damages.

The First District pointed out that, in jurisdictions in which contributory negligence continues to be a complete bar to recovery, recognition of the seat belt defense as contributory negligence would result in an unjustified bar to any recovery in many

instances, presenting a logical dilemma to the court confronted with a seat belt defense in a contributory negligence jurisdiction. The same is not true, the court continued, in comparative negligence jurisdictions. Since Florida permits the plaintiff's fault to be apportioned with that of the defendant by reducing the amount of damages in proportion to plaintiff's own fault, the court determined that the application of the concept of mitigation of damages for purposes of reducing a plaintiff's damages resulting from his or her failure to use a seat belt was now subsumed within that of comparative negligence.

Continuing, the First District stated that a preferable way of looking at the issue was that followed by the Arizona Supreme Court in Law v. Superior Court in and for Maricopa County, 157 Ariz. 147, 755 P.2d 1135 (1988), in which the court observed that non-use of a seat belt is more accurately described as "fault." The concept of fault, the First District continued, as applied to comparative negligence principles, was consistent not only with the uniform comparative fault act, but also with Florida's pure comparative negligence system under Hoffman v. Jones, supra. Concluding, the First District held (529 So.2d at 1149-1150):

> Therefore, if the occupant of a vehicle were an adult and had failed to use an available seat belt, and if there were competent evidence to prove that his or her failure produced or contributed substantially to a portion of the damages sustained, the Pasakarnis rule, by applying comparative negligence principles, would require that such damages be apportioned pursuant to the theory of mitigation of damages. Because, however, section 316.613(3) has explicitly precluded the admission of evidence relating to the failure of a child to be placed in a child restraint device for comparative negligence purposes, the concept of mitigation of

> damages, inseparable, under the circumstances at bar, from the doctrine of comparative negligence, is similarly statutorily inadmissible when such nonuse is attempted to be interjected as a defense.

The First District's Parker decision was quoted with approval and relied upon by the Fourth District in First southern Ins. Co. v. Block, 567 So.2d 960, 961 (Fla. 4th DCA 1990), in which that court expressly rejected a contention that the seat belt defense could not be considered as an aspect of comparative negligence. That contention, the court said, had been put to rest by Pasakarnis and Parker.

In short, the First District in Parker, like the Third District in Knapp and Rex Utilities, and the Fourth District in Vosbursh and First Southern, has analyzed the effect of failure to use a protective device (be it motorcycle helmet, child restraint seat or seat belt) in terms of comparative negligence.[19]

Parker, Knapp, Rex Utilities, and Vosbursh, we hasten to point out, were all handed down prior to passage of the 1990 amendment to Section 316.614(10), Florida Statutes. The legislature is presumed to know the law, and it is further presumed, as a matter of statutory construction, that changes in a statute are made for a purpose. Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822 (Fla. 1964); Blount v. State, 102 Fla. 1100, 138 So. 2 (1931); Sunshine

[19]Additionally, the Second District in Burns v. Smith, 476 So.2d 278 (Fla. 2d DCA 1985), affirmed a judgment entered on a jury verdict "determining that Mr. Burns was seventy-five percent comparatively neslisent for failing to wear his seat belt" even though seat belt non-use did not contribute to causing the accident.

State News Co. v. State, 121 So.2d 705 (Fla. 3d DCA 1960). Pursuant to that rule of statutory construction, we submit that the legislature was aware of these decisions by the First, Third and Fourth Districts, found the logic of the First District in Parker compelling, and intended to clarify the proper status of the statutory seat belt defense as being a matter of comparative negligence, rather than mitigation of damages, notwithstanding the fact that the Pasakarnis Court had originally classified the common law seat belt defense as involving a mitigation of damages issue.

In order to ensure that the extent of plaintiff's fault was not counted twice, however, the legislature specified that, although such evidence could be used as comparative negligence, it was not available for mitigation of damages purposes. We submit that this legislative intent can be easily enforced by requiring any defendant who has raised both the statutory and common law seat belt defenses to elect, at the appropriate time, whether to have seat belt non-use treated as a comparative negligence issue or as a mitigation of damages issue (unless, of course, seat belt non-use both contributed to causing the accident and increased the severity of plaintiff's injuries, in which case the two defenses have separate roles).

In short, simple logic and common sense, as well as settled rules of statutory construction, lead to the same conclusion. Section 316.614(10), Florida Statutes (1990), permits the jury to hear and consider evidence that plaintiff's non-use of an available and fully operational seat belt caused additional injuries, whether

or not the non-use also contributed to causing the accident itself. Failure to use a seat belt when a reasonable person would do so is a question of fault, not an issue of damages, and accordingly should be considered as one aspect of comparative negligence. Section 316.614(10), Florida Statutes (1990), permits the seat belt defense to be raised in precisely that fashion.

E. Even if the 1990 Amendment Precludes Use of the Statutory Seat Belt Defense Unless Non-Use Contributed to Causing the Accident, the Common Law Seat Belt Defense in Mitigation of Damages Remains Viable

Even if this Court were to hold that the 1990 amendment to Section 316.614(10), Florida Statutes, precluded a defendant from introducing evidence that seat belt non-use exacerbated plaintiff's injuries under the statutory seat belt defense unless the non-use also contributed to causing the accident, that same evidence would nonetheless be proper in mitigation of damages under the common law seat belt defense.

Pasakarnis was decided in 1984, and established a common law defense that a plaintiff had failed to exercise reasonable care to mitigate his or her damages. It was not until two years later that the Legislature enacted Section 316.614, Florida Statutes. As noted above, the statute prior to the 1990 amendment did not preclude evidence of seat belt non-use in mitigation of damages. Rather, it provided that a violation of its provisions was not to constitute negligence per se or be prima facie evidence of negligence. Thus, the common law and statutory seat belt defenses could

both (to the extent they diverged) be used in mitigation of damages.

The statutory and common law seat belt defenses do, in fact, diverge in some regards, even if the Court should for some reason hold that the statutory proscription extends to evidence of seat belt non-use, rather than just to evidence that such non-use constituted a statutory violation. For instance, Section 316.614, Florida Statutes, does not require rear-seat passengers to wear available seat belts, and hence the statutory defense would not apply to rear-seat passengers. The common law seat belt defense, however, does apply to rear seat passengers, as well as to the driver and front seat passengers. In American Automobile Association, Inc. v. Tehrani, 508 So.2d 365, 370 (Fla. 1st DCA 1987), the District Court expressly rejected a contention that the seat belt defense was inapplicable to rear seat passengers, holding untenable the "argument that our 1986 Legislature's passage of the Florida Safety Belt Law , §316.614, Fla. Stat. (Supp. 1986), should somehow establish or control the parameters of the Pasakarnis seat belt defense.'" Thus, the Tehrani court clearly recognized that the common law seat belt defense was not bounded by the strictures of the statute.

Indeed, acceptance of a contrary position leads to wildly irrational results. Under that theory, the fact that a driver or front seat passenger (required by law to wear a seat belt) increased his or her injuries by not wearing the seat belt could not be considered by the jury. Yet that fact that a rear seat

passenger in the same accident (not required by law to wear a seat belt) increased his or her injuries by not wearing a seat belt could be considered by the jury.[20] The absurdity of such a result speaks for itself.

If this Court were to hold, notwithstanding the arguments set forth above, that the effect of the 1990 amendment to Section 316.614(10), Florida Statutes, was to restrict the scope of the statutory seat belt defense to situations in which seat belt non-use contributed to causing the accident itself, there is no reason to similarly constrict the Pasakarnis common law seat belt defense (and, as shown above, significant reasons exist not to so constrict the common law defense).

In establishing the common law seat belt defense in Pasakarnis, this Court expressly rejected a contention that it should not recognize such a defense in the absence of a statute requiring the use of seat belts. The subsequent passage of such a statute should not constrict that common law defense.

Recognizing the continuing viability of the common law seat belt defense in mitigation of damages would be consistent with the

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[20]This conclusion obviously follows from the statutory language, as well as from Tehrani. Since rear-seat passengers are not required to wear seat belts, their failure to do so cannot constitute "a violation of the provisions of this section" as specified in Section 316.614(10), Florida Statutes (1990), and there is no basis to apply that statute. For precisely that reason, the theory that the 1990 amendment restricted the seat belt defense to those rare instances in which non-use caused the accident cannot be extended to rear seat passengers. Thus, if that theory were to be accepted, it would inevitably lead to the paradoxical result noted above.

legislative intent to preclude "double-dipping" and also with the fundamental public policy of equating extent of liability with extent of fault. The statutory defense would remain available in those rare cases where seat belt non-use contributed to causing the accident, and the common law defense would be available (as to all occupants of the vehicle) in those cases where seat belt non-use caused an exacerbation of plaintiff's injuries. Only where seat belt non-use by a driver or front seat passenger both contributed to causing the accident and also exacerbated plaintiff's damages would both defenses be available. At the same time, retention of the common law defense in mitigation of damages furthers the fundamental policy of holding each party liable only for the damages caused by the fault of that party.

Thus, we submit, even if this Court were to adopt the interpretation of the 1990 amendment advanced by the organized plaintiff's bar, the introduction of evidence that plaintiff's non-use of an available and fully-operational seat belt exacerbated his injuries should still be permitted.

CONCLUSION

For all the reasons set forth above, this Court should hold that Section 316.614(10), Florida Statutes (1990), does not preclude introduction of evidence that plaintiff's failure to use an available and fully operational seat belt caused or contributed to causing the extent of his injuries, even though non-use of the

seat belt did not cause or contribute to causing the initial accident itself.

Respectfully submitted,

BROWN, OBRINGER, SHAW, BEARDSLEY & DECANDIO
Professional Association

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Attorneys for Florida Defense Lawyers Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail, postage prepaid, **to William D. Hall, Jr., Esquire**, P.O. Box 930, Tallahassee, FL **32302-0930; Francis J. Carroll, Jr., Esquire, P.O. Box 6511, Daytona** Beach, FL 32122; **Gordon Cherr, Esquire**, 101 N. Monroe Street, Suite 900, **Tallahassee, FL 32301;** and **Tim Warner, Esquire**, 221 McKenzie Avenue, Panama City, FL 32402, this 9th day of October, 1995.

Jack W. Shaw, Jr.
ATTORNEY

GROUP1\JWS\RIDLEY-2.BRF

INDEX TO APPENDIX

Tab 9 - Seat Belt

(conversation by Senator Johnson)

What this bill does is several things, the first part of the bill, Section 3, codifies the present position of Florida law as it relates to child passengers and says that they are to use restraint ...shall not be considered as mitigation of damages for children. On the second part of the bill... what it does is it modifies the. law to where you don't get a double hit because under the present law, you get hit for comparative negligence and then you get hit by this statute for mitigation of damages for failure to wear a seat belt. What you actually get is a double hit on any kind of recovery to where you might not get anything. The change says that a person's failure to use a seat belt does not constitute negligence per se, and the "per se" *is* very important, nor may such violation be used as prima facia evidence of negligence or considered in mitigation so what it does is change the present law to where you don't get the double hit of getting hit with comparative negligence and then get hit again with mitigation for failure to wear a seat belt. Comparative negligence very well could consider the fact that you didn't wear a seat belt or the fault (??unintelligible??) that you contributed to your own injury. But under this law as it is now, you are getting a double hit.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-8427-CIV-HURLEY

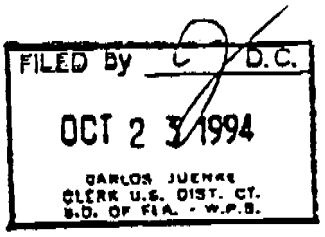
MICHAEL NEWMAN & DAWN NEWMAN, I

Plaintiffs,

vs.

CSX TRANSPORTATION, INC., & NATIONAL RAILROAD PASSENGER CORP. , d/b/a "AMTRAK"

Defendants



ORDER DENYING PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGEKENT

This matter comes before the court upon plaintiffs' motions for partial summary judgement against CSX Transportation, Inc. ("CSX") (DE 80-1) and National Railroad Passenger Corp. ("Amtrak") (DE 81-1). Specifically, plaintiffs seek summary judgement as to defendants' "seat belt defense". After consideration of those motions, all responsive pleadings filed thereto, and relevant portions of the record, this court concludes the following.

I. FACTS

On July 20, 1989, an automobile operated by plaintiff Michael Newman collided with a train owned and operated by defendant Amtrak, on railroad tracks owned and maintained by defendant CSX. As a result of the collision, Hr. Newman suffersd severe injuries. Through this action, plaintiffs seek compensation for those injuries.

In their answer, defendants asserted that Mr. Newman's failure to utilize his seat belt contributed Lo his injuries, and that their liability should be limited 1) to their comparative responsibility for those injuries and 2) by Mr. Newman's failure to mitiqate damages. In response, plaintiffs brought this motion for summary judgement as to defendants' "seat bolt defense".

As a final note, in ¶1 of its statement of undisputed facts accompanying its opposition response, defendant claims that Mr. Newman was not wearing his seat belt at the time of the collision. Plaintiff does not controvert this claim and, under Rule 7.5 of the Local Rules for the Southern District of Florida, any statement of material fact made in conjunction with a summary judgement pleading will be deemed admitted if not controverted by the opposing party. Furthermore, it appears from VII(2)(F) of the parties' bilateral pretrial stipulation that this fact is, indeed, stipulated. Thus, this court will assume for the purposes of this motion that Mr. Newman was not wearing his seat belt at the time of the collision.

II. DISCUSSION

A. *FLA. STAT. § 316.614(10)*

The Florida statutes impose three limitations on the ways in which litigants can use evidence that an individual failed to utilize a safety belt. Under Fla. Stat. 5 316.614(10), litigants are barred from arguing that the failure to wear a seat belt 1)

constitutes negligence per se, 2) constitutes prima facie evidence of neqliqence per se, or 31 is evidence of failure to mitigate damages.[1] Beyond these limitations, there is no statutory bar to the use of evidence that a party did not wear his or her scat belt. Furthermore, § 316.614(10) expressly provides that such evidence may be used to demonstrate comparative fault.

In their motions for summary judgement, plaintiffs ask this court to adopt a very limiting and strained construction of that statute. Citing three unreported opinions -- none of which are binding upon this court -- they argue that, under Florida's statutory scheme, evidence that Mr. Newman did not wear his seat belt can only be used to the extent that it indicates that he was partially responsible for the accident. However, applying a little common sense, it is obvious that such a construction was not intended by the legislature.

The primary purpose of Fla. Stat. § 316.614 (the "Florida Safety Belt Law") is clear from its face. It was intended to minimize injuries suffered in automobile accidents by requiring certain classes of individuals to utilize safety belts while operating or riding in an automobile. Simply put, the legislature

---

[1] It could not be clearer from the face of the statute that defendants' seat belt defense is improper insofar as it is an attempt to employ evidence that Mr. Newman was not wearing his seat belt as proof that he failed to mitigate damages. However, the ways in which defendants may use this evidence to show comparative fault are less clear and deserve more detailed analysis.

wants people to wear their seat belt when they are in Florida. However, in certain circumstances, the policy underlying the Florida Safety Belt Law comes into conflict with other important state policies. Specifically, if a party partially responsible for an accident which caused injuries to another party were able to absolve themselves of liability merely by asserting that the injured party did not wear his or her seat belt at the time of the injury, at least two other important state interests would be compromised. First, the state would lose some of the conduct regulating force of its tort law -- as some clearly negligent drivers would arbitrarily be absolved of any liability whenever their negligence happened to result in a collision with someone not wearing his or her seat: belt. Second, the state would lose some of the injury-compensatory force of its tort law -- as an injured party who just happened not to have worn his or her seat belt would be barred from any recovery, even though their injuries were only partially the result of his or her own negligence.

The Florida Legislature enacted a scheme to balance these competing interests when it included subsection 10 in §316.614. That subsection limits the use of seat: belt evidence to the issue of comparative fault, thereby imposing liability on negligent drivers and injured parties who failed to utilize seat' belts -- but only in proportion to their responsibility for any injuries suffered. This scheme accommodates all three policies. It

encourages drivers to wear their seat belts, as any recovery for injuries will be limited by the extent to which those injuries were caused by their failure to do so. It deters others from acting negligently, as they will. assume full liability for injuries suffered as a result *of* their negligence. Finally, it allows injured parties to recover to the extent that their injuries were not caused by their own negligence.

Plaintiff's interpretation of subsection 10 would obviously undermine this elegant balance. Limiting seat belt evidence to the issue of comparative fault *for* the *accident* would result in an unnecessary windfall to persons injured in automobile accidents partly due to their own failure to wear a seat belt. After all, seat belts do not prevent accidents, they prevent injuries suffered as a result of accidents. Given this reality, no injured party would ever assume any liability for their failure to wear a seat belt under plaintiff's interpretation of the statute. Such a result flies in the face of the primary policy underlying the Florida Safety Belt Law. Consequently, this court refuses to adopt it.[2]

---

[2] Unfortunately, this court has been unable to locate any reported case that deals squarely with this question to cite as authority for its analysis, and thus, is forced to rely on the analysis alone. To be sure, Florida courts have considered the extent to which a decedent's failure to wear a seat belt can be used to show comparative fault *in a vehicular* homicide *case.* Drawing upon vehicular homicide jurisprudence, the courts have adopted the rule that the seat belt defense, (like any other evidence involving the decedent's conduct,)

B. DEFENDANT'S BURDEN OF PRODUCTION

The only issue left for this court to address is whether or not defendant has met its burden of producing sufficient evidence to present its seat belt defense to a jury. Fortunately, the Florida Supreme Court answered this quest-ion under nearly Identical circumstances in Bulldog Leasing Co., Inc. v. Curtis, 630 So.2d 1060 (Fla.1994). Tn that case, the court found that where 1) defendant had presented evidence injured's vehicle was almost new, and vehicles built at the time it was built were required to have seat belts, 2) injured conceded that the vehicle had seat belts, 3) the seat belts in injured's vehicle had been used, and 4) pictures of the vehicle taken immediately after the accident clearly showed that seat belts were present, "defendant had met its burden of presenting competent evidence that the plaintiff's vehicle contained seat belts that could have been used." Id. at 1064-65. Thus, where plaintiff: had presented no evidence to rebut defendant's showing, the seat belt defense was properly submitted to the jury. Id. In this case, defendant has presented evidence nearly identical to that presented in Bulldog Leasing.

"may only be asserted as a defense to a vehicular homicide when [the decedent's failure to wear a seat belt] could be viewed as the sole intervening cause of the accident which resulted in the death." Union v. State, 19 Fla. L. Weekly D1893; 1994 WL 478682 (Fla. App. 1 DCA 1994). However, cases involving vehicular homicide, or any other form of homicide, invoke unique concerns and require a balancing of policies different from those involved here. AS a result, those cases are inapposite here.

Furthermore, plaintiff has offered no rebuttal evidence. Under these circumstances, this court cannot properly strike defendant's seat belt: defense. Accordingly, it is hereby

ORDERED and ADJUDGED as follows:

1) Plaintiffs' motions for partial summary judgement (DE 80-1 and DE 81-1) are GRANTED to the extent that defendants seek to utilize their seat belt defense to prove that Mr. Newman failed to mitigate damages.

2) Plaintiffs' motions for: summary judgement (DE 80-1 and 81-1) are DENIED to the extent that defendants seek to utilize their seat belt defense to demonstrate Mr. Newman's comparative responsibility for his injuries.

DONE and SIGNED in Chambers at West Palm Beach, Florida, this 27 of October, 1994.

Daniel T. K. Hurley
United States District Judge

Copies furnished to:
GORDON JAMES, III, ESQ., P.O. Box 14723, Ft. Lauderdale, FL 33302
TRACY R. SHARPE, ESQ., P.O. Box 24466, West Palm Beach, FL 33401

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA.

CASE NO. 93-2858

JERRY MURPHY and DIANE MURPHY, his wife.

Plaintiffs.

vs.

KENNETH L. BASS d/b/m Trip Lc B Bass,

Defendant.

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING SUMMARY JUDGMENT

This cause having come upon Plaintiffs' Motion for Partial Summary Judgment on Seat Belt Defenses, the court having reviewed memoranda submitted by the parties and having heard the arguments of counsel, finds as follows:

1. The present matter arises out of a motor vehicle accident which occurred in Leon County.

2. To Plaintiff s' Complaint. Defendant raised several affirmative defenses. Defendant's first affirmative defense raised the "seat belt" defense, seeking a possible reduction in damages for the failure to mitigate damages through the alleged non-use of an available ● ,nd functional seat belt/shoulder harness ● pparrtU*. Defendant's ● ccokd affirmative defense also raised the "seatbelt" defense and ● □◆♈♒◆ a possible reduction in damages for failure to utilize an available and functional seat belt/shoulder harness apparatus; calling that alleged failure a matter of comparative fault and a proximate cause of the injuries and damages complained

of. Defendant's second affirmative defense did not allege that the failure to wear a seat belt/shoulder harness was a proximate cause of the vehicular accident itself.

3. Summarily stated, it is Plaintiffs' position that the 1990 amendment to Section 316.614(10), Florida Statutes, did away with mitigation of damages as a viable affirmative defense, that comparative negligence can only be asserted if the failure to utilize a safety belt is proximately related to the cause of the accident itself, and that the amendment has basically returned the state of the law to the pre-Pasakarnis era. In contrast, Defendant's position is that the concept of mitigation of damages has simply been subsumed into the theory of comparative negligence, that negligence (and therefore comparative negligence) refers to both causation and damages, and that reading §316.614(10) in the manner suggested by Plaintiffs is contrary to the intent of §316.614 as well as inconsistent with accepted rules of statutory construction. Plaintiffs argue that Defendant's interpretation is likewise contrary to rules of statutory construction. Both parties have attached orders of sister circuit courts in support of their respective positions.

4. Accepted rules of statutory construction require this court to attempt to harmonize §316.614(10) Fla.Stat., with the stated intent of §316.614. The intent of §316.614 is to provide for enforcement of the safety belt law and to encourage compliance with safety belt usage. While legislative intent is often an elusive quantity, the court finds that the Defendant's interpretation of

§316.614(10) is far more consistent with the intent of the statute than Plaintiffs' reading of that ● ubmaeticn.

5. Statutes ordinarily should be construed in such a way as to harmonize them with the existing common law, unless a statute unequivocally states that it changes common law or is so repugnant that the common law that the two cannot co-exist. A statute should not be held to have changed the common law. For that matter, if the amendment to §316.614(10) was determined to have changed the common law, then the amendment must be strictly construed. Such a strict construction would not allow for this court to add words not already present in the statute.

The law existing in this state since Pennekamp has been that mitigation of damages may be raised in defense of an injury claim in second collision or enhancement of injury cases. Section 316.614(10) does not undertake to change that existing law, but instead codifies the accepted legal doctrine, as stated in Parker v. Montgomery, 529 So. 2d 1145 (Fla. 1st DCA 1988), that the concept of mitigation of damages has been subsumed within the doctrine of comparative negligence. The concept of "negligence" has always included both causation and damages.

6. Section 316.614(10) states that violation of §316.614 (the failure to utilize safety apparatus) "may be considered as evidence of comparative negligence, in any civil action." Notably, the statute does not limit comparative negligence to accident causation only. To read the statute in such a manner would require the court to add words to the statute which are not present. It would also

requires an interpretation inconsistent with the common law and without a clear legislative directive, this court respectfully declines to interpret §316.614(10) in such a manner.

It is thereupon ORDERED AND ADJUDGED as follows:

1. That Plaintiffs' Motion for Partial Summary Judgment is GRANTED as to Defendant's First Affirmative Defense (mitigation of damages).

2. That Plaintiffs' Motion for Partial Summary Judgment is DENIED as to Defendant's Second Affirmative Defense (comparative negligence). Comparative negligence may be raised and argued to include either accident causation or damages or both.

DONE AND ORDERED in Chambers, Tallahassee, Leon County, Florida, this 23rd day of December, 1993.

Circuit Judge

Copies furnished to:

Halley B. Lewis, III, Esquire
Gordon D. Chorr, Esquire

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DWAL COUNTY, FLORIDA.

CASE NO.: 94-03115 CA
DIVISION: CV-C

CHRISTOPHER EASON, by and through his next friend, GLENN EASON, and, GLENN EASON, individually,

Plaintiffs,

vs.

CITY OF JACKSONVILLE and PROTECTION SERVICES, INC.,

Defendants.

----------/

ORDER DENYING PLAINTIFFS' MOTION TO STRIKE DEFENDANTS THIRD AFFIRMATIVE DEFENSE

This cause came on to be heard on the Plaintiffs' Motion to Strike Defendants Third Affirmative Defense and the Court having considered the pleadings, argument of counsel and being advised in the premises, finds as follows:

1. This cause arises out of a one car accident in which Plaintiff's minor, Christopher Eason was the driver. Unfortunately, the driver was thrown from the car and&stained serious injuries to his body,

2. Both Defendants have raised as one of their affirmative defenses the failure of the driver to use an operable seat belt which would have reduced or prevented his bodily injuries.

In 1984, the Florida Supreme Court, recognizing that the seat belt has been proven to afford the occupant of an automobile a means whereby he may minimize his personal damage if properly used,

accepted proof of the failure to use an operable seat belt as a viable affirmative defense in Florida. Insurance Company of North America v. Pasakarnis, 451 So 2nd 447 (Fla. 1984). In Pasakarnis, the Supreme Court held that evidence of the failure to wear an available and fully operational seat belt may be considered by a trier of fact in assessing a Plaintiff's damages when said defense has been properly pled. The Pasakarnis rule was later statutorily codified in Florida. At present, the Florida Safety Belt Law is codified at sec 316.614, F.S. (1993). In particular, sec 316.614(10) after recent modification now provides:

> A violation of the provisions of this section shall not constitute negligence per se, nor shall such violation be used as primar facie evidence of negligence or be considered in mitigation of damages, but such violation may be considered as evidence of comparative negligence, in any civil action.

Plaintiffs seek to have the "seat belt" defense stricken as pled because the Defendants pleading is couch in language regarding reduction or mitigation of damages as opposed to causation of the accident. The statute certainly has some ambiguity in it as related to this issue and it's practical application. The cardinal rule in statutory construction is to determine the purpose of the legislation with consideration given to the intention of the legislature. Vildibill v. Johnson, 492 So 2nd 1047 (Fla. 1986).

Plaintiffs attempt to limit the use of the seat belt defense to cases where it can be proven that the failure to use an operable seat belt somehow caused or attributed to the cause of an accident is impracticable and virtually impossible. Nor is the Court of the opinion that this was the intent of the legislature. From the plain meaning of the statute, it is obvious that the failure to use

an operable seat belt cannot in and of itself be considered as negligence per se nor prima facia evidence of negligence which would justify a reduction in the damages of the injured party. Certainly, the legislature, by drafting the statute, sought to recognize a seat belt defense but only in relation to some act or conduct which would be within the purview of comparative negligence. The statute does not contain the words "causation" this to the Court is important.

While the determination of legislative intent is often an elusive exercise, the Court must attempt to fashion a construction which accomplishes their intent and is consistent with the present practice of the common law unless the statute unequivocally states or by the clear meaning of the language it obviously repeals the common or existing law.

With the current practice of the comparative negligence doctrine as applied to automobile accident cases it would appear that the concept of avoidable consequence is included with the doctrine of comparative negligence. Parker v. montgomery, 529 So 2nd 1145 (Fla. 1st DCA 1988). Under this doctrine the failure to use an available seat belt which is shown to reduce or c&tribute to the damages would mandate an apportionment of the damages pursuant to comparative negligence principles. See Parker p1148. Thus evidence of the failure to use an operable seat belt may only be introduced if the defense is able to produce competent evidence that the failure of Plaintiff to use or wear a seat belt caused or substantially contributed to the injuries sustained by Plaintiff. See Zurline v. Kelly, 19 Fla L. Weekly D2064, 4th DCA 1994.

Therefore, it is ORDERED,

1. Plaintiffs' Motion to Strike Defendants affirmative defense of the failure to use an operable seat belt is denied.

2. However, said evidence of the lack of use of a seat belt will be limited subject to Defendants offering proof that said failure to use the seat belt contributed to the injuries suffered by Plaintiff's minor.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 25 day of October, 1994.

L. HALDANE TAYLOR

L. HALDANE TAYLOR
Circuit Judge

Copies to:

Joshua A. Whitman, Esquire
7077 Bonneval Road, Suite 200
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Office of the General Counsel
600 City Hall
220 East Bay Street
Jacksonville, Florida 32202

Michael I. Coulson, Esquire
225 Water Street, Suite 1000
Jacksonville, Florida 32202

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

Case No.: 94-00734-06

GALIT HAIK

v.

INTERAMERICAN CONTRACTORS and DONNY SHAUMON

ORDER

THIS CAUSE having come on to be heard on ~~Defendant~~ s/Plaintiff's Motion For Summary Judgment - Seat Belt Defense and the Court having heard argument of counsel, and being otherwise advised in the. Premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby

DENIED.

DONE AND ORDERED in Chambers. at Fort Lauderdale, Broward County, Florida, this 20th day of June, 1994.

RECEIVED
JUN 21 1994

GEOFFREY D. COHEN

OCT 25

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

JOYCE KRATE and EUGENE KRATE, her husband,

Plaintiffs,

v.

ROBERT ALEX MURRAY, TCT INTERNATIONAL, INC., et al,

Case No.: 92-26802 (18)

ORDER

THIS CAUSE having come on to be heard on ~~Defendant's~~/Plaintiff's MOTION FOR SUMMARY JUDGMENT (re affirmative defense of Seat Belt) Motion

and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby Denied.

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida, this 21 day of October, 1994

Copies furnished:

Glenda Goldlist, Esq.
Carol-Lisa Phillips, Esq.
Sara C. Lindsey, Esq.

W. Herbert Moriarty
Circuit Judge

A-18

10.

IN THE CIRCUIT COURT Of THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

92- .

DUARA BRADY/SHANNON SNEEDEN

Plaintiffs,

vs.

STATE OF FLA./D.O.T. et al.,

Defendants.

Case No.: 13968 (14)(CONSOLIDATED)

ORDER

ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THESEAT BELT DEFENS:

THIS CAUSE having come on to be heard on [redacted]s/Plaintiff's

BRADY and SNEEDEN's

Motion FOR SUMMARY JUDGMENT ON THE ISSUE OF THE SEAT BELT DEFENSE and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby

~~Defendant~~ DENIED

DONE AND ORDERED in Chambers, at Fort Lauderdale, Florida this 26th day of July, 1994.

Circuit Judge

Copies furnished:
All counsel of record

PAUL M. MARKO, II
TRUE COPY

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

JOYCE KRATE, and EUGENE KRATE her husband,
Plaintiffs,

vs

GREGORY THOMAS FERRARO, et al
Defendants

Case No.: 92-03322-08

ORDER

THIS CAUSE having come on to be heard on ~~Defendant's~~ Plaintiff's JOYCE KRATE and EUGENE KRATE'S Motion FOR SUMMARY JUDGMENT (re Seat Belt Defense) and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby Denied

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida, this 6th day of Oct, 1994.

Copies furnished:
SARA C. LINDSEY, ESQ.
LEONARD BISHOP, ESQ.
LEWIS JACK, ESQ.

Harry G. Hinckley, Jr.
Circuit Judge

STORAGE NAME: s2670s1z.
DATE: June 21, 1990

HOUSE OF REPRESENTATIVES
COMMITTEE ON INSURANCE
FINAL STAFF ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: CS/SB 2670

RELATING TO: Insurance

SPONSOR(S) : Committee on Insurance and Senator Langley

EFFECTIVE DATE: October 1, 1990

DATE BECAME LAW: June 21, 1990

CHAPTER #: 90-119, Laws of Florida

COMPANION BILL(S): HBs 1871, 2259, 2637, 2707, 2857, 2961, and 3079

OTHER COMMITTEES OF REFERENCE: (1)

(2)

****

I. SUMMARY:

(See section-by-section analysis)

A. PRESENT SITUATION:

(See section-by-section analysis)

B. EFFECT OF PROPOSED CHANGES:

(See section-by-section analysis)

C. SECTION-BY-SECTION ANALYSIS:

Section 1. Currently, the department is required to include information regarding availability, affordability, and profitability of manually rated commercial multiperil and commercial casualty lines of insurance. The report must contain information from Florida and countrywide regarding loss reserves, premiums written, premiums earned, incurred losses, paid losses, allocated loss adjustment expenses, renewal ratio and other relevant information. Renewal ratios collected from insurance companies must be held confidential unless the data reveals a violation of the Florida Insurance Code or rules adopted by the department.

This bill allows the department discretion in determining what information regarding the availability, affordability, and profitability of manually rated commercial multiperil and casualty lines of insurance should be included in the department's annual report. If renewal ratios are collected from companies there would no longer be a specific provision in this

section requiring that the ratios be held confidential.

Section 2. Amends s. 624.418, F.S., to apply the exemptions from certain specified ratio requirements listed in s. 624.4095, F.S. to s. 624.418, F.S. which penalizes insurers for violations of the ratio requirement. This revision conforms with solvency requirements which were enacted during the 1989 session.

Section 3. Currently an insurer is required-to annually file audited financial statements, an opinion, and a letter report of weaknesses with the department.

The audited financial statements and opinion must be based upon generally accepted accounting principles or on statutory principles consistent with the Florida Insurance Code. If an insurer has less than $500,000 in direct written premiums in Florida during the calendar year for which a statement would be prepared or with less than 1,000 policyholders or certificateholders at the end of the calendar year, the insurer is allowed to submit an affidavit sworn by a responsible officer of the insurer specifying the amount of direct premiums written in this state and number of policyholders and certificateholders.

An insurer may also submit an application for exemption from compliance with this filing requirement if the department determines that compliance would result in an undue financial hardship on the insurer due to the cost of preparing the statements, The insurer must file financial statements which have been reviewed or compiled by an independent certified public accountant and which the department determines are sufficiently reliable and complete for the department to evaluate the financial condition and stability of the insurer, If the insurer is a member of an insurance holding company system, it is required to file an audited consolidated financial statement and opinion.

This bill amends s. 624.424, F.S., to allow the Department to' require that'an insurer file an audited financial statement based upon statutory principles consistent with the insurance laws of the state of domicile rather than based on general accounting principles.

Section 4. This bill authorizes a commercial self-insurance fund to become a domestic mutual insurer if the department approves the plan to convert based on a determination that the plan is equitable to the fund members and that the requirements of forming a domestic mutual insurer have been met.

Section 5. This bill amends s. 624.502, F.S., to increase the service of process fee paid to the department from $7.50 to $15.00 and to include all service of process made upon the Insurance Commissioner not just those required by the Insurance Code.

Section 6. This bill clarifies and codifies the department's current practice regarding the valuation of investments in

subsidiaries and related corporations. These investments would be valued in an amount which in the aggregate does not exceed the lesser of: (a) 10 percent of the insurer's admitted assets, or (b) 50 percent of the insurer's surplus as to policyholders in excess of the minimum surplus as to policyholders as required by the Insurance Code.

Section 7. This bill creates s. 625.181, F.S., to require that assets received by an insurer as a capital or surplus contribution be deemed to be purchased by the insurer at a cost equal to the market value, appraised value or at prices determined by the department as representing the fair market value.

Section 8. Currently, an insurer is allowed to invest in stocks or other securities of one or more subsidiaries or related corporations with certain limitations. This bill amends s. 625.325, F.S., to codify the department's current interpretation on the limitation of such investments to provide that at the time any new or additional investment is made, the sum of the insurer's cost of the investment and the aggregate values of all existing investments in the corporation shall not exceed the lesser of: (a) 10 percent of the insurer's admitted assets or (b) 50 percent of the insurer's surplus as to policyholders in excess of the minimum surplus as to policyholders required to be maintained by the insurer.

Section 9 and 10. These sections amend ss. 625.50 and 625.52, F.S., to allow the same form and types of deposits and securities for agents as are allowed and accepted for insurers.

Section 11. This section re-publishes s. 627.331. Subsection (4) was inadvertently repealed during the 1989 regular session and reenacted in a 1989 special session, but was not republished in the 1989 Florida Statutes.

Section 12. This bill amends 627.4133, F.S., to exempt mortgage guaranty insurance from the 45 day notice requirement for nonrenewal. This is due to the fact that mortgage guarantee insurance is paid on a one time fee basis and therefore is not subject to the nonrenewal provisions.

Section 13. Currently, an insurer may have an extended term policy without offering a reduced paid-up nonforfeiture clause. This section amends s. 627.476, F.S., to require certain life insurance policies to provide a reduced paid-up nonforfeiture provision. "Reduced paid-up nonforfeiture benefit" is defined as a benefit whereby the policy may be continued at the option of the insured as reduced paid-up life insurance, and includes the amount attributed to such benefit. This requirement would not be applied to policy forms filed prior to October 1, 1990.

Section 14. Credit life rates are not allowed to contain age restrictions which make ineligible those debtors or lessors 70 years old or under at the time the indebtedness is incurred or which makes ineligible those debtors who will be 71 or under on the scheduled maturity date of the indebtedness.

This bill amends s. 627.6785, F.S., to disallow a credit disability rate if it contains an age restriction which makes a debtor or lessor ineligible for coverage if they are 65 or under at the time the indebtedness is incurred. However, the bill allows credit life coverage to be terminated at age 71 and credit disability coverage to be terminated at age 65 on the loan anniversary date or upon the maturity date of the loan, whichever is earlier, (This section takes effect July 1, 1991,)

Section 15. This section amends s. 627.7288, F.S., to make a clarifying revision.

Section 16. This section amends s. 627.782, F.S., to make a technical revision.

Section 17. This section amends s. 627,803, F.S., to require that contracts or certificates providing variable or indeterminate values in annuity contracts, life insurance contracts, and contracts upon the lives of beneficiaries under life insurance contracts in certain circumstances, state that the initial interest rate is guaranteed only for a limited period of time.

Section 18. This section amends s. 627.915, F.S., to delete certain reporting requirements for insurers transacting medical malpractice, private passenger automobile liability, commercial automobile liability, or other liability insurance since this information is required by other sections of the Insurance Code.

Section 19. This bill amends s. 634.312, F.S., to require that every home warranty contract be mailed or delivered to the warranty holder no later than 45 days after the effectuation of coverage.

section 20. This section reenacts ss. 624.11 (2), 624.316 (l)(b), 629.518, 632.638 (3), and 635.091 for the purpose of incorporating the amendments made to ss. 624.418 and 627.915 in this bill.

Section 21 provides for the review and repeal on October 1, 1991, of any section which is added to chapter 625, i.e., s. 625.181 as created by section 7.

Section 22 amends section 45.061, F.S., relating to offers of settlement to provide that it does not apply to causes-of-action that accrue after the effective date of this act (October 1, 1990). Such causes of action would be subject to section 768.79, as amended by section 48 of this bill.

Section 23. Currently drivers involved in an accident resulting in bodily injury or death or damage to property of $500 are required to file a report with the Department of Highway Safety and Motor Vehicles (DHSMV) within 5 days, unless the investigating officer has made a written report.

This section amends s. 316.066(6), F.S., to impose a penalty ($32 fine) for failing, refusing or neglecting to make a timely accident report.

Section 24. Currently seat belts are required by law for those passengers in the front* seat of a vehicle., However, the -- enforcement of the statute does not occur-until the driver has been detained for a suspected violation of other sections of law.

This section further amends s. 316.614(10), F.S., to add that if any person. fails to use a seat belt it shall not be considered in mitigation of damages but rather may be used for consideration as comparative negligence in a civil action.- See "Comments," below for information regarding a study of seat belt usage.

Section 25: Presently if the estimated costs of repairing the physical and mechanical damage-to a vehicle is equal to 80 percent or more of the current retail cost of the vehicle, as established in the Official used Car Guide of the National Automobile Dealers Association, the DHSMV declares the vehicle unrebuildable and prints a notice on the salvage certificate that the vehicle is unrebuildable and refuses to issue a certificate of title for the vehicle.

This section amends paragraph (b) of subsection (2) of section 319.30, F.S., to exempt those vehicles that are worth less than $1,500 retail in undamaged condition from the act.

Section 26. This section amends s. 320.02(5)(a) to expand the requirements of the contents on the proof-of-purchase insurance cards. The bill requires the name of the insured's insurance company, the insured's policy number, the make, year and vehicle identification number of the vehicle insured.

Section 27 amends s. 322.0261, F.S., to require drivers who are convicted or plead nolo contendere to traffic offenses to take a driver safety education course administered by the DHSMV if the driver has: (1) been involved in accidents causing bodily injuries or death, (2) had two accidents within a two year period with property damage in an apparent amount of at least: $500.

Section 28. Presently, the financial responsibility law in chapter 324 requires drivers to obtain bodily injury liability insurance or another approved form of proof of financial responsibility only after they have been involved in an accident of a certain magnitude or after they have been convicted of certain serious traffic offenses. In general, this law does not require an individual to obtain bodily injury liability insurance if the driver was not at fault in the accident.

This section amends s.324.051(2)(a), F.S., the FR law, to provide that all drivers involved in certain accidents are subject to the FR law, regardless of fault.

Section 29 creates s. 324.121(2)(b), F.S., in the FR law, to provide that suspension of the license and registration for an

unsatisfied judgment would not apply if the DHSMV determines tha: an insurer was obligated to pay the judgment upon which the suspension was based,-but failed to do so.

Section 30 amends s. 624.155, F.S., which presently entitles persons to bring a civil remedy action-against an insurer when such person is damaged by a violation of an insurer of one or--- more specifically cited violations of the Insurance Code. The bill clarifies that the remedies provided by this statute do not preempt any other remedy or cause of action.provided by other . statutes or common law. However, the bill also specifies that a person may obtain a common law bad faith judgment against an insurer or a judgment under this statute, but shall not be entitled to ajudgement under both remedies.- Damages recovered under the section would be those damages which are a reasonably foreseeable result of -the violation, including an amount that exceeds policy limits.- Since all of the above is intended to be clarifying existing law, the amendments are specifically given retroactive effect.

Section 31 is the reenactment of sections and subdivisions of the Statutes that update cross-references to insure those references are to the law as amended by the bill rather than to the law as it existed prior to the changes in this bill.

Section 32 creates s. 624.3151(1), F.S., to require the DOI to publish complaint ratios of motor vehicle insurers.

Section 33. Presently, it is deemed to be an unfair insurance trade practice for an insurer to refuse to insure an applicant due to his failure to agree to place collateral (other) business with that or any other insurer. Despite this law, it is apparently not uncommon for insurers writing excess (umbrella) liability policies to require the insured to maintain underlying liability coverage with that insurer or another insurer. The bill amends s. 626.9541(1)(x) to specifically allow this practice.

Section 626.9541(1)(o)4., F.S., presently allows an insurer to impose a surcharge or refuse to renew a motor vehicle insurance policy if the insured commits two or more noncriminal traffic infractions within an 18-month period. The bill amends this section to also allow an insurer to impose a surcharge or refuse to renew a policy for three or more noncriminal traffic infractions_ committed within a 36-month -period.

Section 34. Presently, private passenger automobile rates are subject to a "use and file" procedure. This procedure allows the insurer to implement a rate change before filing the rate change with the DOI.

For other lines of property and casualty insurance (e.g homeowners insurance and commercial property and casual;; coverage), the insurer has two options: "file and use," by which the insurer gives the DOI at least 60 days advance notice of a rate change; or "use and file," by which the insurer may

implement a rate change and then give the WI notice within 30 days thereafter. If an insurer chooses the "use and file" method and the DOI finds the rate to be excessive, the DOI may order the insurer to refund the excess portion of the rate.

This is not the case under the private passenger automobile rating law. For private passenger auto lines, an insurer can implement a rate filing prior to giving notice to the DOI, and the DOI has no authority to order a refund even if the rate is later found to be excessive. Refunds may be provided years later under the excess profits law. But excessive rates do not necessarily result in excess profits: The excess profits law compares a company's actual underwriting profit to its anticipated underwriting profit over a 3 year period. Excess profit is realized if there is an actual underwriting profit greater than the anticipated underwriting profit, plus 5 percent earned premium.

Section 627.0651(1) is amended to conform automobile rating laws to those used for other types of property and casualty coverage, which will give insurers two options, "use and file" or "file and use" (as explained above).

The DOI will also order, for any "use and file" filing that premiums charged each policyholder constituting the portion of the rate above that which was actuarially justified, be returnee to the policyholder as a credit or refund. When the WI finds that a rate filing is inadequate, the new rate will be applicable only to new or renewal business written after the effective date of the filing.

Language is added specifying that the DOI shall issue an order of disapproval when a rate filing is excessive, inadequate, or unfairly discriminatory, and require a new rate which responds to the findings of the WI.

Presently, each insurance company uses their own method for dividing the state into different territories for rating purposes. These territories usually fall into 20 to 30 different definitions. Most companies use geographical boundaries, such as county lines, or highways, not zip codes in establishing their territory definitions. The definition of each of these territories is based on many factors, such as traffic densities, accident and theft frequency; road design and maintenance, law enforcement and socio-economic factors (medical and legal fees). The rates are based on the company's experience under the territory definition they have identified.

The section also amends s. 627.0651(8), F.S., to prohibit single zip code rating by the insurance companies.

This section further amends s. 627.0651(12), F.S., to remove costs due to bad faith, punitive damages and other taxable costs associated with judgments which award punitive damages against insurers from the allowable rate base. Currently, those costs are included in the rate base.

Section 35. The bill repeals subsection (4) of section 627.331, F.S., relating to filing of underwriting guidelines because these provisions are transferred to the rating section of the statutes in s. 627.0651(13).

Section 36. This section authorizes a pilot study in a South Florida county that will designate the entire county as a single rating territory for PIP policies. The DOI will report to the Legislature in January of 1992 regarding the effect of implementing the program on a statewide basis. If it is the decision by the Legislature to not implement the program; the rating division of the county would return to the status as before the pilot study was conducted.

Section 37. This section creates s. 627.0653(1), F.S., to mandate a discount on bodily (BI), property damage (PD) and collision rates of motor vehicles equipped with anti-lock brakes.

This section also creates s. 627.0653(2), F.S., to require insurance companies to provide comprehensive coverage discounts for motor vehicles equipped with approved anti-theft devices.

This section creates s. 627.0653(3), F.S., to mandate a discount on personal injury protection coverage and medical payments coverage for motor vehicles equipped with one or more air bags.

The bill specifies that the removal of any of the discounts or credits provided pursuant to this section does not constitute the imposition of a surcharge if the basis for the discount for credit no longer exists.

Section 38 amends s. 627.7262, F.S., to allow an insurer to be joined in a suit after a settlement or verdict, and prior to the judgment in a law suit. This section also specifies that an insurer shall be considered a party for the purpose of recovering taxable costs or attorney's fees recoverable by the insured.

Section 39. This section amends section 627.727(1), F.S., the uninsured motorist (UM) coverage statute, to clarify that a named insured is authorized to reject UM coverage or to select limits for UM coverage on behalf of all insureds.

Section 40. The section amends s. 627.736(5), F.S., to require insurers to include provisions in PIP policies for binding arbitration of PIP medical payment disputes between insurance companies and health care providers if the health care provider has agreed to accept assignments of PIP benefits. The arbitrator may award reasonable fees and expenses, including attorney's fees to the prevailing party.

Section 41. Currently insurance agents are not required to make a visual inspection of the motor vehicle in which the policy is being written. Nor are they required to take photos of the vehicle being insured. However, some companies are currently taking photos of the vehicle to be insured on their own accord.

This bill creates S. 627.744, F.S., to require insurers to inspect a private passenger motor vehicle prior to the issuance or renewal of physical damage coverage, including collision or comprehensive coverage. The inspection shall be at no cost to the applicant, The inspection must be recorded on a form prescribed by the DOI and must include taking the physical imprint of the vehicle identification number (VIN), and listing accessories and any existing damages.

Exempted from the law are: (a) a new policy for a policyholder who has been insured continuously for 3 years or longer and has physical damage coverage issued by the same insurer; (b) any motor vehicle purchased from an auto dealer if the insurer is provided with a description, with all options and a copy of a bill of sale or buyer's order which contains a full description of the vehicle, including accessories;, or a copy of the title establishing transfer of ownership and a copy of the window sticker showing the accessories and retail price; (c) a temporary substitute motor vehicle; (d) a leased motor vehicle for less than 6 months, if the insurer receives the lease agreement with a description including the condition; (e) vehicles 10 years old or older; (f) any renewal policy; (g) any policy issued in a county with a 1988 population or less than 500,000; and (h) other exemptions established by rule of the WI.

The insurer may defer the inspection for 7 calendar days for new coverage if the time of the requested inspection creates a serious inconvenience to the insured. If the inspection does not take place within the specified time period the insurance coverage is immediately suspended. This information must be conveyed to the applicant on forms prescribed by the WI.

The DOI is given rule making authority to establish such procedures and notice requirements as may be necessary to implement this law.

Section 42. The bill allows either party to demand mediation of a motor vehicle insurance claim filed with an insurer for personal injury in an amount of $10,000 or less or a claim for property damage in any amount. Requests for mediation are to be filed with the DOI and act to toll the applicable statute of limitations for filing a claim for sixty days following the conclusion of the mediation process. This process is intended to apply to first-party claims such as a PIP claim, in which case the terms and conditions for mediation must be specified in the policy, and to third party claims, such as a liability claim. The WI would randomly select mediators, subject to the right of either party to make one rejection. Mediators must complete a 40-hour training program approved by DOI (which requirement does not take effect until 180 days after the effective date of the act) and have a masters or doctorate degree in psychology, counseling, business, or economics, or be a member of the Florida Bar or have been actively engaged as a qualified mediator for at least four years prior to July 1, 1990. Costs are to be borne equally by both parties. Unless otherwise agreed, only one

mediation proceeding would take place which must be held within 45 days of the request for mediation. The DOI must promulgate rules of procedure for claims. Disclosures and information divulged in the mediation process shall not be admissible in any subsequent "action or proceeding relating to--the claim;

Sections 43-47 provide exemptions from or revisions in application requirements, acquisition filings, annual filings and dissolution or liquidation proceedings relating to a service warranty association for manufactures of products who wish to sell warranties on those products which they-manufacture. To qualify as a manufacturer for-the purposes of the exemptions or revisions, an entity or affiliate thereof must: derive a majority of its revenue from the sale--of a product which it manufactures; issue service warranties only for those products; be listed and traded on a recognized stock exchange; be listed in the National Association of Security Dealers-Automated Quotation' system, b&publicly traded in the over-the-counter securities markets and be required to file specified forms with the States Securities and Exchange Commission; if it maintains outstanding debt obligations they must be in the top four rating categories by a recognized rating service; have and maintain a minimum net worth of $10 million; and be authorized to do business in Florida.

Section 48 rewrites section 768.79, dealing with offers and demands for judgment, combining and revising provisions of existing sections 45.061 and 768.69, to be applicable to all civil actions for damages. (Section 22 of the bill provides that s. 45.061 does not apply to causes of action that accrue after the effective date of the act.) The bill specifies that if a defendant files an offer of judgment which is not accepted by the plaintiff, the defendant is entitled to recover costs and attorney's fees if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than the offer. Similarly, if the plaintiff files a demand for judgment which is not accepted by the defendant, the plaintiff is entitled to costs and attorney's fees if he recovers a judgment at least 25 percent greater than the offer. The bill requires that the offer be in writing and state that it is being made pursuant to this section and that it include certain specified information, The offer must be served upon the party to whom it is made, but it does not need to be filed with the court unless it is accepted or unless-necessary to-enforce -this section. In determining the "judgment obtained" by aplaintiff when an offer served by the defendant is not accepted by the plaintiff, this amount is the net judgment entered plus any post-offer collateral source payments received or due as of the date of the judgment, plus any post-offer settlement amounts by which the verdict was reduced. However, for purposes of determining the "judgment obtained" when a plaintiff serves an offer which is not accented by the defendant, the amount is the net judgment entered, plus any post-offer settlement amounts by which the verdict was reduced. A court may determine that an offer was not made in good faith and disallow an award of costs and attorney's fees. When determining the reasonableness of an award, the court must

consider a list of specified factors.

Section 49 creates s. 817.236, F.S., to increase the penalty for falsifying an application for motor vehicle insurance from a second degree misdemeanor to a misdemeanor of the first degree.

Section 50 requires the insurers in the state to submit to the DOI a report showing the rate impact of this legislation. The report is to be submitted two years after the effective date.

Section 51 repeals each section that is added to chapter 624, effective October 1, 1991.

section 52 provides for repeal of those sections of chapter 627 created by this act, as of October 1, 199.2.

Section 53 provides the authority for the Department to study the feasibility of tax collectors selling PIP, PD and combined forms of motor vehicle insurance. Presently, only those persons authorized by the Department are permitted to sell insurance. At the present time, tax collectors are required to verify motor vehicle insurance prior to the renewal of an auto license tag, they do not sell insurance.

Section 54 provides for the funding and positions necessary for the Department to implement this act.

Section 55 sets October 1, 1990 as the effective date and specifies that the act shall apply to all policies issued or renewed on or after that date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring or First Year Start-Up Effects:

None

2. Recurring or Annualized Continuation Effects:

None

3. Long Run Effects Other Than Normal Growth:

None

4. Appropriations Consequences:

Section 36. The Department of Insurance estimated the cost to be approximately $75,000 to conduct the single county rating study, however, there is no specific appropriation amount listed.

Section 53. The Department of Insurance estimated the cost to be approximately $75,000 to conduct the tax collector

study, however, there is no specific appropriation amount listed.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring or First Year Start-Up Effects:

None

2. Recurring or Annualized Continuation Effects:

None

3. Long Run Effects-Other Than Normal Growth:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECT-OR:

1. Direct Private Sector Costs:

Section 23. A $32 fine is imposed on persons who fail to make a timely accident report when required by s. 316.066(6).

Section 27. Drivers involved in certain accidents are required to take a driver safety education course which typically costs $20.00 for defensive driving courses and $135.00 for first offense alcohol related offenders.

Section 20. 'Drivers involved in certain accidents will be required to obtain bodily injury liability insurance or some other form of financial responsibility, even if the driver is not at fault in the accident.

Section 49. Persons falsifying an application for motor vehicle insurance would be subject to the penalties of a first degree misdemeanor; currently the crime is classified as a second degree misdemeanor.

2. Direct Private Sector Benefits:

Sections 14. Persons 65 and under will be able to purchase credit disability insurance without age being a requirement for qualification.

Section 25. Persons with vehicles valued at $1,500 or less would no longer have their vehicles declared a total loss when the estimated cost of repair is 80 percent or more of the current retail cost.

Section 34. Insurers are required to return excessive premiums charged to policyholders in the form of a credit or refund. Insureds should benefit to the extent of these refunds and to the extent that rates are more reasonably determined' to begin with.

Section 37. DOI: To the extent auto insurers and/or auto owners who install this equipment are more readily able to recover a stolen vehicle, there may be some reduction in insurer losses from theft. And, those auto owners who install this equipment will have some savings in premium cost, although this savings may not equate with the cost of purchase and installation of the equipment.

Section 41. The requirement that vehicles be inspected prior to being insured is intended to reduce fraudulent physical damage claims and thereby reduce collision and comprehensive motor vehicle insurance rates. This will result only if the reduction in claims costs exceeds the additional cost of the inspection itself. New York has a similar law, but it requires three color photographs of the vehicle. The Florida law does not require any photographs. Therefore, the cost of the inspection in Florida should be significantly less than the $12 to $14 cost experienced in New York. However, even at this cost, New York reports significant overall savings in physical damage premiums.

Sections 43-47. Exemptions from certain requirements under the laws for service warranty associations for qualified manufacturers should benefit such manufacturers and make it more likely that they will form a service warranty association for the products they manufacture. Consumers will benefit to the extent that large, financially solvent manufacturers are more likely to provide a warranty on their products.

3. Effects on Competition, Private Enterprise, and Employment Markets:

D. FISCAL COMMENTS:

None

III. LONG RANGE CONSEQUENCES:

IV. COMMENTS:

Section 24. The University of Kentucky conducted a study and found that the average cost per patient involved in an accident not wearing seatbelts was $6,496, while costs for those using seat belts was $1,458. The study further found that 98 percent of the belted victims were treated and released and 21 percent of the unbelted victims were admitted to the hospital and their stay was 5.2 times longer.

Section 37. According to a publication by State Farm Insurance Company, auto thefts in the United States reached 1.43 million in 1988. According to the Federal Bureau of Investigation's Uniform Crime Reports the value of the stolen vehicles for 1988 was ~~$7.3~~ million.

The National Automobile Theft Bureau (NATB) reported that in 1988, about 66 percent of the vehicles stolen were recovered, compared to about 90 percent in.1960. Since the parts of a vehicle are more . . valuable than the whole, many of the vehicles that were not recovered were most likely sold as parts.

According the Justice Department auto theft threatens people's safety. Over 100 lives were lost and 1,500 injuries caused during auto thefts in 1988.

Section 38. This section amends the non-joinder statute; s. 627.7262, to allow insurers to be joined as parties after-a verdict is reached but before a settlement is entered. This raises a question of constitutionality in light of previous decisions of the Florida Supreme Court regarding this section. An earlier version of this statute was held unconstitutional by the Court in Markert v. Johnston, 367 So.2d 1003 (Fla. 1978), because'the statute involved procedural aspects of trials rather than substantive rights and, therefore, invaded the state Supreme Court's exclusive rule-making authority in violation of the State Constitution (Fla. Const., Art. 2, sec. 3; Art. 5, sec. 2). The statute was amended in 1982 in such a way as to deal with substantive rights of parties rather than procedural aspects of trials, and the Florida Supreme Court upheld the statute's constitutionality in VanBibber v. Hartford Accident & Indemnity Insurance Company, 439 So.2d 880 (Fla. 1983). The amendment made by this bill may raise the constitutional issue again by arguably dealing with the procedural aspect of a trial. However, it appears that the basic provisions of the statute which deal with substantive rights of parties is unaffected by the amendment.

Section 41. The State of New York passed mandatory pre-insurance auto inspection in 1977 and has credited the law with a drop in auto thefts and a drop in fraud claims within the New York Department of Insurance. After the passage of the photo inspection law, New York's theft rate dropped by 10.8 percent and other states around New York experienced from 16 to 36 percent increases in auto thefts. It should be noted that staff is unable to determine what other, if any, factors attributed to New York's reduction in their theft rate. However, John Riersen of the New York Department of Insurance is of the opinion that the passage of the photo inspection law was the only reason for the drop. He said that no other legislation was passed at that time which would have affected the theft drop. He estimates the savings for New York to be about $14-$17 million based on 900,000 inspections.

Massachusetts also has a similar law. They estimate that 25 to 30 percent of all auto thefts are fraudulent. Massachusetts experienced a 3.4 percent drop in the auto theft rate following the passage of the 1988 law requiring pre-inspection. Other statistical information from Massachusetts is unavailable.

According to the National Auto Theft Bureau (NATB) estimates about 15 percent of all reported thefts are attempts to defraud an'insurer. The percentage ranges from 25 to 30 percent in urban areas. The

Florida Department of Law Enforcement (FDLE) reported 62,976 cases of theft, which represented $234,863,146 of value during 1988. (These figures represent approximately 70%-75% of the total figures, FDLE's data was incomplete at the time of this report.)

The DOI provided staff with several cases which could have been avoided had insurers been required to inspect the vehicle prior to issuing a policy.

Section 42. This section entitles either party to demand mediation of a claim prior to the institution of litigation for certain personal injury actions. (See Section 42, above.) This raises a question of constitutionality under the access to courts and due process provisions of the Florida Constitution. It may be argued that an injured party is denied access to courts for redress of injuries by being required to first proceed through mediation if demanded by the defendant. (Fla. Const., Art 1, Sec. 21) Depending upon how the mediation process works in practice, arguments may also be made that the mediation process may deprive parties of due process of law. (U.S Const., Amend, 14; Fla. Const., Art. 1, sec. 9) The mediation process for medical malpractice actions was determined to be unconstitutional based on such arguments in the case of Aldana v. Holub, 381 So.2d 231, (Fla. 1980).

V. SIGNATURES:

COMMITTEE ON INSURANCE:

Prepared by: H. Fred Varn

Staff Director: Brian Deffenbaugh

FINAL ANALYSIS PREPARED BY COMMITTEE ON INSURANCE:

Prepared by: H. Fred Varn

Staff Director: Brian Deffenbaugh

A bill to be entitled

An act relating to motor vehicle safety requirements; amending s. 316.613, F.S.; providing that failure to provide and use a child restraint may not be considered in mitigation of damages in civil actions with regard to negligence; amending s. 316.614, F.S.; deleting provisions requiring enforcement of safety belt requirements only as a sccondrry action: providing that failure to use safety belts is not negligence per se and prohibiting such failure from being used as prima facie evidence of negligence or being considered in mitigation of damages in any civil actions; providing an effective date.

Be It Enacted by the Leqislatutt of the State of Florida:

Section 1. Subsection (3) of section 316.613, Florida Statutes, is amended to read:

316.613 Child restraint requirements.--

(3) The failure to provide and use a child passenger restraint shall not be considered comparative negligence, nor shall such failure be admissible as ● vidtnct or considered in mitigation of damages in the trial of any civil action with regard to negligence.

Section 2. Subsections (9) and (10) of section 316.614, Florida Statutes, are amended to read:

316.614 Safety belt usage.--

~~(9)--Enforcement-of-this-section-by-state-or-local-law enforcement-agencies-shall-be-accomplished-only-as-a-secondary~~

CODING: Words stricken art deletions; words undtrlintd are additions.

action-when-a-driver-of-a-motor-vehicle-has-been-detained-for a-suspected-violation-of-another-section-of-this-chapter, chapter-320, or-chapter-322.

(9)[10] A violation of the provisions of this section or a person's failure to use a seat belt does shall not, constitute negligence per se, nor may shall such violation be used at prima facie evidence of negligence or considered in mitigation of damages in any civil action.

Section 3. This act shall take effect upon becoming a law.

CODING: Words stricken are deletions; words underlined are additions.

. s 1 7 7 0 1990 SESSION DATE 06/07/90 TIME 15x26 PA
GENERAL BILL/C3 by Judiciary-Civil; Johnson (Similar H 1425)
Safety Belts/Child fen/Failure to Use; provides that failure to provide & us a child restraint may not be considered in mitigation of damages in civil actions re negligence; provides that failure to use rafety belts is not negligence per se & prohibit.8 such failure from being used as prima facie evidence of negligence or being considered in mitigation of damages in any civil actions. Amends 316.613,.614. Effective Date; Upon becoming law.
03/23/90 S Prefiled
04/12/90 S Introduced, referred to Judiciary-Civil -SJ 00098
04/13/90 S Extension of time granted Committee Judiciary-civil
04/19/90 S On Committee agenda-- Judiciary-Civil, 04/25/90, 1:00 pm, Room-1C(309)
04/25/90 S comm. Action:-CS by Judiciary-Civil -SJ 00206
04/26/90 S CS read first time on 04/26/90 -SJ 00223; Placed. on Calendar -SJ 00207
06/02/90 S Died on Calendar

96

IN THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT, IN AND
FOR COLUMBIA COUNTY, FLORIDA

CASE NO. 93-1331-CA

WILLIAM TOMBERLIN and
DOROTHY TOMBERLIN,
Plaintiffs,

v.

RAYCO CONTRACT SERVICES! INC.
RAY WATSON COMPANY, INC. and
JOHN R. FAIR. JR.,
Respondents.

ORDER ON PLAINTIFF'S AMENDED MOTION TO STRIKE DEFENDANT'S SEAT BELT DEFENSE

Upon review of the oral arguments of counsel, and their statutory, caselaw, and written memoranda on the above issue, (including legislative information and rulings from other circuit courts uf this state), the Court finds as follows:

1) The primary purpose of 316.614 Florida Statutes was to minimize injuries by requiring use of seatbelts. The purpose was not to insulate negligent defendants from the results of their failure to we dua care resulting in injury to others. However, the law clearly intends to allow the trier of fact to find comparative fault also with an injured party who fails to use an available, operational seatbelt if that failure increased the injuries/damages which occurred.

2) Plaintiffs' Motion to Strike asks in effect that this Court adopt a very limited and strained construction of the above-cited statutes. Such 3 construction was not intended by the legislative {see documents attached to Defendant's Memorandum in Opposition.

The Amended Motion to Strike is DENIED.

DONE AND ORDERED this 5th day of December, 1994 in Lake City, Columbia county, Florida.

PAUL S. BRYAN
Circuit Judge

Copies to:

William J. Corda, Esquire
1715 Lakeland Hills Blvd.
Lakeland, FL 33805

W. Alan Winter, Esquire
1301 Gulf Life Drive, Suite 2210
Jacksonville, FL 32207

TOTAL P.03

NOT FINAL UNTIL TIME EXPIRE3 TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF *APPEAL*

OF FLORIDA

SECOND DISTRICT

DAVID MILLS TRAYLOR,

Appellant/
Cross-Appellee.

v.

CRICKETT LOSH,

Appellee/
Crass-Appellant.

CASE NO. 94-00368

Opinion filed November 30, 1994.

Appeal from the Circuit Court for Manatee County; Harry M. Rapkin, Judge.

Jeffrey M. Adams and Karen R. White of Fox, Grove, Abbey, Adams, Reynolds, Byelick & Kiernan, St. Petersburg, for Appellant/Cross-Appellee.

M. David Shapiro of M. David Shapiro, P.A., Sarasota, for Appellee/ Cross-Appellant.

PER CURIAM.

Affirmed.

FRANK, C.J., DANAHY and QUINCE, JJ., Concur.

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

DAVID MILLS TRAYLOR,

Appellant/Cross-Appellee,

vs.

CRICKET LOSH,

Appellee/Cross-Appellant.

CASE NO. 94-368

ON APPEAL FROM THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA
THE HONORABLE HARRY M. RAPKIN
CIRCUIT CIVIL NO.' CA-92-3831

ANSWER BRIEF OF CROSS-APPELLEE

FOX, GROVE, ABBEY, ADAMS,
REYNOLDS, BYELICK & KIERNAN

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ARGUMENT

I. WHETHER THE TRIAL COURT PROPERLY DENIED CROSS-APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION IN LIMINE ON THE SEAT BELT DEFENSE?

An appellate Court's review of a motion for summary judgment is limited to determining whether there was sufficient, competent substantial evidence before the lower court from which a jury could have lawfully drawn an inference in favor of the non-moving party. Halavin v. Tamiami Tours. Inc., 124 So. 2d 746, 747 (Fla. 1st DCA 1960). In reviewing motions for summary judgment, if there is even the slightest doubt as to the existence or nonexistence of a material fact, such issue must be resolved against a party moving for summary judgment. Crandall v. Southwest Florida Blood Bank. Inc., 581 So. 2d 593, 595 (Fla. 2d DCA 1991). Furthermore, a party making an unsuccessful motion in limine must object to the evidence at trial to preserve the error for appeal. O'Brien v. Ortiz, 467 So. 2d 1056 (Fla. 3d DCA 1985). Nothing in the record suggests that Cross-Appellant properly preserved the error for review.

In appellate proceedings, the decision of the trial court has the presumption of correctness and the burden is on the appellant to demonstrate error. Appelgate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979). In the case at hand, Cross-Appellant has failed to demonstrate error. In essence, Cross-Appellant contends that the enactment of §316.614(10), Fla. Stat. (1993) has completely abrogated the common law seat belt defense as set forth in Insurance Co. of North America v. Pasakarnis. 451 So. 2d 447 (Fla. 1984). However, neither the language of §316.614, Fla. Stat. (1993), the legislative history nor recent case law arguably suggests that the seat belt defense has been limited to only those instances where the plaintiff's failure to utilize the seat belt contributes to the cause of the accident. Rather, the plain language

of §316.614(10), Fla. Stat, (1993) compels a conclusion that the seat belt defense as set forth in Pasakarnis has not been abrogated by legislative pronouncement, and a plaintiff's failure to wear an available and operational seat belt can still be utilized to mitigate damages.

In 1984, the Florida Supreme Court adopted the seat belt defense in recognition of the fact that "failure to expend the minimal effort required to fasten an available safety device...should be deemed admissible in an action for damages, part of which would not have been sustained if the seat belt had been used." Pasakarnis, 451 So. 2d at 453, quoting, Ins. Co. of North America v. Pasakarnis, 425 So. 2d 1143 (Fla. 4th DCA 1982) (Schwartz, J., dissenting). The Pasakarnis court expressly rejected using the seat belt defense as bearing on comparative negligence because the applicability of the *defense* would be limited to instances where the plaintiff's failure to exercise due care caused in whole or part the accident. 45 1 So. 2d at 453. Therefore, the Pasakarnis court adopted the mitigation of damages of approach as set forth below:

> **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 the 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 the defendant may otherwise be liable should be reduced- 451 So. 2d at 454.**

However, the Pasakarnis court did not preclude the seat belt defense from bearing on the issue of liability if the defendant could prove that nonuse was the proximate cause of the accident. 451 So. 2d at 454.

In 1986 the Florida Legislature adopted the "Florida Safety Belt Law". Ch. 86-49, §2, Laws of Florida. At the time of its adoption Section 316.614(10) stated as follows:

> A violation of the provisions of this section shall not constitute negligence per se nor shall such violation be used as prima facie evidence of negligence in any civil action. § 316.614(10), Fla. Stat. (Supp. 1986) (emphasis added).

Nothing in the legislative history suggests an intent to abrogate the common law safety belt defense. Rather. consistent with Pasakarnis, the legislative history clearly indicates a desire for the law to encourage safety belt usage. See Senate Staff Analysis and Economic Impact Statement, April 10, 1986 Bill No. SB 210 (noting that other jurisdictions which enacted safety belt laws showed a decrease in automobilt accident fatalities and that studies indicated reduced medical costs for consumers that buckled up). In 1990, the legislature amended Section 316.614(10) in Ch. 90-119 to state as follows:

> A violation of the provision of this section shall not constitute negligence per se nor shall such violation be used as prima facie evidence of negligence or be considered in mitigation of damages, but such violation may be considered as evidence of comparative negligence in any civil action. § .316.614(10), Fla. Stat. (1991) (emphasis added).

Similar to the adoption of the statute in 1986, the legislative history surrounding the 1990 amendment is virtually nonexistent, In fact, tht Senate Staff Analysis and Economic Impact Statement is void of commentary and merely reiterates the language of the amendment. See Senate Staff Analysis and Economic Impact Statement, May 24, 1990, SB 2670.

The law is well settled that unless a statute unequivocally states that it changes the common law or is so repugnant to the common law that the two cannot co-exist the statute will not be held to have changed the common faw. Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990). Section 316,614 clearly and unambiguously states that "a violation of the provisions of this section shall...be considered as evidence of comparative negligence-"

§316.614, Fla. Stat. (1993) (emphasis added). The express Use of the words "violation of the provisions of this section" indicates a clear intent on part of the legislature to Iimit the comparative negligence standard to violations of §316.614, Fla. Stat. (1993). The law is well settled that when the language of a statute is clear and unambiguous the legislative intent is derived from the language in the statute. Zuckerman v. Alter, 615 So. 2d 661,663 (Fla. 1993).

In the case at hand, Cross-Appellee never raised, nor attempted to admit into evidence, a violation of §316.614, Fla. Stat- (1993). Rather, Cross-Appellee relied solely on the seat belt defense as set forth in Thus,athes.comparative negligence standard is completely inapplicable and the Cross-Appellee does not have to show that nonuse of the seat belt was the cause-of-the-accident only prove that the plaintiff did not USC an available and operational seat belt, that the plaintiffs failure to use the seat belt was unreasonable under the circumstances and that there was a causal relationship between the injuries sustained and the plaintiffs failure to buckle up. Pasakarnis, 451 So.2d at 454.

However, if this Honorable Court determines that the statute is ambiguous, the legislative history can be analyzed. Department of LegaA f f a i r ns1,434 So. 2d 879, 882 (Fla. 1983)(legislative history is considered only when the courts need to resolve an ambiguity in the statute). The legislative history surrounding the adoptiotr of the statute in 1986 indicates that the legislature intended for the mandatory scat belt law to encourage seat belt use and minimize injuries. Senate Staff Analysis and Economic Impact Statement, April 10, 1986 SB 210. Nothing in the legislative history surrounding the 1990 amendment alters the legislative intent expressed when the statute was adopted in 1986. See Senate Staff Analysis and Economic Impact Statement, May 24, 1990, SB 2670. Certainly the legislative history does not indicate,

as stated in Cross-Appellant's Initial Brief, that the legislature "intended to alter the statute in such a manner that it provided greater protection to plaintiff's in civil litigation.' Cross-Appellant's Initial Brief at page 8. Furthermore, there is absolutely no indication in the legislative history that Pasakarnis was abrogated by the adoption of or amendment to §316.614, Fla. Stat. (1993). In fact, Pasakarnis was never mentioned.

Cross-Appellant erroneously relies on Ramos v. Ambu-Car of Dade County, Inc. as evidence that the amendment to g316.614, Fla. Stat, (1993) has limited the seat belt to defense to only those instances where the plaintiffs failure to utilize the seat belt contributes to the cause of the accident. 627 So. 2d 1255 (Fla. 3d DCA 1993). Cross-Appellant's assertion is particularly interesting considering the fact that in Ramos a violation of §316.614, Fla. Stat. (1993) was never alleged, mentioned or interpreted. Rather, the Ramog court solely relied on Pasakarnis. The Ramos court, relying on Pasakarnis, held that because there was no evidence that the seat belt was fully operational the defendant could not use the seat belt defense to mitigate the plaintiffs damages, 627 So. 2d at 1256-57. Furthermore the Ramos court held that there was no evidence that Ramos' failure to fasten the seat belt was the proximate cause of the accident. 627 So. 2d at 1257. Nothing in the Ramos opinion indicated that Pasakarnis had been abrogated. In fact, it is clear from the Ramos decision that if the Defendant had met the burden of pleading and proving the elements set forth in Pasakarnis the Defendant could have mitigated the plaintiff's damages, 627 So. 2d at 1256-1257. Therefore, Cross-Appellant's reliance on Ramos is completely misplaced and without merit

It is Cross-Appellees position that the current law in Florida allows the defendant to raise the seat belt defense as set forth in Pasakarnis and §316.614(10), Fla. Stat (1993) in the following manner:

1. in mitigation of damages if nonuse of an available seat belt caused or contributed to the plaintiff's injuries;

2. as evidence of comparative negligence if nonuse of an available seat belt caused the accident;

3. as evidence of comparative negligence if the defendant can plead and prove that the plaintiff violated the provisions §316.614, Fla. Stat. (1993).

Such a construction is Consistent with the clear language of the statute and accompanying legislative history. Absent a cleat declaration from the legislature that Pasakarnis has been abrogated, a contrary interpretation such as that set forth by Cross-Appellant, is purely speculative and unreasonable.

Furthermore, even if the doctrine of comparative negligence is adopted, nonuse of a seat belt should still be admissible if the Defendant can prove that such nonuse caused or contributed to the Plaintiff's injuries. When Pasakarnis was decided other comparative negligence jurisdictions adopting a seat belt defense held that the Defendant must show that nonuse of the seat belt Riley:d the accident. See Melesko v. ,339 A.2d 479 (Corm. 1975). Certainly, the Florida Supreme Court was aware of these decisions, and recognized the difficulty the Defendant would have in asserting a scat belt defense. Pasakarnis, 451 So. 2d at 453 (rejected the comparative negligence approach because of its limited applicability). Thus, the Florida Supreme Court adopted a mitigation of damages approach.

However, currently the majority of comparative negligence jurisdictions hold that comparative negligence applies when there is a causal relationship between the failure to wear a seat belt and the aggravation of the plaintiff's injuries. See e.g., Law v. Superior Court of State of Arizona, 755 P.2d 1135, 1145 (Ark 1988)(under the theory of comparative fault nonuse may be considered in reducing damages); Waterson v. General Motors Corp., 544 A2d 357 (N.J. 1988)(jury can determine whether the evidence establishes that failure to utilize an available seat belt contributed to the plaintiff's damages). In fact, in Smith v. Goodyear Tire and Rubber Co. the court characterized plaintiff's attempt to reduce damages only if the *failure* to utilize *the* seat belt was the cause of the accident as novel and illogical, 600 F.Supp. 1561, 1565 (D. Vermont 1985). Therefore, even if this Honorable Court were to bold that the mitigation of damages approach had been abrogated by 5316.614, Fla. Stat. (1993)., the only reasonable interpretation would be to hold that the Defendant stilf need only prove that nonuse of the seat belt contributed to the plaintiffs injuries.

In conclusion, the lower court properly denied Cross-Appellant's motion for summary judgment and motion in limine. As set forth above, the mitigation of damages approach has not been abrogated by $316.614, Fla. Stat. (1993). Under Pasakarnis, the Defendant must prove that the seat belt was operational. The affidavits submitted by Cross-Appellee created a genuine issue of material fact as to the seat belt's operability, and summary judgment was therefore inappropriate. The trial judge's Order erroneously stated that the scat belt defense was admissible only as evidence of comparative negligence. Rather, consistent with the Ramos decision and absent clear legislative declaration, the mitigation of damages approach is still the law in Florida. However, if this Honorable Court deems that comparative negligence is the

appropriate standard, the only reasonable application would be to hold that the defendant still need only show that the nonuse of the seat belt caused or contributed to the plaintiffs injuries.

Transcription of the tape from the
Senate Floor Debate of May 31, 1990

Read the next bill.

CLERK: Committee Senate Bill 2670. A bill is being entitled and relating to insurance.

Mr. Langley: Thank you Mr. President. This is the rewrite between us and the insurance department as well as the incorporation of many of the recommendations of the committee that was appointed, the study group that was appointed by the legislature to study motor vehicle insurance. Has a lot of changes in it. I would like to numerate about ten (10) that are the major changes. If you understand use in file, this allows use in file, but if the rate is not approved by the department then the insurance companies must regurgitate they call it, they must pay back the unapproved excesses. It also allows any one of the parties to refuse the uninsured motorist insurance. If you. and your wife on the car and the policy refusal by *one* is binding on the other. It allows the insurance company to require underlying coverage for umbrella or excess insurance. That is so they don't get exposed beyond what they were advised. It goes back to the old version of financial responsibility to where both parties in an accident have to prove insurance before they can bill SR22's to insure more people to have insurance. It provides that a judgment against the insured is a judgment against the insurer which prohibits the double suits that have been taking place.

In the seat belt language, it provides that seat belts, the lack of seat belts can no longer be used twice against the

Plaintiff. It is either used as mitigation or comparative negligence. Now it can only be used in the comparative negligence.

The offer of judgment language is in there to encourage the settlement of suit. It demands credit for anti-theft or anti-lock devices for brakes, and it also provides that if an insurance company is assessed for punitive damage or bad faith negotiations they cannot use that in their rate base. So it is a compromise the bill as it is before you is agreed by all parties and I have a couple technical amendments.

SPEAKER: Any questions of the Sponsor Senator Don L. Childers is recognized. Senator Childers.

SPEAKER: Senator Langley would you take the floor and deal with the questions of Senator Childers.

Senator Langley: Certainly. ,

Senator Childers: Okay, uh Senator Langley, you know I introduced a bill that would uh return excess profits to the consumers and I believe you got this in the amendment. Is that correct?

Senator Langley: Yes, if they start using the rate filed for approval and that approval is denied or reduce, they must return that excess that they have collected during that time to the policyholder.

Senator Childers: Thank you Senator.

SPEAKER: Further question, Senator Dudley.

Senator Thurman: There is another bill that has this language in it that already has passed this body.

SPEAKER: In light of that I would appreciate if the Senator **would** withdraw his bill, his amendment. Recommend a negative at roll call.

Senator Stuart is recognized.

SPEAXER: On the amendment, all those in favor signify **by** saying aye. Aye, opposed no, No.

Two to one. After vacation is not allowed. I believe **the** amendment failed. So read the next amendment.

CLERK: By Senator Stuart: Amendment to Amendment on *page* 3, 3 - 5 strike all said language and insert subsection shall be applicable when a vehicle is less than five (5) years old or.

SPEAKER: Senator Stuart.

Senator Stuart: It is controversial, but's it's conforming to that other with some respect. Withdraw that.

SPEAKER: Without objection. Withdrawn. Read the next Amendment to Amendment. No further Amendments to the Amendments. Back on the Amendment. Any further discussion on the Amendment as before us, Any debate. All those in favor signify by saying aye, Aye, oppose no, show it passing.

SPEAKER: Senator Langley.

Senator Langley: Mr. President, just one thing some people have asked about the seat belt provision. This does not allow the

lack of a seat belt as a primary cause for a wreck. It still has to be secondary to some other cause of a wreck.

SPEAKER: Any further Amendments. Read the next amendment.

CLERK: By Senator Don Childers on page 4 between lines 24 and 25, insert section one legislative intent.

SPEAKER: Senator Don Childers available for his amendment. Senator Childers.

Senator Childers: Just withdraw those.

SPEAKER: Without objection. Read the next Amendment.

CLERK: By Senator Don Childers on page 13 between

SPEAKER: Withdraw those without objection. Read the next Amendment.

CLERK: One titled with a Titled Amendment to a Titled Amendment.

SPEAKER: One with objection and objection. Senator Langley moves rules waived Committee Substitute Senate Bill 2670 be taken up and read for a third time by title only placed on final pass with that objection read that bill.

CLERK: Committee Substitute for Senate Bill 2670 a bill to be entitled and not relating to insurance.

SPEAKER: Clerk will unlock the machine and members will proceed to vote. Have all members voted? Clerk will lock the machine and announce the vote.

CLERK: 38 yea's and no nays.

SPEAKER: Senator Gordon.

Senator Gordon: Yes, I just want to move to reconsider Committee Subject for Senate Bill 2670. I need to discuss an amendment with Senator Langley.

SPEAKER: Okay, show that motion and that it's pending. And uh, Senator Cordon.

Senator Gordon: President, I would like to move to withdraw my motion to reconsider the Committee Subject for Senate Bill 2670.

SPEAKER: Without objection. Without objection. Senator Cordon would you uh, our parliamentarian here says that we need to actually take up the motion and you heard the negative vote on it and they can dispose of it.

Senator Gordon: Fine, fine.

SPEAKER: Senator Gordon moves that we do take up the motion to-'reconsider and he urges a negative vote all those in favor of the motion to reconsider signifying by saying aye, opposed no, show the motion to reconsider defeated. Thank you sir. Okay, uh.

End of tape.

/tf