IN THE SUPREME COURT OF FLORIDA

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HAROLD RIDLEY and KATHY RIDLEY, his wife, et al,

Petitioner(s),

vs.

SAFETY KLEEN CORPORATION, a foreign corporation,

Respondent(s).

Case No. 86,280

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF CASE

Respondent agrees with Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

Safety Kleen agrees for the most part with Petitioner's Statement of the Facts, except as noted below.

First, Ridley relates in his Statement of Facts that the stop sign was "readily" visible. (Hall Brief at p.7). Ridley cites several witnesses testimony for that proposition. Respondent disagrees with the Statement of Fact, as Trooper Lonnie Baker, testified that the stop warning was "worn" and "faded". (Statement of Facts, March 12, Vol.I, T.33). Ronnie Reed testified that the warning was in fact "not in great condition" and "a little vague". (Statement of Facts, March 10, 1994, Vol.I, T.162).

Respondent also disagrees with Mr. Ridley's Statement of Facts that he suffered two significant residual injuries. (Hall Brief at p.7). While Respondent agrees that Mr. Ridley did suffer a joint depression fracture of the left calcaneus bone, Respondent disagrees with the implication that it was conceded that Mr. Ridley also suffered organic brain damage. In fact, the question of causation and extent of Mr. Ridley's brain damage was hotly disputed at trial. While Mr. Ridley did put on evidence as to brain damage, Safety Kleen also put forth evidence that there was no organic brain damage suffered by Mr. Ridley. Thus, the issue of organic brain damage was disputed at trial.

Lastly, Safety Kleen disagrees with Mr. Ridley's characterization that its driver knew that he was to stop at the intersection in question, but simply did not do so. (Hall Brief at p.89). In fact, Mr. Steven Manly testified that he had not been on North Street prior to the accident and in fact had taken that route

only because he was returning a customer's knife from Silcox Auto Repair and thus was deviating from his normal route when the accident occurred. (Statement of Facts, March 12, 1994, Vol.I, T.84,86). Mr. Manly also testified that as he approached the intersection he "looked off to the right as best I could and didn't see anything coming either way so I proceeded into the intersection." (Statement of Facts, March 12, 1994, Vol.I, T.89). He stated that he did not see the word "stop" painted in the intersection. Therefore, there was again an issue of fact for the jury's consideration as to whether Mr. Manly was the driver.

PRELIMINARY STATEMENT

Petitioner has referred to the testimony at trial in the form of "Statement of Facts", filed by the volume and page number where the evidence appears, which Respondent Safety Kleen has designated as (T. _____). Safety Kleen has also designated portions of depositions that were published at trial, and will be denominated as (_____ Depo. T. _____).

SUMMARY OF ARGUMENT

The District Court of Appeal question should be answered in the affirmative. The statutory intent behind §316.614(10) is to codify Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984). As such, the statute would be applicable, to all cases where the seatbelt is properly pled and proven. Therefore, since the seatbelt law is a traffic statute, the jury should have been instructed as to its violation. The issue on appeal is preserved, as the proper jury instruction was requested, and denied by the trial court. The jury verdict as to reasonableness was not supported by the evidence, and thus the instruction was important, and this case should be reversed for a new trial.

In addition, the jury verdict improperly calculated the present money value of the future economic damage award of $75,500.00. A future damage award of $75,500.00 cannot be reduced to present money value of $100,000.00. Thus, the jury verdict must be reversed on that basis as well.

Lastly, the jury also miscalculated the damages inasmuch as it added past medical expenses to future medical expenses and lost earning capacity to arrive at the $100,000.00 figure.

The issues of liability and damages in this case are intertwined, and thus the district court correctly remanded the case to the trial court for a trial on all damages.

ARGUMENT

I. WHETHER THE TRIAL COURT PROPERTY DENIED RESPONDENT'S REQUESTED JURY INSTRUCTION BASED ON STATE OF FLORIDA JURY INSTRUCTION 4.11 REGARDING SECTION 316.614, FLA. STAT. (1991)

A. INTRODUCTION

The arguments presented in this appeal, involve, for the most part, the interplay of Florida Standard Jury Instruction 4.11 with the seatbelt defense that was espoused by this Court in Insurance Company of North America v. Pasarkanis, 451 So.2d 447 (Fla. 1984). At the outset, none of the parties argued in this appeal that the seatbelt defense found in Pasarkanis has in any way altered or changed by the adoption of §316.610(4). The argument made by Petitioners in this case are actually based upon the dissent filed by Judge Ervin on rehearing. In particular, Ridley's argument is simply that in instances where the seatbelt defense is pled as a theory in mitigation of damages, "Florida Standard Jury Instruction 6.14 informs and instructs the jury properly on this issue (damages) along with Florida Standard Jury Instruction 3.8, if applicable under the circumstances." (Cherr Brief, p.27, See also Cherr Brief at p.18). Ridley also argues that the 4.11 instruction was not requested by Safety Kleen, but that it wanted a "preemptive" jury charge with regard to reasonableness, "and did not want the jury instructed that Mr. Ridley's failure to use a seatbelt could be considered as evidence of negligence." (Hall Brief, p.15).

Thus, the issue formulated by the briefs is simply whether the majority decision in the court below, or the dissent by Judge Ervin

is the correct view of the interplay between §316.614(10), and the seatbelt defense. In other words, the issue is whether an instruction incorporating Florida Standard Jury Instruction 4.11 can be given in instances where the seatbelt defense relates only to mitigation of damages.

B. THE FAILURE TO GIVE THE INSTRUCTION WAS NOT HARMLESS ERROR

Ridley argues that the failure to give the jury instruction was harmless error, in two respects, both factually as there was little evidence that the seatbeltwould have prevented Mr. Ridley's injuries and the jury verdict finding Mr. Ridley's nonuse of his seatbelt was reasonable, was amply supported by the evidence, and the jury had already adequately charged under Standard Jury Instruction 6.14.

It is well settled in Florida that the trial court's failure to give an instruction with regard to a traffic control statute, which, undisputably S316.614 is included, constitutes reversible error. Seaboard Coastline Railroad Co. v. Addison, 502 So.2d 1241 (Fla. 1987). In Addison, this Honorable Court held that the trial court should have given an instruction on a traffic violation in accordance with Florida Standard Jury Instruction 4.11. In that regard, the Court held "When there is evidence of such a violation a party is entitled to the jury instruction thereon. This is simply a specific application of the equally established rule of law that a party is entitled to have the jury instructed upon its theory of the case when there is evidence to support the theory." Addison at 1242. As correctly stated by the First District in its

opinion, the failure of a party to be instructed as to their theory of the case when there is evidence to support the theory, is reversible error. In other words, a refusal to give a traffic instruction based on Florida Standard Jury Instruction 4.11 when there is evidence of a violation is not subject to the harmless error rule, and will result in the granting of a new trial. Robinson v. Gerard, 611 So.2d 605 (Fla. 1st DCA 1993).

Further, the issue of whether there was credible testimony on the question of causation is not relevant to the issue in the instant appeal. Initially, Safety Kleen points out that the jury verdict did not reach the question of causation. Thus, there can be no way to determine how the jury would have found on this issue. Further, as admitted by Mr. Ridley, Safety Kleen presented expert evidence as to whether the non-use of the seatbelt contributed to Mr. Ridley's injury. (Hall Brief, p.28). While Mr. Ridley attacks Mr. Clark's testimony, and cites to Dr. Thornberry's testimony, this is a question of weight, and thus is one for resolution by the jury.

As to the jury finding of reasonableness, the explanation offered by Mr. Ridley is insufficient, and the trial court should have directed a verdict, as Safety Kleen argued below, on the issue of reasonableness. At trial, Mr. Ridley testified that he was on his way home at the time of the incident. In fact, he stated that he had left work and took his daughter out of school early to go to Panama City for a senior portrait. Specifically, Mr. Ridley testified as follows:

Question: Did you and your daughter do something that day?

Answer: Yes we yes, we did.

Question: What did you do?

Answer: She got out of school early, I don't know, about eleven and I carried her to Panama City to Shipes' Photo to have her senior portrait made for school.

(Statement of Facts, March 10, 1994, Vol. I, T.156).

Thus, Mr. Ridley was on his way home from taking his daughter to Panama City at the time of the incident. In fact, although Mr. Ridley contended that the accident occurred close to the Ridley home, Mr. Ridley lives off Chipoa Road, which is a distance of about four miles from the intersection. (Statement of Facts, March 10, 1994, Vol. I, T.187).

It is undisputed that the plaintiff has testified that other than the fact that he did not like to wear seatbelts, he had no explanation for not wearing it on the day of the accident. Specifically, the plaintiff testified as follows:

Question: You never wear your seatbelt?

Answer: Do I never wear it?

Question: Right.

Answer: Oh, yeah, I do wear it.

Question: You wear it now?

Answer: Not all the time, no.

Question: But back prior to this accident you didn't like to wear a seatbelt, is that correct?

Answer: That's correct and I still don't

like to wear them.

Question: Other than that, any other reason why you did not wear a seatbelt on that day?

Answer: No, no, sir.

(Statement of Facts, March 10, 1994, Vol. I, T. 166).

As pointed out in Pasakarnis, the evidence for the effectiveness of safety belts in reducing deaths and injury severity is substantial and unequivocal. Pasakarnis at 453. This Honorable Court has agreed in another case with Judge Schwartz's observation that "only a minimal effort is required to fasten an available safety device....". Pasakarnis at 453 (quoting Insurance Company of North America v. Pasakarnis, 425 So.2d 1143 (Fla. 4th DCA 1982)(Schwartz, J. dissenting)).

Thus, an evaluation as to the reasonableness of Mr. Ridley's conduct should be weighed in reference to the potential benefits of "buckling up", and the minimal burden of doing so. Viewed from this prospective, it is clear that to allow a jury finding of reasonableness under these circumstances would be tantamount to eviscerating the seatbelt defense. In other words, the seatbelt defense itself would be nullified if a jury was allowed to find that a driver reasonably failed to wear a seatbelt because he did not "like" them.

C. THE JURY FINDING OF REASONABLENESS WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

In the instant case Ridley argues that plaintiff's counsel admitted in opening statement that his client was not wearing a seatbelt at the time of the incident. (Vol.I, T.16, Transcript of

Mar. 9, 1994). In the course of the trial, the plaintiff himself admitted that he was not wearing a seatbelt at the time of the accident, for no other reason than he didn't like to wear them. (Vol.I, T.191, Transcript Mar. 10, 1994). Further, the plaintiff admitted that the seatbelts were operational. (Vol.I, T.189, Transcript of Proceedings Mar. 10, 1994). However, despite this evidence, the jury expressly found that it was not unreasonable for the plaintiff to fail to use his seatbelt. This finding is against the manifest weight of the evidence. "A verdict is against the manifest weight of the evidence, however, where the evidence is clear, obvious, and indisputable that an opposite result should have obtained." Weygant v. Fort Myers Lincoln Mercury, 609 So.2d 714 (Fla. 2d DCA 1992). The plaintiff had no explanation for failing to wear an available seatbelt. To allow this finding to remain undisturbed, would be to, in effect, allow the jury to abrogate the defense.

D. SAFETY KLEEN DID NOT REQUEST A PREEMPTIVE JURY INSTRUCTION

As stated above, Ridley argues that Safety Kleen did not ask for a 4.11 instruction but instead, requested a charge instructing that a violation of S316.614 was negligence per se. As stated in the lower court opinion, Safety Kleen did request a modified jury instruction based on 4.11. Ridley, 20 FLW D842. The court noted that "Appellee contended during the oral argument that the requested instruction was withdrawn at some point by the defendant. The record does not reflect that the requested instruction was withdrawn, but rather there is an indication on the form that it

was denied." Ridlev, n.1 at D843.

The record reflects that Safety Kleen did in fact ask, and was denied its requested instruction on 4.11 as it related to S316.614 The jury instruction by Safety Kleen appears as follows:

> FLORIDA STANDARD JURY INSTRUCTION 4.11 MODIFIED
> F.S. 316.614. Safety-belt usage.
> (1) This section may be cited as the "Florida Safety-belt law."
> (4) It is unlawful for any person:
> (b) to operate a motor vehicle in this state unless the person is restrained by a safety-belt.
> Violation of a traffic regulation prescribed by statute is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that a person alleged to have been negligent violated such a traffic regulation you may consider that fact, together with the other facts and circumstances, in determining whether such person was negligent.
> Authority: F.S. 316.614 (1991)
> GRANTED _____
> DENIED X
> WITHDRAWN _____

Thus, the jury instruction was requested and denied by the trial court. Therefore, this issue is preserved for appeal.

Ridley contends that the issues on appeal do not relate to the counterclaim against him, and thus, regardless of the outcome, the jury verdict with regard to the counterclaim, and by implication, Ridley's comparative negligence should not be disturbed. As argued in this appeal, and on the appeal below, there are issues with regard to damages, which support the district court decision to remand this cause for a new trial on all issues between Mr. Ridley and Safety Kleen. In the earlier case of Rowlands v. Signal Construction Company, 549 So.2d 1380 (Fla. 1989), this Honorable Court addressed a similar issue. In Rowlands, the trial court ordered remittitur, and further ordered that if plaintiff agree to

remittitur, the case would be retried on all issues. The district court of appeal, while approving remittitur, reversed the trial court, holding that the trial court should have ordered a new trial only on the amount of damages and on the percentages of comparative negligence of the parties, and not on all issues. However, it is well settled that where the issues of liability and damages intertwine, a new trial on all issues should be ordered. Further, because a new trial was ordered on the issue of damages, and comparative negligence being a compenent of damages, a new trial on all issues should be ordered as well. Rowlands. Thus, the district court was correct in ordering a new trial on all issues.

E. THE DISTRICT COURT OPINION CORRECTLY ALLOWS AN INSTRUCTION BASED UPON 4.11, IN ANY CASE WHERE THE SEATBELT DEFENSE IS PROPERLY PLED AND PRQVEN

As pointed out in the underlying case, the resolution to this issue is determined by a reference to the concept of comparative negligence, found in the statute §316.614(10), in its current form provides, in pertinent part, "A violation of the provisions of this section shall not constitute negligence per se, nor shall such a 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."

The intent of the statute, as pointed out by the majority opinion in Safety Kleen Corporation v. Ridlev, 20 Fla. L. Weekly d1710 (Fla. 1st DCA July 28, 1993), was, in effect, to codify the law as it existed before the amended statute. Ridlev, at d1710.

Pasarkanis, originally approved the seatbelt defense for Florida before the enactment of §316.614. In Pasarkanis, the Florida Supreme Court, after conducting a thorough review of the existing law, and reviewing the conceptual theory behind the defense, approved the admission of evidence of a plaintiff's nonuse of their seatbelt in reducing their recovery. As is well recognized, the Court couched the defense in terms of a plaintiff's failure to mitigate their damages. However, the concept of mitigation of damages is subsumed into the theory of comparative negligence. Parker v. Montgomery, 529 So.2d 1145,1147 (Fla. 1st DCA 1988). In Parker, the appellate court was concerned with the affect of §316.631(1)(a), Florida Statutes 1985 with regard to Pasarkanis. In that case, the appellate court addressed the issue of whether the statute regarding child restraint devices, which prohibited evidence regarding the failure of the responsible parent or guardian to place the child in a restraint device for negligence or comparative negligence purposes, included denying the use of the evidence for failure to mitigate ddamages.

The court held that under the circumstances of that case, that evidence of the violation was in fact barred for that purpose, noting in the process that because mitigation of damages is subsumed within the concept of comparative negligence, "If the occupant a vehicle were an adult and had failed to use an available seatbelt, 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 Pasarkanis rule, by applying comparative

negligence principles, would require that such damages be apportioned pursuant to the theory of mitigation of damages." Parker, at 1149.

Therefore, the statute does not alter or restrict consideration of the seatbelt defense merely to instances where the nonuse of a seatbelt caused or contributed to the accident itself. Ridley concedes this position. (Cherr Brief at p.23, Hall Brief at p.30).

Further, as initially noted by Ridley, and by the appellate court, this interpretation of the statute, which is to codify Pasarkanis, is consistent with the statutory intent of the statute. See Ridlev, d1710; Meros, The Seatbelt Defense is Alive and Well under the Amended Section 316.614, 1 Trial Advocacy Quarterlv, 9 (1995).

Ridley however argues that under these circumstances, the trial court correctly denied Safety Kleen's instruction. Initially, Safety Kleen would point out that the committee note to Florida Jury Instruction 6.14 states on this issue that "The Committee expresses no opinion as to the effect of Section 316.614(10), Fla. Stat. (1990), concerning seatbelt usage, on this instruction." Ridley argues that the jury instruction should not be read where the seatbelt defense is pled only in reference to mitigation of damages. However, as pointed out by the district court opinion, this argument flies in the face of the plain language of the statute, which allows the violation to be considered as evidence of comparative negligence. As stated by the

district court "It is not reasonable to assume that this language was only intended to be utilized in those very rare instances where the use of the seatbelt actually caused the initial accident. Nor does the legistation itself contain such a limitation." Ridlev at d1710. In fact, the better view is that the statute was designed to prevent a "double" penalty by the plaintiff, by allowing a jury first to assess comparative negligence, and then to reduce the plaintiff's recovery by their failure to use a seatbelt. However, the jury instruction only informs the jury of the effect of the ordinance, on the seatbelt defense. Since the statute, as is admitted by all the parties to the appeal, does not purport to differentiate between the concepts of comparative negligence, and in fact codifies the Pasarkanis rule by subsuming mitigation of damages within the concept of comparative negligence, causation and damages, the trial court erred in refusing to instruct the jury on the effect of a violation of S316.614. Ridlev.

11. THE JURY INCORRECTLY CALCULATED THE DAMAGES ON THEIR VERDICT

A. INTRODUCTION

The jury verdict in this case of $200,000.00 was arrived at by the jury in an erroneous manner. The first error in the calculation, was the jury's failure to reduce future economic damages to present money value. The second error relates to a double calculation of damages which occurred when the jury added the various items together in an erroneous manner. Judge Ervin noted that the jury verdict was defective and that the verdict must be reversed and recalculated "because the jury failed to reduce future economic damages to present value, and it included the sum of $24,500.00 for past medical expenses and earnings in its calculations." Ridlev, 20 Fla. Weekly at d1713 (Fla. 1st DCA July 26, 1995)(Ervin, concurring and dissenting). In response, Ridley makes two arguments, first, that Safety Kleen waived its objection to the verdict form, and second, that the future damage award reduced to present value of $100,000.00 "was intended" by the jury and thus the verdict should be affirmed. (Hall Brief at p.36).

B. THE JURY FAILED TO PROPERLY REDUCE FUTURE DAMAGES TO PRESENT MONEY VALUE

Present money value is defined in Florida as "The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) for these losses as they actually experience in future years." Std. Jury Inst. (Civ.) 6.10. In Florida, every verdict is required by statute to reduce future

economic losses to present money value. §768.77(2), Fla. Stat. (1991).

Section 768.77 requires the jury as part of the verdict to itemize the amounts to be awarded to the claimant into several categories of damages. §768.77(1). Those categories, as enumerated in the statute, include an amount intended to compensate the claimant for economic losses. §768.77(1)(a). The statute goes on to state that, "Each category of damages, other than punitive damages, shall be further itemized into amounts intended to compensate for losses which have been incurred prior to the verdict and into amounts intended to compensate for losses to be incurred in the future. Future damages itemized under paragraph (l)(a) shall be computed before and after reduction to present value. Damages itemized under paragraphs (l)(b) or (c) shall not be reduced to present value. In itemizing amounts intended to compensate for future losses, the trier of fact shall set forth the period of years over which such amounts are intended to provide compensation." §768.77(2). Thus, "The only recoverable element of the plaintiff's claim for future monetary losses is their present money value." Seaboard Coastline Railroad Company v. Burdi, 427 So.2d 1048, n.4 at 1050 (Fla. 3d DCA) rev. dism., 431 So.2d 988 (Fla. 1983).[1] It is well settled that the failure of the trier of

[1] The reduction to present money value and an instruction requiring the jury to reduce future damages to present money value is warranted "because payment of the full amount of damages before the loss is incurred gives the recipient premature use of the funds." First American Bank and Trust v. International Medical Centers, Inc., 565 So.2d 1369 (Fla. 1st DCA 1990). Thus, present

fact to reduce future economic losses to present money value will result in the reversal of the verdict. Vibrant Video, Inc. v. Dixie Point Associates, 567 So.2d 1003 (Fla. 3d DCA 1990).

In the instant case, the jury awarded $75,500.00 as future economic damages, to Harold Ridley. The jury also, as required by S768.77, found that those economic losses would be experienced by Mr. Ridley over a period of forty-two years. However, the jury found that the present money value of $75,500.00, reduced over a period of forty-two (42) years, was $100,00.00. It is impossible for the present money value to exceed an award of future economic damages. Bursess v. Mid-Florida Service, Inc., 609 So.2d 637 (Fla. 4th DCA 1992).

Petitioner argues, if not expressly, implicitly, that the reduction to present money value of the future damage award of $75,500.00 increased to $100.000.00 is proper as the jury may take into account "inflationary trends". (Petitioner's Brief at p.35). However, this argument has no relevance as it applies to whether the jury properly reduced the award of $75,500.00 to a present money value of $100,000.00. In fact, it would be impossible for a present money value of future damages of $75,500.00 multiplied, over the course of forty-two (42) years to equal $100,000.00 as a matter of logic. In essence, the jury determined that it would

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money value is "based on the concept that the plaintiff will be able to profitably invest his award, so that less money is required now to compensate him for money which, absent defendant's negligence, he would not have received until some future time. Seaboard Coast Line R.R. Company v. Garrison, 336 So.2d 423, 425 (Fla. 1st DCA 1976).

take, pursuant to Fla. std. Jury Inst. 6.10, an award of $100,000.00 today, for Mr. Ridley to receive an amount equal to $75,500.00, extended over forty-two (42) years of his life.

The methods of reducing a verdict to present money value are discussed in Delta Airlines, Inc. v. Ageloff, 552 So.2d 1089 (Fla. 1989). In Ageloff, this Honorable Court, in response to the question certified by the Eleventh Circuit Court of Appeals, discussed the effect of inflation on the determination of the present value of a net accumulation award in a wrongful death action. As stated by this Court, there are three recognized methods for taking into account the effect of inflation, the case-by-case method, the below market method, and the total offset method. Ageloff, 552 So.2d at 1093.

Although this Honorable Court has noted that any of the methods are acceptable, In Re Standard Jury Instructions - Civil, 570 So.2d 294 (Fla. 1990), clearly, the calculation done by the jury in the instant case cannot be justified under any of the three methods.

Although Ridley criticizes the fact that Safety Kleen did not have an economist testify, it is well settled that it is not the defendant's burden as to present competent evidence with regard to present money value, and thus, there is no obligation on behalf of Safety Kleen to present expert testimony. Howell v. woods, 489 So.2d 154 (Fla. 4th DCA 1986); Burdi.

The economist, Dr. Charles Rockower, testified as to his conclusion as to Mr. Ridley's future damages and the amount of

future damages, but did not testify as to the method of computation of present money value. Thus, the jury had no guidance as to computing present value, and resorted to its own knowledge in computing the present money value. In Re Standard Jury Instructions, 570 2d, at 295.

C. THE ISSUE IS PRESERVED FOR APPELLATE REVIEW

Petitioner argues that Safety Kleen "Made no objection to the form of verdict at trial, and therefore, cannot now raise the particular argument that it does not like the fact the verdict form called for the addition of lines 7(A), 7(B-3), 7(C-1), and 7(C-2) to arrive at Mr. Ridley's total damages figure. . ..If Safety Kleen believed that the addition of figures required by the form of the verdict would result in a double calculation of damages, it could have easily objected at trial." (Hall Brief, p.33). Respondent disagrees with Petitioner's characterization of this issue. The verdict form was proper. The jury improperly filled out the form by their improper calculations. This issue was properly preserved, as the record reflects that Safety Kleen did object to the calculation of the verdict at trial:

The Court: What I am concerned about is you add those up, have you added them up?

Mr. Fischer: They don't add up. Future damager are not reduced to present value. What they found is taking past damages.

(Upon resuming)

The Court: Let me ask y'all, if y'all would go with the Bailiff back to the jury room for just a minute, please.

(Thereupon the jury retired from the courtroom)

The Court: If you add these up, $24,500., $75,500. and it says to add A, B3, which is $100,000. Then if you add Cl is $25,000., then C2 is $50,000. That would come out right, wouldn't it?

Mr. Hall: That's $200,000., the figures add up.

The Fischer: Except that. . . (sic)

The Court: They add up, you know. It appears to me there is no inconsistencies in the verdict form.

Mr. Fischer: Yes, sir, the future damages and they have projected what the total amount of future damages is $75,500. To reduce those to present value they should award a sum of money that is equal to the amount of money that it would take now over a period of 42 years.

The Court: But how in the world if you were to send them back in there. . .

Mr. Cherr: They don't have to do that.

The Court: I think there is no inconsistencies and I think I need to thank them and let them go because the figures add up.

Mr. Fischer: Your Honor, just for the record, our objection is that the future damages have not been reduced to present money value as required by the model tort reform verdict and that what the jury has done is awarded the entire amount of future damages, added it to past damages to arrive at $100,000. in total economic damages and then awarded past and future pain and suffering of $75,000. and those two together would be $175,000.

The Court: Well, the instruction says to add A and B and added together to get B3 and that's incorrect.

Mr. Cherr: Maybe they think the market is going to be sour. They don't have an obligation to make a reduction.

The Court: If they add together I know where you are coming from, but there is no way in the world if I were to send that jury in and tell them there is inconsistencies. For the record, it is certainly noted what you are saying, Mr. Fischer.

(Statement of Facts, Volume II, March 14, 1994, T.70-72).

Thus, it is clear that Safety Kleen objected to the improper calculation of the jury by their failure to reduce the award of $75,500.00 to present money value, and their improper double calculation. The error was not to the verdict form, but was in the jury's calculation.

Initially, Respondent notes that the jury form used with regard to the damages portion of the verdict corresponds exactly with the verdict form found in the Standard Jury Instructions. Std. Jury Inst. (Civ. 8.1). The verdict form used also corresponds to the statutory requirements of S768.77. The verdict form used by the jury is thus correct. The actual issue raised by Safety Kleen is not whether the verdict form was deficient in that it called for the addition of erroneous lines on the verdict form, but that the jury did not correctly follow the verdict form in arriving at their calculations and certainly did not follow the court's instructions as to their determination of the present value of the future damages, which they found to be $75,500.00. Thus, the error in the

jury's calculation is preserved for this appeal.

D. THE VERDICT WAS IMPROPER AND SHOULD BE REVERSED

The second argument related to the jury's failure to properly reduce the future damage award to present money value made by Petitioner is that the trial court correctly "decided to ratify the jury's intent". (Hall Brief at p.35). Although Petitioner characterizes the award of $100,00.00 as the "future economic damages award" (Hall Brief at p.34), the actual future economic award given by the jury was $75,500.00. The amount of that award, was the result of the jury's evaluation of the testimony and evidence in the case with regard to Mr. Ridley's lost earning ability and future medical expenses. The Petitioner ignores the clear language of the verdict form, and instead argues that the juryintendedto award a total of $100,000.00, (in contravention of the jury instructions and directions on the verdict form) and further that the trial court agreed with this intent. Ridley misinterprets the award, and the trial court's ruling. Contrary to Ridley's statement, the trial court overruled Safety Kleen's objections as it found that the verdict was not inconsistent. (Statement of Facts, supra, T.70-72). Ridley argues that the jury's intentionwas to award $100,000.00 in future damages reduced to present money value. In fact, there is nothing in the record to support this conclusion.

On the contrary, it is clear that the jury added the future damages to the past medical expenses in order to arrive at the figure of $100,000.00, thus representing a double calculation. The

cases cited by Ridley, do not support his argument that a court can ignore what is a plain error on a verdict in order to effectuate what the trial court perceives to be the jury's intent.

For example, it is well settled that a jury verdict is clothed with a presumption of regularity, and will not be set aside lightly. In cases where a clerical error has occurred, such as in Cory v. Grevhound Lines, Inc., 257 So.2d 36 (Fla. 1971), where a jury reversed the verdict in a wrongful death claim, for the plaintiff, based upon her claim as surviving widow and as executrix of the deceased's estate, the trial court was empowered to correct the error. However, the trial court is not empowered to correct a verdict that does not contain a clerical error, such as a case where the verdicts were the result of misconceptions of the jury as to the facts on law. Those matters adhere in the verdict, and thus as this Honorable Court has already stated, cannot provide the grounds for challenge of a verdict. Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97,99 (Fla. 1991). In cases where there has been a misconception of the jury or an error in arriving at the jury verdict, as opposed to a clerical error clearly ascertained from the form, a trial court cannot disturb the verdict. As stated in Dover Corporation v. Dean, 473 So.2d 710,712 (Fla. 4th DCA 1985), "Thus, a motion alleging a juror thought her verdict would bring about a different result or that she miscalculated the damage, or did not understand the judge's instruction on certain matters alleges matters inhering in the verdict." Thus, these facts do not constitute good grounds for setting aside a verdict.

Marks v. State Road Department, 69 So.2d 771,774-775 (Fla. 1954). In the instant case, Ridley argues that the jury intended to render a verdict of $100,000.00 for his future damages. However, the jury clearly awarded $75,500.00 for Ridley's future damages, and erroneously failed to properly reduce $75,500.00 to present money value. Thus, the verdict does not contain a clerical error, but contains an error in calculation of the award to present money value.

Ridley does not defend the failure of the jury to reduce the future damage award of $75,500.00, or explain the method of the jury's calculation, but merely argues that the $100,000.00 figure was justified by the evidence. Again, the future damage award was not $100,000.00 but $75,500.00. Although Ridley argues that an award of $100,000.00 was justified, he did not argue that the award of $75,500.00 was inadequate in the court below.[2] Safety Kleen

[2] Ridley points to the testimony of Joyce Puckett, and the economist Dr. Charles Rockower to support his argument that $100,000.00 was an adequate verdict for future damages. As stated above, this argument has no relevance to the actual issue, which is whether the jury miscalculated the award of future damages of $75,500.00 to presentmoneyvalue. Further, the question of future lost earnings was hotly contested at trial. At trial, the plaintiff claimed damages from a healed fracture, which Dr. Thornberry, categorized as a "moderate fracture*' (Thornberry Depo. T.7), and organic brain damage. As stated by Mr. Ridley in his brief, he presented evidence that these claimed injuries effected his employability, Safety Kleen presentedtestimonywhich disputed plaintiff's claim. Safety Kleen presented, by way of deposition, the testimony of Dr. Melvin Greer, and Dr. Dawn Bowers, from the University of Florida. Dr. Greer and Dr. Bowers, who are a neurologist and neuropsychologist respectively, both tested Mr. Ridley. Without belaboring Dr. Greer's testimony, it was Dr. Greer's opinion that Mr. Ridley suffered no permanent injury to his neck or back as a result of the accident (Green Depo. T.34), and that there were no mental defects as well related to the accident. (T.35). Dr. Greer did note that in his opinion that Mr. Ridley

does not argue that the jury verdict was excessive, but that the jury verdict failed to reduce the verdict in a proper fashion.

E. THE JURY IMPROPERLY CALCULATED DAMAGES

Ridley has admitted that the jury improperly calculated damages as $200,000.00 rather than $199,500.00, but the jury also improperly calculated the award by adding both the amount of future damages for medical expenses and lost earning ability to the amount of past damages and lost earning ability to arrive at the "present value" of the future damages. This is patently improper, and results in calculating plaintiff's past damages twice. In fact,

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sustained a mild concussion, but "he suffers no permanent residual to the brain as a consequence of that." (T.44,46).

Dr. Dawn Bowers conducted a series of neuropsychological tests on Mr. Ridley, and found that Mr. Ridley did not suffer any memory loss or brain damage as a result of this accident. In fact, according to Dr. Bowers, Mr. Ridley's "memory skills are actually one of his strengths." (Bowers Depo. T.27). She did not detect any deficits with regard to Mr. Ridley's short term memory, and the tests conducted on his long term memory were normal as well. (T.27-28). According to Dr. Bowers, the plaintiff did not fit the general pattern of people who sustained a head injury. In addition, the defendant Safety Kleen submitted the testimony of Steve Schmookel, a physical therapist who did a functional capacities evaluation with regard to Mr. Ridley and Geri Pennachio, a vocational rehabilitation counselor.

Dr. Thornberry was plaintiff's major treating orthopaedic surgeon. According to Dr. Thornberry, he released plaintiff to work as of at least the last visit on March 19, 1993, with no limitations. (Thornberry Depo., T.17,24). Defendant cites this testimony, for the purpose of illustrating that the issue of future lost earnings, and Mr. Ridley's disability were issues hotly contested at trial, recognizing that the weight to be given the conflicting testimony is a jury function. However, it is well within the jury's province to award $75,500.00 as future damages based upon the conflicts in evidence cited. Again, Safety Kleen notes that this discussion is not relevant since there is no question raised in this appeal as to the adequacy of the verdict of $75,500.00. The issue raised is the jury's error in not reducing that amount to present money value.

the verdict specifically directed the jury to "add lines A, B3, Cl, and C2" in calculating Mr. Ridley's damages. They were not instructed to add "B1" which is the total amount of future damages.". Thus, the jury erroneously calculated damages twice.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING A PORTION OF SAFETY KLEEN'S EXPERT TESTIMONY

The district court below held that the trial court did not abuse its discretion in excluding Safety Kleen's expert James Clark from testifying as to his opinions and conclusions as to whether Safety Kleen's driver would have appreciated the danger inherent in this type of marked intersection. In particular, Mr. Clark was not permitted to testify that from a human factors standpoint, the word "stop" painted on the ground is an insufficient que to a driver, as opposed to a sign. (Statement of Facts, March 11, 1994, Vol.II, T.178-179).

The trial court found that Mr. Clark was not qualified to render opinions in this field. The facts at trial indicated that Mr. Clark was a professional engineer, (Statement of Facts, March 12, 1994, Vol.II, T.52), with twenty-six (26) years experience with Massey Ferguson, the last six (6) years as product safety manager. (Statement of Facts, March 12, 1994, Vol.II, T.151). Section 90.702 of the Florida Statutes (1991) defines an expert as a person "qualified by knowledge, skill, experience, training or education." Given the wealth of experience and education Mr. Clark has brought to the courtroom, it was an abuse of discretion for the trial court to find that he was not qualified to testify.

Human factors experts have long been authorized to testify in Florida courts. Welfare v. Seaboard Coastline Railroad Companv, 373 So.2d 886 (Fla. 1979). In Buchman v. Seaboard Coastline Railroad Companv, 381 So.2d 229 (Fla. 1980), this Honorable Court

held that it was error not to allow an expert to testify at the intersection of a railway and a roadway presented a deceptive quality, and thus was dangerous.

As stated above, the test for admissibility is whether the testimony offered is beyond the ordinary understanding of the jury. Of course, this is in accordance with the statutory requirement found in the evidence code. Thus, in instances where a human factors engineer's testimony is sought to be elicited simply on the issues of typical or reasonable human reactions to ordinary events, the testimony will not be allowed. If on the other hand, there are unusual physical conditions or circumstances which would be out of the ordinary, the testimony should be admitted. Public Health Foundation v. Cole, 352 So.2d 877 (Fla. 4th DCA 1977), cert. den., 361 So.2d 834 (Fla. 1978). The use of a human factors expert was approved in instances where the issue was whether the plaintiff would have appreciated the danger of operating a certain type of machinery. Keene v. Chicago Bridge & Iron Company, 596 So.2d 700 (Fla. 1st 1992).

CONCLUSION

The certified question should be answered in the affirmative, and this case should be remanded for a new trial on liability and damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 10th day of Oct., 1994 to: William D. Hall, Jr., Esquire, Attorney for Plaintiffs, Post Office Box 1501, Tallahassee, Florida 32301-1501; Timothy D. Warner, Esquire, Attorney for Defendants/Cross-Defendant, Calhoun County, 221 McKenzie Avenue, Panama City, Florida 32402; Gordon Cherr, Esquire, Attorney for Counterdefendant, Ridley, 101 North Monroe Street, Monroe Park Tower, Suite 900, Tallahassee, Florida 32302 and Jack W. Shaw, Jr., Esquire, 225 Water Street, Suite 1400, Jacksonville, FL 32202-5147; Attorneys for Florida Defense Lawyers Association.

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