IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

Case No. 86,280

SAFETY KLEEN CORPORATION, a foreign corporation,

Respondent.

PETITIONER/COUNTERDEFENDANT HAROLD RIDLEY'S INITIAL BRIEF ON THE MERITS

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INTRODUCTORY NOTE

This Brief on the Merits is filed and served on behalf of Harold D. Ridley, solely in his status as Petitioner/Counter-defendant.

Appellees Harold Ridley and Kathy Ridley were plaintiffs in the lower court. However, Harold Ridley was also a counter-defendant. For purposes of this Brief on the Merits, Petitioner/ Counterdefendant will simply be referred to as Ridley.

Respondent Safety Kleen Corporation was a defendant in the lower court. Safety Kleen was also a counterplaintiff (as against Ridley) and a crossplaintiff (as against Calhoun County). Respondent/Counterplaintiff/Crossplaintiff will be referred to as Safety Kleen.

Calhoun County was a defendant and a crossdefendant (as against Safety Kleen) in the lower court. Appellee/Defendant/ Crossdefendant will be referred to as Calhoun County. Calhoun County is not involved in the present matter.

Reference to matters of record shall be referred to as "R" followed by the appropriate page citation.

Reference to the trial transcript shall be to the date of the testimony followed by the volume and page number. (For example: March 10, Volume 1, page 139.)

Reference to the deposition of witness Sherry Reed is made by identification of the page of the transcript (the video was played to the jury).

Reference to Petitioner's Appendix is by "A" followed by the appropriate page citation.

STATEMENT OF THE CASE

Harold Ridley, in his capacity as Petitioner/Counterdefendant, adopts that Statement of the Case as set out by Harold Ridley and Kathy Ridley in their capacity as Petitioner/Plaintiffs, and also adds the following to the Statement of the Case:

In response to Ridley's Complaint, Safety Kleen raised six (6) affirmative defenses (R 29-42). The First Affirmative Defense alleged that Ridley was comparatively at fault in the operation of his vehicle. The Fifth Affirmative Defense raised a seat belt defense, but only in the guise of mitigation of damages and it was neither suggested nor implied that the failure to utilize a seat belt or safety apparatus in any way related to the actual cause of the collision in question.

Safety Kleen also filed a counterclaim against Ridley for damages allegedly sustained by Safety Kleen. The counterclaim alleged that Ridley operated his motor vehicle negligently, similar to the First Affirmative Defense. The counterclaim did not allege that Ridley's failure to utilize a seat belt or safety apparatus was related in any way to the actual cause of the collision. The jury found for Ridley against Safety Kleen on all issues of liability and no comparative fault was attributed to Ridley, either.

In its initial opinion in this matter (A 1-6), the First District reversed the verdict of the jury and remanded for a new trial on all issues, stating that the jury was entitled to be

informed that violation of the seat belt law (Section 316.614, Fla.Stat.) constituted evidence of negligence (despite the clear terms of §316.614(10), Fla.Stat.). 20 Fla.L.Weekly D42-43. Thereafter various of the parties involved moved for rehearing and/or for clarification. A second opinion was rendered on July 26, 1995, on motion for rehearing and clarification. 20 Fla.L.Weekly D1710.

On rehearing (A 7-23), the majority adhered to its initial opinion but was further of the opinion that failure to utilize functional and available safety apparatus in a motor vehicle could be raised and argued as evidence of negligence in causing an accident or in failing to mitigate damages. However given the seemingly confusing language found in §316.614(10)[1], Fla.Stat., the following question was posed by the majority:

> 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 injuries suffered by the Plaintiff should Florida Standard Jury Instruction 4.11 (violation of traffic regulation as evidence of negligence) be given?

The dissenting and concurring minority noted that the entire seat belt issue raised on appeal by Safety Kleen was really a non-

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[1]Section 316.614(10) states 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 or be considered in mitigation of damages, but such violation may be considered as evidence of comparative negligence, in any civil action."

issue as to liability because Safety Kleen made no contention that Ridley's nonuse of a seat belt in any way contributed to the cause of the accident. It was further noted that Safety Kleen raised the seat belt issue only in the traditional "failure to mitigate damages" theory. While not explicitly stated, the clear implication was that Safety Kleen got the instruction to which it was entitled, Florida Standard Jury Instruction 6.14. The minority then posed its own question:

> Once a trial court agrees to give Florida Standard Jury Instruction 6.14 (pertaining to a plaintiff's failure to use an available and fully functional seat belt), do the provisions of Section 316.614(10), Florida Statutes, require it to give as well Florida Standard Jury Instruction 4.11 (involving a violation of a traffic regulation as evidence of negligence), or a modification thereof, if the record discloses that the theory of the defense in relying on the violation (the nonuse of a seat belt) is solely for the mitigation of the plaintiff's damages caused by his or her failure to use the belt?

Thereafter, the Ridleys filed their Notice to Invoke Discretionary Jurisdiction pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure. On August 24, 1995, this court issued its Order Postponing Decision on Jurisdiction and Briefing Schedule, and ordered briefs to be filed on the merits.

STATEMENT OF THE FACTS

This lawsuit was initiated due to a motor vehicle collision which occurred at the intersection of North Avenue and 21st Street, in Blountstown, Florida, on August 31, 1992 (R 1-9). North Avenue runs east and west. Twenty-first (21st) Street runs north and south (March 12, Volume I, pp. 37, 114). Twenty-first (21st) Street is the "through" street at this intersection (March 12, Volume I, p. 44). Traffic is controlled at this intersection (theoretically anyway) by stop signs and the painted word "STOP", all on North Avenue, to the east and west sides of the intersection (see Plaintiffs' Trial Exhibit 1, 6A, 6B; March 10, Volume 1, pp. 162-163). There are no traffic control devices on 21st Street at this intersection (March 10, Volume I, pp. 191-192). Due to obstruction by vegetation and a fence at the southwest corner of the intersection of North Avenue and 21st Street, this is an intersection with restricted visibility (March 9, Volume I, pp. 125-126; March 12, Volume I, pp. 38, 146, 168; March 14, Volume I, p. 90).

On the date of this accident, Ridley was operating his pick up truck north on 21st Street (March 10, Volume I, p. 191). The record in this case, including all of the trial testimony, failed to disclose even a scintilla of evidence that Ridley was driving improperly. Rather, he was on the through street, driving at an estimated 20-25 miles per hour (March 10, Volume I, p. 196).

The Safety Kleen truck was being operated by its employee, Steven Manley. Manley had been assigned this particular route beginning in April, 1991, through the date of the accident, August 31, 1992 (March 12, Volume I, p. 55). He drove the route periodically (March 12, Volume I, p. 61), using the same truck or type of truck as involved in this accident (March 12, Volume I, p. 123). On the date of this accident, Manley performed a scheduled servicing at the Silcox Garage on 22nd Street (March 12, Volume I, pp. 85, 87, 89). When he left, he drove north on 22nd Street, and made a right turn onto North Avenue, and headed east.

Manley testified that he had never driven on North Avenue before this accident (March 12, Volume 1, pp. 74, 87, 106, 128), yet various witnesses[2] testified to seeing a Safety Kleen truck on North Avenue several times in the months before this accident (deposition of Sherry Reed, pp. 4, 5, 7, 12; March 9, Volume I, pp. 45, 49, 50, 54, 55). For that matter, Safety Kleen could not identify any driver, other than Manley, who ever operated a Safety Kleen truck in the vicinity of this accident site (March 11, Volume I, p. 125).

As Manley drove the Safety Kleen truck east on North Avenue, he should have been confronted with a stop sign before entering the intersection at 21st Street. Unfortunately, that stop sign was missing and had been missing for many months before the accident (March 9, Volume I, pp. 125, 134; March 12, Volume I, pp. 31-32,

[2]Sherry Reed, Woody Griffin, Vicky Harmon.

38-39, 40). However, the letters "S-T-O-P" were painted on North Avenue facing Manley, as he approached the intersection with 21st Street. The letters "S-T-O-P" were faded, but clearly visible (March 9, Volume I, pp. 120, 132-133, 135-136; March 10, Volume I, pp. 162, 163; March 12, Volume I, pp. 33, 44). Manley did not see[3] the painted letters "S-T-O-P" (March 12, Volume II, p. 105), and he proceeded into the intersection without stopping. He did look to his right, but his view of traffic northbound on 21st Street was obscured by a hedge (March 12, Volume I, p. 90).

Mr. Ridley, on the through street, entered the intersection almost simultaneously. According to Safety Kleen's reconstruction expert, Clarke, Ridley's view of the oncoming Safety Kleen vehicle was likewise obscured until 1.32 seconds before actual impact (March 12, Volume II, p. 1). By that time it was physically impossible for either Manley or Ridley to react quickly enough to avoid the accident (March 12, Volume II, p. 1).

[3]Manley did not testify that the letters S T O P were obscured or too faded to see. He simply testified that he did not see them.

SUMMARY OF ARGUMENT

Safety Kleen raised no issue on appeal which related to any aspect of the jury's verdict on liability. The "seat belt defense" was raised only as it related to damages. Therefore, the jury verdict on liability should have been affirmed by the First District Court, instead of remanding the case back on all issues.

As the seat belt defense was raised by Safety Kleen only as it related to the issue of damages, the lower court properly instructed to jury through the use of Florida Standard Jury Instruction 6.14. The clear terms of §316.614(10), Florida Statutes, do not allow Safety Kleen to advise the jury that a violation of §316.614(4)(b), Fla.Stat., may have occurred, and Safety Kleen was not entitled to an additional instruction including the use of Florida Standard Jury Instruction 4.11.

The seat belt defense is properly raised in the context of proximate causation and/or damages reduction. Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984), §316.614(10), Fla.Stat., and Florida Standard Jury Instruction 6.14 are all harmonious and consistent with one another.

ARGUMENT

Point I

A. NONE OF THE APPEALABLE ISSUES RAISED BY SAFETY KLEEN RELATED TO THE DECISION OF THE JURY ON SAFETY KLEEN'S COUNTERCLAIM AGAINST RIDLEY. MOREOVER, THAT VERDICT WAS BASED UPON COMPETENT, SUBSTANTIAL EVIDENCE OF RECORD AND SHOULD HAVE BEEN AFFIRMED BY THE FIRST DISTRICT COURT OF APPEAL.

In its Special Verdict the jury found Safety Kleen to be 100% at fault in causing the traffic accident between its hazardous waste truck and Ridley's Chevrolet S-10 pick up (R 1445-1446). The jury totally exonerated Ridley and Calhoun County, and did not place blame on any unnamed nonparties for causing any portion of this accident.

As to Ridley's driving and his lack of responsibility for causing this collision, there was much competent, substantial evidence of record to support the jury determination. For example, Ridley was on the through street. Ridley was travelling only 20-25 miles per hour. The traffic control devices controlled North Avenue, not 21st Street. The respective drivers' views of 21st Street and of North Avenue were obscured by vegetation and a fence at this intersection such that neither driver could possibly avoid the other once each came into the view of the other.

Ridley was not wearing a seat belt. However, there was no record evidence whatsoever that Ridley's failure to wear his seat

belt affected in any way the cause of and responsibility for the collision.[4]

In its Answer to Ridley's Complaint, Safety Kleen raised six (6) affirmative defenses (R 29-42). The First Affirmative Defense alleged only that Ridley was comparatively at fault in the operation of his motor vehicle. The failure to wear a seat belt was not mentioned anywhere in this affirmative defense.

Safety Kleen's Fifth Affirmative Defense raised the seat belt issue, but only in the guise of mitigation of damages, and Safety Kleen did not suggest nor imply that the failure to utilize a functional and available seat belt proximately contributed in any way to the actual cause of the collision.

Safety Kleen's counterclaim alleged that Ridley operated his motor vehicle in a negligent and careless manner, causing it to collide with its truck. The matter of seat belts or any safety apparatus, or the failure of Ridley to utilize such apparatus as proximately causing the collision was nowhere alleged.

Thus, as to Safety Kleen's counterclaim, the seat belt issue was a nonissue. It was not pleaded by Safety Kleen. It was not argued at trial by Safety Kleen as a proximate cause of this accident. There was absolutely no evidence adduced at trial upon which to base an argument that Ridley's failure to utilize a seat belt or any other safety apparatus had any relationship to the

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[4]In contrast to the issue of possible reduction or mitigation of ensuing damages suffered by Ridley. See Point I-B, below.

cause of the collision, and there could be no way for the jury to apply the seat belt issue to Safety Kleen's counterclaim.[5]

Given all of this, plus the fact that under no view of the evidence could any reasonable juror find Ridley at fault in causing the accident (regardless of the negligence or lack of negligence of Manley), the verdict on the counterclaim and the verdict on the entire liability issue in favor of Ridley should have been affirmed by the First District Court of Appeal.

This court should reverse the decision of the First District Court and reinstate the jury verdict on all issues of liability.

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[5]Or to Safety Kleen's First Affirmative Defense of comparative fault, for that matter.

B. THE FAILURE OF THE LOWER COURT TO GIVE SAFETY KLEEN'S REQUESTED JURY INSTRUCTION ON RIDLEY'S NONUSE OF A SEAT BELT, BASED UPON SECTION 316.614(10), FLORIDA STATUTES, DID NOT DEPRIVE SAFETY KLEEN OF A FAIR TRIAL ON THE ISSUE OF LIABILITY. AS A RESULT, THAT PORTION OF THE JURY VERDICT IN FAVOR OF RIDLEY AND AGAINST SAFETY KLEEN ON LIABILITY SHOULD HAVE BEEN AFFIRMED REGARDLESS OF THE CORRECTNESS OF THE INSTRUCTIONS GIVEN BY THE LOWER COURT.

It was never alleged by Safety Kleen nor was there any evidence adduced at trial that Ridley's failure to wear a seat belt or other safety apparatus proximately caused or contributed to the collision at the intersection of 21st Street and North Avenue. As a result, had Safety Kleen sought an instruction on Ridley's failure to wear a seat belt in violation of §316.610(4)(b), Fla.Stat., relating to any liability issue, such an instruction, if given, would undoubtedly have been inappropriate.

Instead, it is clear from the record that Safety Kleen sought this instruction as it related to Ridley's alleged failure to mitigate damages. This was admitted on the record by counsel for Safety Kleen during the charge conference (March 14, Volume I, p. 125). It is also contemplated by the comment following Florida

Standard Jury Instruction 6.14, and Note no. 3[6] [7]. The lower court instructed the jury pursuant to the standard instruction on this possible mitigation issue (March 14, Volume II, pp. 52-53).

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[6]The comment following Florida Standard Jury Instruction 6.14 reads as follows:

> See Insurance Co. of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984). This charge is appropriate when the seat belt issue is raised in diminution of claimant's damages for claimant's failure to mitigate damages. When the issue is rather whether claimant's failure to use a seat belt contributed as a legal cause to the accident itself, see Pasakarnis ns. 3 and 4, the issue is presented by the comparative negligence charge, 3.8. The Committee expresses no opinion as to the effect of Section 316.614(10), Fla.Stat. (1990), concerning seat belt usage on this instruction.

[7]Note No. 3 states:

> The percentage found by the jury in response to this charge, representing the degree of claimant's total damages caused by claimant's failure to wear a seat belt, is to be multiplied by the net damages otherwise awardable to claimant, independent of seat belt mitigation, after reducing claimant's total damages in the degree his other negligence contributed to the accident. See Pasakarnis, 451 So.2d at 454. For example, assume that defendant was found 80% negligent, claimant 20% negligent and claimant's total damages are $100,000. Claimant's net recovery without regard for seat belt mitigation would be $80,000. If the jury also finds that claimant's failure to wear a seat belt accounted for 10% of his total damages, the court will enter judgment for $80,000 less 10%, or $72,000.

In addition, the issue of damages mitigation for failure to utilize a seat belt was clearly placed before the jury on Question No. 9, Question No. 10 and Question No. 11 of the Special Verdict (R 1445-1454). It was argued vigorously in closing by Safety Kleen (March 14, Volume I, pp. 156-160), but the jury resolved the reasonableness issue in favor of Ridley, and did not reach the matter of damages reduction.

Nevertheless, Safety Kleen argued and the First District apparently agreed that it was entitled to inform the jury that failure to wear a seat belt was a statutory violation, and that a statutory violation was evidence of negligence. The clear terms of the statute require rejection of Safety Kleen's position.

Section 316.614 states as follows:

> (10) 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 or be considered in mitigation of damages, but such violation may be considered as evidence of comparative negligence, in any civil action.

Safety Kleen requested an instruction on the failure to wear a seat belt, coupled with the statutory requirement that one be worn, further coupled with Florida Standard Jury Instruction 4.11:

> Violation of this 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.

Significantly, the Note on Use to Instruction 4.11 states that this charge should not be given if the statute or ordinance in question provides that its violation is not evidence of negligence (emphasis added). Further, deJesus v. Seaboard Coast Line Railroad Company, 281 So. 2d 198 (Fla. 1973), rehearing denied, and its substantial progeny, clearly state that a statutory violation, if proximately related, can only be one of two things: (1) Negligence per se or (2) prima facie evidence of negligence.

Section 316.614(10), by its own clear terms, states that a violation of §316.614 shall not constitute negligence per se nor shall proof of such a violation be used as prima facie evidence of negligence, in any civil action. It reasonably follows that if a violation of §316.614 cannot be used as (1) negligence per se nor (2) prima facie evidence of negligence, then there is no other category of negligence for the violation to fall under or into. Section 316.614(10) will not allow for the jury to be informed that a statutory violation may have occurred.

Nevertheless, the Legislature in its wisdom has not prohibited the use of such a violation before a jury.[8] The failure to use a seat belt can be argued as a matter of simple comparative fault.[9]

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[8]Compare §316.613(3), Fla.Stat., where a total prohibition exists regarding the use of evidence of failure to use a child passenger restraint, also a statutory violation.

[9]This argument can take two (2) different forms. There can be comparative fault in that the failure to wear a seat belt proximately caused or contributed to the accident, although that is rare. It can take the form of comparative fault in the creation or

Regardless of the correctness of the instruction given as opposed to the additional instruction requested, this issue applies to damages only and not to liability. The jury verdict on liability should have therefore been affirmed by the First District Court of Appeal.

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exacerbation of damages, a classic mitigation of damages argument. This is more common. See Parker v. Montgomery, 529 So. 2d 1146-1149 (Fla. 1st DCA 1988). Simply stated, "mitigation of damages" has been subsumed within the larger doctrine of "comparative negligence", similar to "implied assumption of the risk," as stated in Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977), rehearing denied. Please see Point II, infra.

Point II

THE INSTRUCTION GIVEN BY THE LOWER COURT ON THE SEAT BELT DEFENSE IS CONSISTENT WITH PREVIOUS DECISIONS OF THIS COURT AS WELL AS THE CLEAR TERMS OF SECTION 316.614(10), FLORIDA STATUTES.

In the lower court, the seat belt defense was raised by Safety Kleen as it reflected upon the issue of damages and not as to the issue of liability or accident causation. If this court were to conclude that, as a result, the issue on appeal is related to damages only, then that portion of the jury verdict on liability should properly be reinstated in favor of Mr. and Mrs. Ridley. There is no need to answer either question certified by the majority or the minority in this case. 20 Fla.L.Weekly D42-43.

But what of the question of great public importance posed by the majority and of that posed by the minority? It seems that each is really the same question, namely (if one may paraphrase) whether a defendant is entitled to a pre-emptive 4.11 Florida Standard Jury Instruction when there is evidence of failure to utilize a functional and available seat belt and that such failure on the part of the plaintiff may arguably amount to a failure to mitigate damages?

The answer to that question is "NO", based upon the clear terms of §316.614(10), Fla.Stat., and given that Florida Standard Jury Instruction 6.14 adequately instructs a jury on all applicable issues related to the failure to utilize a seat belt. In point of

fact, §316.614(10), Fla.Stat., Florida Standard Jury Instruction 6.14, and the decision of this court in Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984), are all entirely consistent.

Prior to this court's decision in Pasakarnis, the seat belt defense was limited such that evidence of a seat belt's nonuse could be introduced and argued only when that failure contributed to or caused an accident. Brown v. Kendrick, 192 So. 2d 49 (Fla. 1st DCA 1966). This court did not require any statutory enactment to hold that a seat belt defense was available, and further that such a defense could be raised in mitigation of damages:

> Pasakarnis urges that we adhere to the First District's ruling in Brown v. Kendrick and answer the certified question in the negative. He asserts that the single most compelling reason for such a holding is the principle that courts are law interpreting and not lawmaking and argues that we should not act in a peculiarly legislative matter.
>
> We disagree and find this issue particularly appropriate for judicial decision. In the past, this Court has not abdicated its continuing responsibility to the citizens of this state to ensure that the law remains both fair and realistic as society and technology change. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). In fact, the law of torts in Florida has been modernized, for the most part, through the courts.
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> 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. In addition to our emphasis on individual responsibility, the other common thread running through our decisions has been that the law will step in to protect people against risks which they cannot adequately guard against themselves.

In Hoffman v. Jones, we decided that contributory negligence as a complete bar to a plaintiff's action was unjust. We reasoned that contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all parties involved, based upon the circumstances, and stated that it was inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of another to produce the loss. The best argument in favor of comparative negligence we found was that it simply provided a more equitable system of determining liability. We stated that in the field of tort law, the most equitable result to be achieved is to equate liability with fault. In adopting the doctrine of comparative negligence, we explained that under this theory a plaintiff is prevented from recovering "only that proportion of his damages for which he is responsible." 280 So.2d at 436 (emphasis supplied).

We reiterated this principle in Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975),

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Logically and consistently applying these principles to the present case, we hold that the "seat belt defense" is viable in Florida. The seat belt has been proven to afford the occupant of an automobile a means whereby he or she may minimize his or her personal damages prior to occurrence of the accident.

451 So. 2d 451-54 (emphasis in original).

Pasakarnis lead directly to the promulgation of Florida Standard Jury Instruction 6.14 and the special verdict form which was used at trial in this lawsuit.

Thereafter, §316.614 was enacted, in 1986. Subsection four, made it unlawful for any person to operate a motor vehicle in this state unless that person was restrained by a "safety belt."[10] Also, §316.614(10) (1986) stated in full 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.

It is abundantly clear that the Legislature was not prohibiting the use of the seat belt defense in its entirety. If so, it would have so stated as it did in §316.613(3), Fla.Stat., with regard to child restraint devices:

> The failure to provide and use a child passenger restraint shall not be considered comparative negligence, nor shall such failure be admissible as evidence in the trial of any civil action with regard to negligence.

It would logically seem that by enacting §316.614(10), Fla.Stat. (1986), the Legislature thought it improper for a jury to be instructed that a statutory violation per se had occurred, but it is also clear that there was no legislative attempt made to disallow a defendant from arguing the seat belt defense for purposes of either proximate causation or mitigation of damages,

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[10] "'Section 316.614(3)(b) defined "safety belt" as a "seat belt assembly that meets the requirements established under Federal Motor Vehicle Safety Standard No. 208, 49 CFR s. 571.208."

both of which being previously approved as viable legal theories by this court in Pasakarnis,

The holding in Pasakarnis was later clarified by Judge Ervin in Parker v. Montgomery, 529 So. 2d 1145 (Fla. 1st DCA), review denied, 531 So. 2d 1354 (Fla. 1988). Judge Ervin pointed out that the Pasakarnis concept of mitigation of damages, which reduced a plaintiff's damages resulting from his or her failure to use a seat belt, is actually subsumed within the theory of comparative negligence. Parker, 529 So. 2d at 1148 (emphasis added). Judge Ervin wrote that the concept of mitigation of damages and comparative fault were inseparable as those concepts apply to **seat** belt defense cases. Parker, 529 So. 2d at 1150.

The Parker decision referred to an annotation which discussed the nonuse of a seat belt as failure to mitigate damages and remarked that the term "mitigation of damages" has no single meaning but is most commonly used in seat belt defense cases as the doctrine of avoidable consequences where the plaintiff reasonably could have avoided a part or all of the consequences of the defendant's wrongful act. Parker, 529 So, 2d at 1147, citing Annotation, Nonuse of Seat Belt as Failure to Mitigate Damages, 80 A.L.R.3d 1033, 1036, n.1 (1977). Under the Parker analysis, mitigation of damages was just another aspect of comparative fault.

The 1990 amendment of §316.614(10), Fla.Stat., added the following underlined language:

> 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 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. (Supp. 1990).

The above quoted amendment did not alter the common law created by Pasakarnis and did not abolish the defense of "mitigation of damages" as it applied to seat belt defense cases. The Legislature did not return the seat belt defense to the pre-Pasakarnis era. In fact, such an interpretation would fly in the face of the stated public policy of this state that enactment of the Florida Safety Belt Law "is intended to be compatible with the continued support by the state for federal safety standards requiring automatic crash protection. . . ." §316.614(2), Fla.Stat. (1993). Moreover, it seems incomprehensible that the Florida Legislature would enact legislation providing for enforcement of the safety belt law and encouraging compliance with the safety belt usage law (§§316.614(4), (5), (7), (8) and (9)), and then amend the statute to allow for plaintiffs to recover damages for injuries which were caused by their failure to comply with the codified law of this state. Instead, the 1990 amendment was an attempt to clarify the confusion surrounding the use of the seat belt defense in civil cases.

The intent of the Legislature was to have the seat belt defense used solely as evidence of comparative negligence, a concept which includes mitigation of damages. Parker, 529 So. 2d at

1148. The amendment of §316.614(10), Fla.Stat., simply codified the Pasakarnis and Parker holdings and did not operate to change the existing law in Florida as it related to the seat belt defense.

If this court were to interpret the 1990 amendment as abolishing the seat belt defense as it relates to second collision or enhancement of injuries, then the amendment clearly alters the common law as declared by Pasakarnis. Statutes ordinarily should be construed in such a way as to harmonize them with the existing common law. Law Offices of Harold Silver v. Farmers Bank & Trust co., 498 So. 2d 984 (Fla. 1st DCA 1986). Unless a statute unequivocally states that it changes common law or is so repugnant to common law that the two cannot coexist, the statute should not be held to have changed common law. Thornber v. City of Ft. Walton Beach, 568 So. 2d 914 (Fla. 1990); Mostoufi v. Presto Food Stores, Inc., 618 So. 2d 1372 (Fla. 2d DCA 1993), review denied, 626 So. 2d 207 (Fla. 1993).

The amendment to §316.614(10), Fla.Stat., does not expressly state that it changes the common law in regard to the seat belt defense nor is the amendment so repugnant to the common law that the two cannot coexist. There **was** no expressed intention by the Legislature to abolish the seat belt defense, either in the language of the amended statute or in the legislative history which is attached for the Court's reference (see Appendix, pp. 24-30). Neither **was** there an expressed intention to limit the seat belt

defense to cases in which the failure to use an operational seat belt contributed to the cause of the initial accident.

Further, there is a logical way to interpret the amendment so that the common law and the amendment are harmonious, that is, to allow evidence of seat belt nonuse as it relates to the secondary or enhanced injury, to be introduced under the doctrine of comparative negligence. The statute, by its very terms, allows for evidence concerning the failure to use an operational seat belt to be used as "evidence of comparative negligence in any civil action." If the intent were otherwise, the language would read as "evidence of comparative negligence ~~in causing the accident~~ in any civil action."

Presumably, before passing the amendment, the Legislature was aware of that holding in ~~Parker v.~~ Montgomery, 529 So. 2d 1145 (Fla. 1st DCA 1988), that the doctrine of mitigation of damages was subsumed within the doctrine of comparative negligence. The amendment could reasonably be interpreted as excluding mitigation of damages as a separate theory while acknowledging t-hat mitigation of damages is to be subsumed within the concept of comparative negligence.

Finally, the amendment could also be interpreted as the Legislature's objection to the two part jury verdict form which was implemented as a result of Pasakarnis. The amendment merely collapsed this two part reduction in the plaintiff's damages into

a one part reduction which included the seat belt defense in with other comparative negligence considerations.

While the two-tiered procedure was designed to promote the fair consideration of both the liability and damages aspects of the seat belt defense, some have speculated that this procedure allowed the defendant to "double dip" concerning the plaintiff's failure to use a seat belt. If the jury properly follows the instructions as set out in Pasakarnis this would not occur. Nevertheless, there is some support in the language of the amended statute for the seat belt defense to be considered together with other aspects of comparative negligence without the interrogatory jury verdict form required by Pasakarnis.

In conclusion, the 1990 amendment to 5316.614 (10), Florida Statutes, did not abolish the seat belt defense nor restrict its application. The amendment either codified the law as set out in Pasakarnis and Parker or, alternatively, modified the way in which the issue is to be submitted to the jury, by making the seat belt defense an aspect of the comparative negligence charge. The express language of the amendment did not limit its application to **cases** in which the failure to use a seat belt contributed to or caused the initial accident.

In no instance would a charge to a jury under Florida Standard Jury Instruction 4.11 be appropriate. The clear terms of §316.614(10), Fla.Stat. (1990), simply will not allow for that. Yet, the seat belt defense remains viable. Absent a statutory

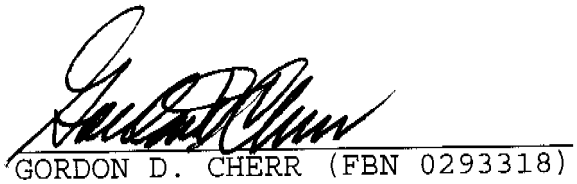
enactment specifically abolishing that defense as it relates to either proximate causation or comparative fault on the partofa plaintiff for causing or contributing to his own injuries (previously termed "failure to mitigate damages"), the seat belt defense is still viable in Florida. Florida Standard 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 (causation).

The instructions given by the lower court to the jury were entirely appropriate, The decision of the First District Court, to remand on all issues, including liability is erroneous given the clear terms and wording of §316.614(10), Fla.Stat. This court should therefore reinstate the jury verdict on all liability issues.

CONCLUSION

The Final Judgment and the jury verdict in this matter should be reinstated by this court,

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail to:

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