IN THE SUPREME COURT OF FLORIDA

HAROLD **RIDLEY** and KATHY **RIDLEY,** his wife,

Petitioners,

v. **CASE NO. 88,280**

SAFETY KLEEN CORPORATION, a foreign corporation,

Respondent,

PETITIONER'S REPLY BRIEF

On Review from the District Court of Appeal, First District State of Florida

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ISSUE I

Considering the false and inconsistent assertions made by Safety Kleen in this appeal it is fortunate this Court does not have to rely upon those assertions to determine exactly what jury instruction was requested on violation of Section 316.614, Florida Statutes: every word of jury charge conference was transcribed so there can be no debate that the issue was not preserved for appeal. Tr. [March 14, Voll 89 (24) through 103 (1 73.

Before this Honorable Court, Safety Kleen argues it: "Did Not Request A Pre-emptive Jury Instruction. " [Answer Brief, p. 15, headnote "D"). However, at charge conference Safety Kleen stated the opposite, to wit:

> [Safety Kleenl: Just for the record, our position is this Statute 316.614 was passed after the drafting of the Standard Instructions by the Supreme Court and passed in response to the decision in the Pasakarnis case and that it in effect **pre-empts** the issue of whether or not it is reasonable for someone not to wear a seat belt. And that the Legislature has determined that all drivers with two exceptions have to wear seat belts . . . . Mr. Ridley is under the mandate of this statute to wear a seat belt and that question of his reasonableness and failing to wear a seat belt has been **legislatively pre-empted** and that issue should not go to the jury. [emphasis added). Tr. [March 14, Vol. II 91 (22-25), 92 (1-12).

Safety Kleen premises its misrepresentation that it requested a standard 4.11 jury charge on Section 316.614, on a portion of the District Court's first opinion which provided: "[the Ridley's] contended during the oral argument that the [standard 4.111 instruction was withdrawn at some point by the defendant.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withdrawn, but rather there is an indication on the form that it was denied." Safety Kleen Corporation v. Ridley, 20 Fla. L. Weekly D842, 843 (Fla. 1 st DCA April 6, 19951.

In making this conclusion, the District Court apparently did not refer to the record transcript of charge conference which clearly shows Safety Kleen ultimately did not request a standard 4.11 instruction based on its theory of negligence per se Tr. [March 14, Vol. II 91-92. To illustrate, the record reflects that when Safety Kleen initially provided a written, standard 4.1 1 instruction on violation of Section 316.614, to Judge Roberts, he responded by stating: "It appears I should give that." Tr, [March 14, Vol. II 91 (1-2). However, instead of allowing the trial court to proceed to consider the use of the standard 4.11 instruction, Safety Kleen then told Judge Roberts that it did not want the issue to "go to the jury," modifying its request to a pre-emptive instruction that Mr. Ridley had violated Section 316,614 and that violation constituted negligence. Tr. [March 14, Vol. II 91 (22-25), 92 (1 -51.

This fact is ultimately confirmed by Safety Kleen's motion for new trial in which it never argued that it requested a standard 4.11 instruction: it claimed categorically that the trial judge failed to pre-emptively charge the jury that Mr. Ridley's failure to use a seat belt was negligence R. 1467-1480, para. 3.

The record clearly demonstrates that Safety Kleen had the opportunity to receive a standard 4.11 instruction' but withdrew to and maintained, both during and after trial, its position of requesting only a preemptive charge of negligence par se. Indeed, Safety Kleen even concedes it requested "a modified jury instruction based on 4.11," [Answer Brief, p. 15, lines 21-221, but then fails to acknowledge that a modified version of standard instruction 4.11 would no longer allow the jury to consider violation of a traffic regulation as evidence of negligence, but rather would instruct the jury that the violation was negligence per se. However, notwithstanding Safety Kleen's public policy arguments, Section 316.614 (10) specifically provides that "[al violation of the provision of this section shall not constitute negligence per se." Moreover, the Legislature's pronouncement is in concert with this Court's prior decisions of Bulldog Leasing Co. v. Curtis, 630 So. 2d 1060 (Fla. 19941, and Insurance Company of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 19841.

The trial judge appropriately refused to instruct the jury with the specific, pre-emptive 4.1 1 instruction he was requested to give on violation of Section 316.614. Neither the protestations of Safety Kleen to the contrary nor a blind eye turned to the record can change what issues were preserved for appellate consideration. Tr. [March 14, Vol. 11 89 (24) through 103 (1 71.

'The Ridleys maintain such an instruction would likewise have been improper based on the record facts. See the text of their initial brief, pages 25 and 26, thereof.

At this point, the Ridleys must take the opportunity to address several misrepresentations made by Safety Kleen in it's Answer brief.

First, the Ridleys have never argued that the trial court's refusal to instruct on 4.11 was "harmless error. " [Answer Brief, p. 11, section "B"). Judge Ervin's dissent raised this issue. Safetv Kleen Corporation v. Ridlev, 20 Fla. L. Weekly 01710, 171 l-l 712 (Fla. 1st DCA July 26, 19951. The Ridley's have always held to the position, supported by the record, that there was no error in refusing to pre-emptively instruct the jury that Mr. Flidley was negligent as a matter of law.

Second, it is inaccurate to claim the issue presented for this Court's consideration is whether, in Safetv Kleen v. Ridlev, 20 Fla. L. Weekly D 17 10 (Fla. 1 st DCA July 26, 19953, the majority position or the dissenting position is the correct interpretation of the "interplay" between Section 316.614, and the "seatbelt defense" [Answer Brief, pps. 10 and 11): neither position is record appropriate nor legally correct.

Third, Safety Kleen further misrepresents that the issues of liability and damages were "intertwine[d]," [Answer Brief, p. 173. This was a vehicular accident case in which the jury's decision that the Safety Kleen truck driver was negligent had nothing to do with damages; neither did the jury's determination that Mr. Ridley's driving was not negligent have anything to do with damages. The

liability portion of the jury's verdict was clear, separate and distinct from the issue of damages.

Safety Kleen misconstrues this Court's decision of Rowlands v. Signal Construction Comoanv, 549 So. 2d 1380 (Fla. 19891. In Rowlands, an issue was presented as to whether a trial court must order a new trial on liability and damages when a jury's percentages of liability were contrary to the manifest weight of the evidence. This Court held that "liability is inextricably bound up with the apportionment of damages under the doctrine of comparative negligence," and remanded the case for a complete retrial due to the liability percentage problem. Id. at 1383.

Safety Kleen refuses to acknowledge that its seat belt defense was not presented as an issue of comparative negligence: the failure to use a seat belt had nothing to do with the accident itself. This defense was only offered in mitigation of Mr. Ridley's damages, such that it had no relation to the negligence of Safety Kleen nor Mr. Ridley's lack of negligence in the collision. As Safety Kleen argued before Judge Roberts: "[I]t is our position that the only issue that should go to the jury is should his failure to wear a seat belt, did it cause or contribute to causing his injuries." Tr. [March 14, Vol. II 92 (12-15). Therefore, the liability verdict both against Safety Kleen and for Mr. Ridley should have been inviolate, notwithstanding the Section 3 16.6 14 issue.

Next, Safety Kleen completely fails to appreciate on whom the burden of proof lay for the seat belt defense. This defense was Safety Kleen's to prove, and not Mr. Flidley's to disprove. While Safety Kleen strenuously argues about the virtues of "buckling up" [Answer Brief, p. 143, it was still obligated to prove at trial Mr. Ridley's failure to use a seat belt was unreasonable inasmuch as the Legislature has stated such a failure is not negligence per se. §316.614(10), Fla. Stat. If the Legislature had wanted to make an individual's failure to wear a seat belt a per se violation of law, it could easily have provided for such. Instead, the statute even prohibits such a violation from being "used as prima facie evidence of negligence in any civil action." §316.614 (10), Fla. Stat. (Supp. 19901.

Safety Kleen argues Mr. Ridley "had no explanation for failing to wear an available seatbelt" [Answer Brief, p. 15, lines 12-131 and further contends that Mr. Ridley was "four miles" from his home at the time of the accident. [Answer Brief, p. 131. However this misrepresents the record. Mr. Ridley's destination at the time of the accident was his mailbox, which was just seconds in front of him on a residential street. Tr. [March 12, Vol. 11 31 (3-6); [Initial Brief, p. 61. Therefore, the jury had to determine whether Mr. Ridley acted unreasonably in not using a seatbelt while on a residential street with a low speed limit, within seconds of stopping his vehicle. The Ridleys again note this argument was made by them to the jury in explanation of why the failure to use a seat belt was not unreasonable. Tr. [March 14, Vol. III 27 (1 -81. Had Mr. Ridley already stopped at

his mailbox and been heading to a highway or heavily traveled road to drive another few miles, the jury would have had a different factual frame of reference in which to decide the reasonableness issue.

The fact that the jury rejected Safety Kleen's argument does not mean it "eviscerat[ed] the seatbelt defense. " [Answer Brief, p. 14, line 201. It simply means Safety Kleen failed to carry its burden of proof that Mr. Ridley's action was unreasonable under the facts and circumstances of this case. Moreover, the jury's finding was not "against the manifest weight of the evidence." [Answer Brief, p. 15, lines 8-91. Safety Kleen has not pointed to any record evidence which goes against the jury's conclusion, only to its opinion that the trial court and jury should have concluded Mr. Ridley's failure to wear a seat belt was unreasonable per se. [Answer Brief, p. 12-141.

And finally, the Ridleys must direct this Court's attention to an incredible misrepresentation made by Safety Kleen at page ten (1 0) of its answer brief, namely: "none of the parties argued in this appeal that the seat belt defense found in Pasakarnis has in any way altered or changed by the adoption of §3 16.6 10 (4) (sic). " Safety Kleen argued to Judge Roberts, and it was the basis of their initial appeal, that Section 316.614, Florida Statutes, was "passed in response to the decision in the Pasakarnis case and that it in effect pre-empts the issue of whether or not it is reasonable for someone not to wear a seat belt. " Tr. [March 14, Vol. II 91 (23-25), 92 (1-3). The District Court's confusion over

the record and record-appropriate issue becomes more understandable in light of Safety Kleen's continual inability to correctly recite the record.

The Ridley verdict was fairly tried, fairly won and should be re-instated. The question of great public importance presented by this record, whether the enactment of Section 316.614, Florida Statutes (Supp. 19863, legislatively pre-empted that portion of Florida Standard Jury Instruction 6.14, allowing a jury to decide whether the failure to use a seat belt is reasonable or unreasonable under the particular circumstances of each case, rendering the failure to use a seat belt negligence per se, should be answered "no."

Issue II

There was no "double calculation" of damages by the jury. The verdict form accepted by Safety Kleen instructed the jury to make awards on line 7(a) [past economic damages of $24,500.00), line 7 (c-1) (past pain and suffering of Mr. Ridley of $25,000.00), line 7 (c-2) [future pain and suffering losses of Mr. Flidley of $50,000.00) and lines 7(d 1-23 [Mrs. Flidley's loss of consortium damages totaling $50,000.00). These figures add up to $149,500.00. The lone figure left is on line 7 (b-3) [present value of future economics of $100,000.00).

Therefore, the jury awarded separate dollar amounts on lines 7 (a), 7 cc-l I, 7 to-21 and 7 (d 1-2) for Mrs. Ridley to which no error may be assigned. The only possible issue is whether this case must be remanded to the trial court to empanel a jury solely to determine the present value of Mr. Ridley's future economic damages, despite the fact that the trial judge determined that the jury's verdict, as a whole, was not improper, and denied all post-trial motions attacking the verdict. R. 1622-1623.

Safety Kleen has misconstrued the decision of Buraess v. Mid-Florida Service, Inc., 609 So. 2d 637 (Fla. 4th DCA 19921, which it cites for the proposition "it is impossible for the present money value to exceed an award of future economic damages. " [Answer Brief, p. 231. Importantly, the Court in Buroess stated that a jury's mistaken calculation of one element of damages "goes neither to the foundation of the case nor the merits of the cause of

action. " Id. at 638 [citing to Sanford v. Rubin, 237 So. 2d 134 (Fla. 197011. More importantly, however, the District Court held that a:

> "jury's failure to arrive at a present value calculation that is smaller than the future economic damages awarded does not necessarily prove a failure to follow the court's instructions. Such a figure is consistent with an intentional determination that the present value is equal to future damages by application of a 'total offset' calculation. In Delta Airlines, Inc. v. Aaeloff, 552 So. 2d 1089 (Fla. 19891, the Supreme Court recognized such a method of calculation by which future inflation is presumed to offset any future return on a present investment. " Id.

If the present value of $100,000.00 over forty years can be $1 00,000.00, it is not an impossibility for a jury to determine that a person would need $100,000.00 now to maintain $75,000.00 worth of present value buying power far into an uncertain economic future. Therefore, the trial judge appropriately upheld the jury's award of present value, future economic losses of $1 00,000.00, and that portion of the jury's verdict should be reinstated along with the remaining dollar awards to the Ridleys.

Issue III

Safety Kleen argues the trial judge's refusal to allow certain "human factor" testimony from its expert engineer, James Clark, was error. Mr. Clark's testimony and the court's ruling on this issue appear at Tr. [March 12, Vol. II 177 (7) through 182 (6).

Specifically, Safety Kleen had a photograph of the word "Stop," as it existed at the intersection in question on the day of the accident, and wanted to ask Mr. Clark if the approaching Safety Kleen truck driver should have seen what was depicted in the photograph. Tr. [March 12, Vol. II 177 (2-9).

The photograph was in evidence for the jury's consideration and review. Tr. [March 12, Vol. II 179 (17-18); Ridley trial exhibit 6B.

As Safety Kleen notes, but ignores "where a human factor's 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. " [Answer Brief, p. 343. Whether the Safety Kleen truck driver should have seen the word "Stop" at an intersection was simply an issue of reasonable human reaction to an ordinary event, and the Ridleys appropriately objected. Tr. [March 12, Vol. II 178 (1 -31; Buchman v. Seaboard Coastline Railroad Co., 381 So. 2d 229 (Fla. 19801.

No error occurred in allowing the jury to look at the photograph and decide for themselves whether the truck driver could have seen the word "Stop. "

Conclusion

Safety Kleen stands before this Honorable Court and contends the trial judge refused to instruct the jury on it's theory of the case by virtue of not giving Florida Standard Jury Instruction 4.11. [Answer Brief, pps. 1 l-l 21. However, nothing could be further from the truth. As demonstrated by the record at trial and it's own brief, Safety Kleen's theory at trial was that Mr. Ridley's failure to use a seat belt was unreasonable as a matter of law and conclusively negligence. Safety Kleen, in fact, withdrew the standard instruction from Judge Robert's consideration. Accordingly, it must be concluded this issue was not preserved for appeal and was improperly considered by the District Court as a basis for reversal.

The trial judge's ratification of the jury's present value award of future economic damages should be upheld as well, and the Ridley jury verdict should be reinstated in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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