

**FILED**

SID J. WHITE

JUL 31 1985

CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 67,303

RODNEY KERFOOT,

Petitioner,

vs.

(DCA-4 NO. 84-1218)

CHARLIE EARNEST WAYCHOFF,  
et al.,

Respondents.

\_\_\_\_\_ /

ON CERTIFIED QUESTION FROM THE FOURTH DISTRICT  
COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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and

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PREFACE

Petitioner was the plaintiff in the trial court and will be referred to as the petitioner. Defendant Severson was one of the defendants and will be referred to as defendant. Other parties will be referred to by their proper names.

The following symbol will be used:

R - Record

CERTIFIED QUESTION

DOES AN AUTOMOBILE DRIVER WHO, BY SIGNALS, RELINQUISHES HIS RIGHT OF WAY TO ANOTHER VEHICLE, OWE ANY DUTY TO REASONABLY ASCERTAIN WHETHER TRAFFIC LANES, OTHER THAN HIS OWN, WILL SAFELY ACCOMMODATE THE OTHER VEHICLE?

STATEMENT OF THE FACTS

The facts are accurately set forth in the opinion of the Fourth District. To summarize, defendant was traveling north on U.S. 1 in the inside lane and stopped at a point when traffic was moving slowing. Mr. Waychoff, who was driving south on U.S. 1, was attempting to make a left turn in front of defendant into a driveway. Defendant gave a hand wave for Mr. Waychoff to turn left in front of him. Mr. Waychoff proceeded to turn and plaintiff, who was driving north on a motorcycle in the outside lane of U.S. 1 collided with Waychoff. Plaintiff sued defendant for

negligently signaling Waychoff to make a left turn, alleging that this proximately caused plaintiff's injuries. The trial court entered a directed verdict in favor of the defendant on the theory that the defendant only meant, by his signal, that the defendant would remain stationary so that Waychoff could turn left and that defendant did not mean the path was clear for defendant to turn left. The Fourth District affirmed, acknowledging the question was very close, and certified it as being of great public importance.

#### SUMMARY OF ARGUMENT

One who voluntarily undertakes something, even gratuitously, is under a duty to exercise reasonable care. Thus a motorist who waives another motorist on, is liable if he does so in a negligent manner. The trial court, in directing a verdict in the present case, and the Fourth District, in affirming, erroneously determined as a matter of law that the defendant is in the present case only meant he was relinquishing his own right-of-way when he waived on another motorist and caused an accident. Whether the defendant, in waiving the other motorist on, acted reasonably under the circumstances, was for the jury to determine. It was therefore error to grant a directed verdict in favor of the defendant.

ARGUMENT

CERTIFIED QUESTION

DOES AN AUTOMOBILE DRIVER WHO, BY SIGNALS, RELINQUISHES HIS RIGHT OF WAY TO ANOTHER VEHICLE, OWE ANY DUTY TO REASONABLY ASCERTAIN WHETHER TRAFFIC LANES, OTHER THAN HIS OWN, WILL SAFELY ACCOMMODATE THE OTHER VEHICLE?

The opinion by the Fourth District, and the manner in which the certified question is worded, makes an unwarranted assumption. The Fourth District has assumed that all the signaling defendant was doing was indicating he was relinquishing his right of way and that this was the only manner in which any reasonable person, such as Mr. Waychoff, could have interpreted this signal. Defendant, who waived Mr. Waychoff on, testified:

Question: ... You motioned him to come ahead and make the turn?

Answer: Yes.

Question: And at that point were there any vehicles immediately to the right of you sitting in what would be the lane closest to the curb, heading north on U.S. 1?

Answer: Not for me to see, because I didn't notice. I have a mirror, but I didn't pay any particular attention. I just let him go. I figured if I cleared his way, he could go across. I just let him go.... (R 56).

In affirming a directed verdict in favor of defendant, notwithstanding his signal caused this accident, the Fourth District has held as a matter of law that:

1. The signaling motorist only meant he was waiting and
2. The motorist responding to the signal could only so have interpreted it.

These are jury questions, not questions of law for the court to determine. Certainly Mr. Waychoff, who turned left, contributed to this accident. Can it be properly held, as a matter of law, that defendant, who signaled Mr. Waychoff to proceed, did not in any way cause this accident?

It is well established both in this state and other jurisdictions, that one who voluntarily undertakes to do something, even gratuitously, is under a duty to exercise reasonable care. Barfield v. Langley, 432 So.2d 748 (Fla. 2d DCA 1983).

The Fourth District recognized that the trend in other jurisdictions which have been confronted with the issue is to impose liability on the motorist giving the signals. Annot., 90 A.L.R.2d 1431 (1962). The very case cited by the Fourth District for the majority view, Panitz v. Orange, 518 P.2d 726 (Wash. 1973) presented a very similar situation. A bus driver waived a passenger who was disembarking and the

passenger assumed the waive meant she could safely walk in front of the bus and cross the street. She was struck by a motorist passing the bus and sued the bus company. Plaintiff testified she interpreted the wave from the bus driver to mean it was safe for her to cross the street. The bus driver testified he was just waving goodbye. It was held the bus driver's negligence was for the jury to determine.

In the present case the Fourth District has held as a matter of law that the motorist giving the signal only meant he was not proceeding, although Mr. Waychoff interpreted that signal to mean it was safe for him to proceed. The question is whether defendant acted reasonably under the circumstances. This is an issue for the jury to determine. Certainly conflicting inferences can be drawn as to what the defendant meant when he waived Mr. Waychoff on.

The Fourth District cited Government Employees Insurance Company v. Thompson, 351 So.2d 809 (La. 1977), as representative of the view that there can be no recovery under these facts. In that case the court stated:

Plaintiffs argue that Mr. Decuir was negligent in 'leading Thompson to believe that he could safely make the turn when he could not and in encouraging Thomas to leave a position of safety to one of peril'. We cannot agree. Mr. Decuir's signal was

intended to give Mr. Thomas permission to pass in front of Mr. Decuir's stopped truck. Mr. Thomas cannot be relieved thereby of his obligation to keep a proper lookout for oncoming traffic in other lanes of traffic. His misinterpretation of Mr. Decuir's courteous gesture cannot serve to render Mr. Decuir guilty of negligence proximately causing the ensuing accident. [cites omitted]

It is submitted that the Louisiana court was in error, just as was the Fourth District in the present case, because the court held as a matter of law that there could only be one interpretation of this signal.

The other case cited for the minority view, Devine v. Cook, 279 P.2d 1073 (Utah 1955), suffers from the same faulty reasoning. The court decided as a matter of law how the signal should be interpreted rather than permitting the jury to determine what the signaling motorist meant and what the motorist responding to the signal could have reasonably interpreted the gesture to mean.

Since the Fourth District recognized the trend is to submit the issue to the jury, we shall not extensively discuss the cases from other jurisdictions which so hold.

As the Maryland Court of Appeals stated in Dix v. Spampinato, 278 Md. 34, 358 A.2d 237 (1976), on page 239 of its opinion:

[T]here are cases which deal with situations where a plaintiff places himself in a position of peril in response to verbal directions or hand signals given by others, but they are conflicting. The Court of Special Appeals, after a careful analysis of the cases, 28 Md.App. at 901-106, 344 A.2d 155, found that, of the 11 jurisdictions which had considered the negligence vel non of the signaling operator of a motor or other vehicle, six jurisdictions have concluded under the facts of each case that it is a jury issue. Spagnola v. New Method Laundry Corp., 112 Conn. 399, 152 A. 403 (1930); Sweet v. Ringwelski, 362 Mich. 138, 106 N.W. 2d 742 (1961); Gamet v. Jenks, 388 Mich.App. 719, 197 N.W.2d 160 (1972); Riley v. Board of Education, 15 A.D.2d 303, 223 N.Y.S.2d 389 (1962); Cunningham v. Walsh, 53 R.I. 23, 163 A. 223 (1932); Armstead v. Holbert, 146 W.Va. 582, 122 S.E.2d 43 (1961); Wulf v. Rebbun, 25 Wis.2d 499, 131 N.W.2d 303 (1964).

On the other hand, five jurisdictions have held that the liability of the signaling operator should not be submitted to the jury: Hill v. Wilson, 124 Cal.App.2d 472, 268 P.2d 748 (1954); Harris v. Kansas City Public Service Co., 132 Kan. 715, 297 P. 718 (1931); Charles v. Sullivant, 159 So. 756 (La.App. 1935); Van Jura v. Row, 175 Ohio St. 41, 191 N.E.2d 536 (1963); Devine v. Cook, 3 Utah 2d 134, 279 P.2d 1073 (1955). (Emphasis in original).

In addition to the above cases holding that it is a jury question, the following cases also so hold: Miller v. Watkins, 355 S.W.2d 1, 4-5 (Mo. 1962) and Panitz v. Orange, 10 Wash.App. 317, 518 P.2d 726 (1973).

A number of the cases in the minority view, which defendant relied on in the Fourth District and will undoubtedly cite here, involve factual situations in which the driver proceeding because of the signal was the person injured. He was held barred from seeking recovery because of contributory negligence, in jurisdictions which do not have comparative negligence.

In Kuehner v. Green, 436 So.2d 78 (Fla. 1983), this Court was recently confronted with an issue involving assumption of risk in contact sports, and stated on page 80:

... First, the jury must decide whether the plaintiff subjectively appreciated the risk giving rise to the injury. ...

If the plaintiff is found not to have subjectively appreciated the risk, the trier of fact must determine, after reviewing all evidence, whether this plaintiff should have reasonably anticipated the risk involved. ...

In the present case it was not the function of the trial or appellate court to determine what the defendant meant when he waived Mr. Waychoff to make his left turn in front of him. Defendants testimony was not clearly to that effect and in any event his credibility was for the jury to decide. It is undisputed his signal caused this accident. If Mr. Waychoff misinterpreted the signal that does not, as a matter of law, absolve defendant. What defendant meant by

this signal and whether Mr. Waychoff was entitled to rely on it were for the jury to determine, not the court.

CONCLUSION

The directed verdict should be reversed.

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By   
LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished, by mail, this 29<sup>th</sup> day of July, 1985, to:

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