IN THE SUPREME COURT OF FLORIDA

SYBIL EPPLER,	)	
	)	
Petitioner.	)	CASE NO.: 91,066
	)	
vs.	)	
	)	
TARMAC AMERICA, INC.,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S ANSWER BRIEF

On Review from the First District Court of Appeal

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CASES:

February 17, 2000

Enclosed please find an original and seven copies of Respondent's Answer Brief for filing in the above-captioned appeal. I am also enclsoing a diskette in WordPerfect 6.1 format

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

Petitioner, Sybil Eppler, Appellant/Plaintiff below, will be referred to herein as "Eppler". Respondent, Tarmac America, Inc., Appellee/Defendant below, will be referred to herein as "Tarmac". References to the Record on Appeal will be made by the use of the symbol "R:" followed by the appropriate record citation. References to the Transcript of Proceedings will be made by use of the symbol "T:" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Tarmac does not necessarily disagree with Eppler's statement of the case or statement of the facts. However, Tarmac would point out that the jury verdict form which was utilized by the jury herein was approved by Eppler's counsel and required that the jury determine: Was there negligence on the part of Defendant Tarmac America, Inc., which was a legal cause of damage to Plaintiff Sybil Eppler? The jury answered this question in the negative (R: 42-44).

Furthermore, the testimony of Mr. Morris, the Tarmac driver, was that he had stopped approximately four car lengths before the intersection of Baymeadows Road and Southside Boulevard to wait for a red light. He was driving a partially loaded concrete truck and was approximately ten to eleven feet behind Eppler. When the light changed, the traffic in front of him started to move and he started off in first gear. (T: 370-71). He had obtained a speed of between five and seven miles an hour when Eppler, all of a sudden, "slammed" on her brakes. He applied his brakes but was unable to stop before hitting Eppler's vehicle. (T: 370-73). He testified that Eppler slammed on her brakes without any reason (T: 385). While there was evidence that the accident occurred during rush hour on

a relatively busy thoroughfare, there was no testimony with regard to "stop and go traffic" per se.

SUMMARY OF ARGUMENT

It is respectfully submitted that the question certified by the District Court of Appeal should be answered in the affirmative. Under the particular facts of this case, the explanation given by the Tarmac driver for the accident was reasonable and was sufficient to dissipate the presumption of negligence which normally attaches in a rear-end collision. The driver's testimony that Eppler had started forward when the traffic signal turned green and then, all of a sudden, slammed on her brakes for no apparent reason clearly constitutes a sufficient explanation for the cause of the accident which would require that the issue of the respective party's negligence be submitted to the trier of fact for resolution.

Moreover, contrary to Eppler's contention, the instant case does not expressly and directly conflict with prior decisions of other appellate courts. Rather, the cases are clearly distinguishable based upon the specific facts of each case. Additionally, the appellate court below correctly followed established caselaw in determining that Tarmac had presented a reasonable explanation of a sudden and unexpected stop which dissolved the presumption of negligence normally attaching to the rear driver in a rear-end collision.

Finally, even if this Court were to determine that Tarmac did not present sufficient evidence to rebut the presumption of negligence, Eppler would not be entitled to a directed verdict on the issue of liability. In order to be entitled to a directed verdict on the issue of liability, Eppler would have had to establish that there was no factual dispute with regard to negligence and aproximate causation. In this case, however, Tarmac hotly disputed that Eppler had suffered any damages as a result of the subject accident. Rather, Tarmac

presented evidence that Eppler's injuries, if any, either pre-existed the subject accident or were the result of a subsequent accident. Accordingly, if it is determined that Tarmac did not present sufficient evidence to rebut the presumption of negligence, Eppler would be entitled, at most, to a directed verdict on the issue of negligence. A jury issue would still exist with regard to

proximate causation.

It is respectfully submitted that the District Court of Appeal decision below correctly applied controlling case law to the particular facts presented and that this Honorable Court should answer the certified question in the affirmative.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE EVIDENCE OF EPPLER'S SUDDEN UNEXPECTED STOP IMMEDIATELY AFTER STARTING FORWARD AT THE GREEN LIGHT CONSTITUTED SUFFICIENT EVIDENCE TO OVERCOME THE PRESUMPTION OF NEGLIGENCE WHICH ATTACHES IN A REAR END COLLISION.

The First District Court of Appeal correctly determined that the Defendant had presented sufficient evidence to establish a reasonable explanation for the occurrence of the subject rear-end accident to eliminate the presumption of negligence normally attaching to the rear driver. The Tarmac driver testified that Eppler made a sudden and unexpected stop after beginning to move forward in response to a green traffic signal. This evidence of a sudden and unexpected stop was, as found by the both trial court and the District Court of Appeal, sufficient to dissipate the presumption of negligence. Accordingly, it is respectfully submitted that the certified question posed by the District Court of Appeal

should be answered in the affirmative.[1]

Tarmac recognizes that, in rear end collisions, there is a presumption of negligence against the rearward driver. As noted by Eppler, however, the presumption may be rebutted by evidence of a sudden and unexpected stop of the forward vehicle. See, e.g., Klipper v. Government Employees Insurance Co., 622 So.2d 1141 (Fla. 2nd DCA 1993); Tozier v. Jarvis, 469 So.2d 884 (Fla. 4th DCA 1985); Chiles v. Beaudoin, 384 So.2d 175 (Fla. 2nd DCA 1980). If the rear driver produces evidence which fairly and reasonably tends to show that the real fact is not as presumed, the presumption dissipates and a directed verdict on the issue of negligence is improper. Yellow Cab Company of St. Petersburg, Inc. v. Betsey, 21 FLW D2509 (Fla. 2nd DCA, November 20, 1996). As previously noted by the First District Court of Appeal, in order to create a jury issue in a rear end accident, it is not necessary for the rearward driver to prove that the accident was unavoidable. Rather, the rearward driver must only offer a substantial and reasonable explanation for his actions. Sistrunk v. Douglas, 468 So.2d 1059 (Fla. 1st DCA 1985); Whitworth v. Cuchens, 397 So.2d 357 (Fla. 1st DCA 1981). See also, Conda v. Plain, 222 So.2d 417 (Fla. 1969); Price v. McClain, 484 So.2d 1316 (Fla. 1st DCA 1986) (Judge Zehmer's

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[1] Eppler claims that the certified question posed by the District Court of Appeals is improperly worded. Eppler attempts, therefore, to re-word the certified question. The District Court of Appeal correctly determined that the issue presented was whether a sudden unexpected stop of the forward vehicle immediately after it started forward at a green light was a sufficient explanation for the cause of the accident to overcome the presumption of negligence. Eppler, however, is apparently dissatisfied with this phrasing and claims that the question should be whether a sudden stop in heavy, stop and go rush hour traffic on a busy highway is unexpected. Tarmac submits that the question properly before this Court is as phrased by the District Court of Appeal and that Eppler's attempt to revise the certified question should be rejected.

dissenting opinion); Liriano v. Gonzalez, 605 So.2d 575 (Fla. 3rd DCA 1992).

Whether a Defendant's explanation as to the cause of a rear end accident is sufficiently substantial and reasonable so as to defeat a Motion for Directed Verdict and require submission of the issue to the jury is within the discretion of the trial judge who is in the best position to make such determination. The trial judge's ruling comes to the Appellate Court with a presumption of correctness. See, e.g., Sistrunk v. Douglas, supra.

In this case, Morris, Tarmac's driver, testified that he was behind Eppler in the line of cars waiting at a red light. The light turned green and the cars in front of him began to move. Accordingly, he began to accelerate his vehicle. For no apparent reason, Eppler slammed on her brakes and stopped without warning. Morris attempted to stop but was unable to do so prior to impacting Eppler's vehicle at a low rate of speed. It is respectfully submitted that, as determined by the Trial Court, this evidence was sufficient to rebut the presumption of negligence and to create a jury issue. Accordingly, the Trial Court correctly denied Eppler's Motion for Directed Verdict.

This case is similar to that of Whitworth v. Cuchens, supra, in which the Court concluded that the evidence presented an issue of fact to be determined by the jury and, therefore, that the Trial Court had correctly denied the Plaintiff's Motion for Directed Verdict. In that case, Plaintiff was struck from the rear while traveling over a bridge. There was construction on the other side of the bridge and cars in front of Plaintiff had backed up and stopped. Plaintiff also stopped and was struck in the rear by Defendant's vehicle. The Defendant apparently testified that the Plaintiff had stopped so suddenly that he was unable to avoid the accident. The Court determined that this and other unspecified conflicting testimony sufficiently rebutted the presumption of negligence and presented a

jury issue.

Similarly, in Chiles v. Beaudoin, supra, the Court determined that a jury issue was presented under facts similar to those presented in this case. In Chiles, Defendant rear ended Plaintiff when a car in front of Plaintiff slowed to turn left, causing Plaintiff to slow or stop. Defendant had apparently taken his eyes off of the road for a second and, when he looked forward, the Plaintiff's van was slowing down. He attempted to avoid a collision but was unsuccessful. The Court noted that, where a defendant shows that he was proceeding in a line of vehicles and the sudden and unexpected stop of the vehicle in front of him precipitated an accident, the presumption of negligence is dissipated. 384 So.2d at 385. The Court determined that the testimony of the driver was sufficient to create a question of fact which dissipated the presumption of negligence. Id. at 177.

The presumption of negligence in a rear end collision was sufficiently rebutted under circumstances similar to those presented here in McCloud v. Swanson, 21 FLW D2289 (4th DCA October 23, 1996). In that case, the rear driver testified that she was paying attention but that the forward driver had made a sudden change of lanes and unexpected stop and that she was unable to avoid the collision. The Appellate Court noted that, where there was at least some evidence of negligence on the part of the forward driver, the question of fault should be submitted to the jury. Id. at 2290. The Court further noted that, where there was positive evidence that the forward driver made a sudden stop at a time and place where it could not reasonably be expected, a fact issue was created. The Court concluded that, while the rear driver's testimony with regard to the sudden stop was slight and somewhat inconsistent, such testimony was sufficient to rebut the presumption of negligence and required submission of the issue to the jury. Id. See also, Edward M.

Chadbourne, Inc. v. Van Dyke, 590 So.2d 1023 (Fla. 1st DCA 1991); Davis v. Chips Express, Inc., 21 FLW D698 (Fla. 1st DCA March 20, 1996); Yellow Cab Company of St. Petersburg, Inc., supra, (slow moving traffic on a heavily congested bridge and rear driver's testimony that he was unable to avoid vehicle which pulled in front of him due to sudden braking of semi trailer was sufficient to rebut presumption of negligence).

It is respectfully submitted that Mr. Morris' explanation of the circumstances of the accident was sufficient to dissipate the presumption of negligence arising from the rear end collision. Mr. Morris explained that Eppler made a sudden and unexpected stop after beginning to move forward when the light turned green. This testimony of a sudden and unexpected stop gives rise to a jury issue with regard to Mr. Morris' negligence. The Trial Court's determination that a jury issue was created is supported by the evidence and should not be disturbed on appeal.

Eppler further argues that, in order to dissipate the presumption of negligence attaching to the rearward driver, evidence of a sudden or abrupt stop is not enough. Eppler argues that the evidence must be of an unexpected stop which can be in the form of evidence of an illegal stop or unexpected lane change. In this regard, Eppler argues that a sudden stop in heavy stop and go traffic is expected and is insufficient to dissipate the presumption of negligence and that some sort of illegal stop is necessary on the part of the forward driver.

It is respectfully submitted that there is no requirement that the rear driver present evidence of an illegal stop by the forward driver in order to be entitled to a rebuttal of the presumption of negligence. However, even if evidence of an illegal act on the part of the forward driver is necessary, it is arguable that Eppler's stopping in the roadway at a green

traffic signal is in violation of the state motor vehicle laws. In this case, the testimony was presented that Eppler started forward after the traffic signal turned green and then, for no apparent reason and, without warning, slammed on her brakes, causing the Tarmac driver to collide with her vehicle. Arguably, Eppler's actions could fairly be characterized as in violation of § 316.1945(10)(1)(a)(10), Florida Statutes which prohibits the stopping of a motor vehicle at any place where official traffic control devices prohibits stopping. In this case, since the traffic light had turned green, arguably Eppler was prohibited from stopping on the roadway. See e.g., Catier v. Roberson, 423 So.2d 454 (Fla. 1st DCA 1982) (issue of fact existed as to whether bus was properly stopped within intersection in violation of § 316.1945, Florida Statutes, so as to relieve rear driver of presumption of negligence). According, to the extent that Eppler's conduct can be characterized as in violation of Chapter 316, Florida Statutes, there was evidence of an illegal stop which would dissipate the presumption of negligence.

The certified question posed by the District Court of Appeals should be answered in the affirmative. Based upon relevant caselaw, a sudden unexpected stop such as that made by Eppler clearly constitutes the type of conduct which has previously been found sufficient to rebut the presumption of negligence attaching in a rear-end collision. Accordingly, the certified question should be answered in the affirmative.

II. THE DECISION UNDER REVIEW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF TOZIER V. JARVIS, 469 SO.2D 884 (FLA. 4TH DCA 1985); PIERCE V. PROGRESSIVE INS. CO., 582 SO.2D 712 (FLA. 5TH DCA 1991); AND KAO V. LOREDO, 617 SO.2D 775 (FLA. 3RD DCA 1993) .

Tarmac respectfully submits that the decision under review does not, as argued by

Eppler, expressly and directly conflict with the decisions of *Tozier v. Jarvis,* 469 So.2d 884 (Fla. 4th DCA 1985); Pierce v. Progressive Ins. Co., 582 So.2d 712 (Fla. 5th DCA 1991), rev. denied, 591 So.2d 183 (Fla. 1991); and Kao v. Loredo, 617 So.2d 775 (Fla. 3rd DCA 1993). Each of these cases, as well as the decision under review, applied the same rule of law to the particular facts presented. The fact that the courts may have reached different results in the cases does not demonstrate conflict. Rather, the differing results reflects the fact that each of the cases was decided based upon the particular facts presented.

The Tozier case cited by Eppler as being in conflict with the instant decision is, in fact, distinguishable. The rearward driver in that case indicated that he did not see the car in front of him, had looked in his rear view mirror for two to six seconds and, when he looked back, saw the vehicle for the fist time. The driver further speculated that the Plaintiff may have been backing out of a parking lot onto the roadway. The court determined that this testimony did not constitute a substantial and reasonable explanation for the collision which would absolve the rear driver of the presumption of negligence.

In this case, the testimony of the sudden and unexpected stop in the middle of the road after moving forward at a green light is factually distinguishable from the testimony of the *Tozier* driver to the effect that he was looking in his rear view mirror and didn't even see the car in front until it was too late to avoid a collision.

As was stated by the court in Tozier, *supra*, where there is positive evidence that the lead driver made a sudden stop or suddenly switched lanes at a time and place where it could not reasonably be expected, a factual issue is created with regard to the lead driver's contribution to causing an accident. 469 So.2d at 886. In this case, clearly,

Eppler's unexplained slamming on her brakes after moving forward at the green light cannot fairly be characterized as "expected."

Similarly, the Pierce decision, supra, does not provide the basis for conflict with the instant case. In Pierce, the collision occurred when traffic approaching a red traffic signal stopped abruptly and a chain reaction accident occurred. The court in that case rejected the argument that a sudden stop of the forward vehicle rebutted the presumption of negligence attributable to the rearward vehicle. The court indicated that it was insufficient to merely present evidence of an abrupt stop by a preceding vehicle. Rather, there must be evidence of a sudden stop at a time and place where it cannot reasonably be expected by the following driver which would create a factual issue. This decision is not in conflict with District Court decision below.

The holding in Pierce appears to be based upon the fact that it could reasonably be expected that a car would make an abrupt stop while approaching a red light. In this case, however, the light was green and cars had started forward. The testimony from the Tarmac driver was that there was no reason for Eppler to stop. Accordingly, Eppler's stop can clearly be characterized as a sudden and abrupt stop at a time and place where it would not reasonably be expected for her to stop. Clearly, it is not reasonable or expected that a driver will stop at a green light after beginning to move forward.

Finally, the instant case does not expressly and directly conflict with the decision of Kao, supra. The evidence in the *Kao* decision was that Kao had stopped abruptly in stop and go traffic. There was no evidence to the effect that the stop was at a time and place where it could not reasonably be expected to occur. Again, in this case, the evidence was that the Tarmac driver did not reasonably anticipate or expect that Plaintiff would start

forward upon the light turning green and then for no apparent reason suddenly slam on her brakes.

In summary, the instant decision does not expressly and directly conflict with the decisions cited by Eppler so as to confer conflict jurisdiction upon this Court. The District Court below properly applied the correct rule of law in determining that, under the particular facts presented herein, the presumption of negligence was adequately rebutted so as to require the issue of negligence to be presented to the jury.

III. EPPLER WAS NOT ENTITLED TO A DIRECTED VERDICT ON THE ISSUE OF LIABILITY.

Even if it is assumed that Tarmac did not present sufficient evidence to dissipate the presumption of negligence attaching in rear end collisions, it is respectfully submitted that Eppler was, nevertheless, not entitled to a directed verdict on liability. Tarmac hotly contested the causal connection between the subject accident and the damages complained of by Eppler. (T: 623-26). There was conflicting testimony with regard to the causation issue and it was asserted that Eppler's damages were either pre-existing or were caused by a subsequent motor vehicle accident. (T:302, 308, 326-28). Eppler did not ask for a directed verdict on the issue of negligence but, rather, asked for a directed verdict on the issue of liability which encompasses both negligence and causation. As this Court is well aware, in order to be held liable to Plaintiff, the Defendant must be proven negligent and such negligence must be the legal cause of damage complained of by Plaintiff. See, e.g. McCain v. Florida Power Corp., 593 So.2d 500 (Fla. 1992) (a defendant might be under a legal duty but may still not be liable for negligence because proximate causation cannot be proven). Indeed, the jury verdict utilized in this case recognized this fact and

requested that the jury determine both whether there was negligence and whether such negligence was the legal cause of damage suffered by Plaintiff. This question was answered in the negative.

A similar issue was addressed by this Court in the case of Chomonte v. Ward, 103 So.2d 635 (Fla. 1958), wherein the Court affirmed a verdict for the defendant where the defendant was at fault for backing his vehicle into the side of plaintiff's car. The Court stated:

> We should not lose sight of the rule that the mere fact that the happening of an accident or even the fact that negligence is shown will not, in and of themselves, produce a right to recover damages. The party seeking recovery must prove the extent of his injuries and that they were proximately caused by the negligence of his adversary. Two things combine to create the right of action. One is proof of negligence. The other is proof of injury and damage proximately caused by the negligence proof.

Id. at 637

This case is factually similar to the Chomonte in that there was disputed evidence with regard to the causal connection between plaintiff's damages and the subject accident. The presumption of negligence attaching in rear-end collisions does not alleviate the necessity of proving the causal connection.

Accordingly, even if it were to be assumed that the evidence presented by Tarmac with regard to the cause of the accident was insufficient to rebut the presumption of negligence, it does not necessarily follow that Eppler was entitled to a directed verdict on the issue of liability. Rather, in light of the contested issue of causation, Eppler would be entitled to, at most, a directed verdict on the issue of negligence. The issue of causation would still need to be submitted to the trier of fact for resolution.

In this case, the jury was asked to determine whether there was any negligence on

the part of Tarmac which was a legal cause of damage suffered by Eppler. The jury answered this question in the negative. In light of the conflicting evidence with regard to causation and the issue of whether Eppler had suffered damages as a result of this collision, this determination should not be disturbed. The jury's verdict is certainly subject to the interpretation that it determined that Plaintiff was not injured in the subject accident and, therefore, Eppler was not entitled to recovery.

In this regard, the case is similar to the case of Boeck v. Diem, 245 So.2d 682 (Fla. 2nd DCA 1971). In that case, the Court determined that reasonable persons could have interpreted the evidence to reach the conclusion that the claimant was not injured in the accident and, therefore, could have awarded no damages. See, also, Westbrook v. All Points Inc., 384 So.2d 973 (Fla. 3rd DCA 1980) (finding that the Defendant was negligent and finding that Plaintiff had not incurred a demonstrable injury was permissible given the conflicting evidence).

In summary, even if it is determined that Eppler is entitled to a presumption of negligence, the jury's verdict should not be disturbed. Accordingly, the jury could reasonably interpreted the conflciting evidence with regard to causation to determine that, even if Tarmac was negligent in causing the accident, Eppler did not sustain a measurable injury. Accordingly, it is respectfully submitted that Eppler is not entitled to the relief sought herein.

CONCLUSION

In conclusion, it is respectfully submitted that the certified question should be answered in the affirmative. Clearly, evidence of a sudden and unexpected stop of a forward vehicle after the vehicle has started forward at a green light is sufficient to rebut

the presumption of negligence attaching to the rear vehicle in a rear end collision. The District Court of Appeal below correctly applied controlling caselaw to the particular facts of this case to determine that Tarmac had, in fact, presented sufficient evidence to rebut the presumption of negligence and require that the issue be presented to the jury for resolution.

Moreover, Eppler has failed to establish that the instant decision expressly and directly conflicts any decision from any other appellate court on the same issue of law. Rather, the instant case is clearly distinguishable on a factual basis from the cases cited and, further, represents a correct application of the relevant caselaw to the facts of this case.

Finally, even if this Court were to determine that Tarmac failed to present sufficient evidence to rebut the presumption of negligence, Eppler would, at most, be entitled to a directed verdict on the issue of negligence and not, as argued by Eppler, on the issue of liability. In light of the disputed evidence with regard to causation, this issue would properly be submitted to the trier of fact for resolution.

Based upon the foregoing, it is respectfully submitted that the District Court decision under review should be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered to DAVID R. LEWIS, ESQUIRE, 2468 Atlantic Boulevard, Jacksonville, Florida 32207, by US Mail this ___ day of February, 2000.

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