IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,066

Eppler v. Tarmac, 695 So.2d 775 (Fla. 1st DCA 1997)

SYBIL EPPLER, Petitioner,

vs.

TARMAC AMERICA, INC., Respondent

PETITIONER'S INITIAL BRIEF ON THE MERITS

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

DAVID R. LEWIS, ESQUIRE
FOERSTER, ISAAC AND YERKES, P.A.
Florida Bar No.: 047095
2468 Atlantic Boulevard
Jacksonville, Florida 32207
904/398-7100
Attorneys for Petitioner

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IDENTIFICATION

1. Petitioner, SYBIL EPPLER was the Plaintiff in the Circuit Court of Duval County, Fourth Judicial Circuit and the Appellant/Cross Appellee in the District Court of Appeal, First District. She will be referred to in this brief as "Eppler". Respondent, TARMAC AMERICA, INC., was the Defendant in the Circuit Court and Appellee/Cross Appellant in the District Court of Appeal. It will be referred to as "Tarmac".

2. References to pages of transcript of proceedings will be "T-", references to the record on appeal will be "R-", and references to the Appendix to this brief will be "App-".

3. The Opinion sought to be reviewed, Eppler v. Tarmac, 695 So.2d 775 (Fla. 1st DCA 1997), will be referred to as "Eppler Opinion" or as "the Opinion sub judice."

ISSUE FOR REVIEW

DOES EVIDENCE OF A SUDDEN STOP BY THE LEAD VEHICLE IN HEAVY, STOP AND GO TRAFFIC ON A BUSY HIGHWAY MEET THE DEFINITION OF THE "UNEXPECTED STOP" REQUIRED TO DISSIPATE THE PRESUMPTION OF NEGLIGENCE OF A REAR-END COLLISION?

CERTIFIED QUESTION

DOES THE TESTIMONY OF THE DEFENDANT OF A SUDDEN UNEXPECTED STOP IMMEDIATELY AFTER STARTING FORWARD CONSTITUTE SUFFICIENT EVIDENCE TO OVERCOME THE PRESUMPTION OF NEGLIGENCE WHICH ATTACHES IN A REAR-END COLLISION?

STATEMENT OF THE CASE AND FACTS

I STATEMENT OF THE CASE

1. This personal injury action arising from a rear-end collision originated in the Circuit Court of Duval County, Fourth Judicial Circuit of Florida. Eppler was the Plaintiff and Taramac was the Defendant.

2. At the close of evidence in the jury trial of the case, Eppler's Motion for Directed Verdict on liability was denied (T-584). The jury's verdict found that Tarmac was not guilty of negligence that was the proximate cause of the injuries sustained by Eppler in the subject rear-end collision (T-671). In post-trial motions, Eppler's Motion for New Trial (R-46/47) based upon the trial Court's denial of her Motion for Directed Verdict was denied (R-63).

3. Eppler appealed to the District Court of Appeal, First District on the single issue of whether she was entitled to a directed verdict on liability (R-81 to 84) and Tarmac cross-appealed on entitlement to expert witness fees.

4. In an Opinion filed April 28, 1997, the First District Court of Appeal affirmed the Final Judgment for Tarmac and Reversed and Remanded for the Entry of an Expert Witness Fee for Tarmac's expert on the cross appeal, (App-1).

5. In an Opinion on Motion for Rehearing, filed June 25, 1997 (App-5), the First District

Court of Appeal readopted its previous opinion in this case, but, recognizing that its earlier decision of Whitworth v. Cuchens, 397 So.2d 375 (Fla. 1st DCA 1981), may be in conflict with Tozier v. Jarvis, 469 So.2d 884 (Fla. 4th DCA 1985), Pierce v. Progressive American Insurance Co., 582 So.2d 712 (Fla 5th DCA 1991), rev. denied 591 So.2d 183 (Fla. 1991), and Kao v. Lauredo, 617 So.2d 775 (Fla. 3rd DCA 1993), it certified the following question to be one of great public importance:

> DOES THE TESTIMONY OF THE DEFENDANT OF A SUDDEN UNEXPECTED STOP IMMEDIATELY AFTER STARTING FORWARD CONSTITUTE SUFFICIENT EVIDENCE TO OVERCOME THE PRESUMPTION OF NEGLIGENCE WHICH ATTACHES IN A REAR-END COLLISION?

6. Eppler timely filed her Notice to Invoke Discretionary Jurisdiction, and this Honorable Court entered an ORDER POSTPONING DECISION ON JURISDICTION AND BRIEFING SCHEDULE on July 31, 1997.

II STATEMENT OF THE FACTS

7. On the late afternoon of September 27, 1994, on Southside Boulevard near its intersection with Baymeadows Road in Jacksonville, Florida, Eppler was struck from the rear by a Tarmac cement-mixer truck (T-380). Southside Boulevard in that area is a principal highway, with two travelling lanes in each direction, plus two auxiliary roads of two-way traffic on either side of the main roads. The intersection with Baymeadows Road is controlled by overhead traffic lights (T-370). Traffic was heavy in the usual rush hour traffic at that time (T-384). Eppler was headed home to Green Cove Springs from her employment at the American Heritage Life Insurance building near Butler Boulevard, and the Tarmac truck was returning to the Tarmac yard located southwest of the collision site (T-366).

8. Both Eppler and the Tarmac driver agree that she stopped in traffic because of a red

light ahead of her at Baymeadows Road, but their testimony as to the precise collision is a bit different. Eppler states that she was hit before she started moving forward after the light changed to green (T-289), whereas the Tarmac driver testified that she started forward then suddenly stopped in front of him, causing the collision and pushing her into the vehicle ahead of her (T-372). The only other witness, the driver of the vehicle just ahead of Eppler, testified that he had not started moving forward towards the green light when her vehicle hit his (T-232).

SUMMARY OF ARGUMENT

1. The Certified Question. Although this case comes to this Honorable Court on a certified question, the question is improperly worded. As worded, it asks whether evidence of an UNEXPECTED sudden stop will overcome the presumption of evidence of a rear-end collision. We submit that the correct question should be, "whether a sudden stop in stop and go rush traffic on a busy city street is unexpected?"

2. Presumption of Negligence. Less than four decades ago, Florida established that a presumption of negligence arises from a rear-end collision. Within ten years thereafter, Florida established that said presumption can be dissipated by evidence which tends to show that the facts are not as they are presumed to be -- that is, that the rear driver has a legal excuse for the collision — which would reduce the presumption to an inference of negligence, and require that the issue of fault be determined by the trier of fact.

3. Jurisdictional Conflict and Florida Law. The opinion sought to be reviewed is in conflict with the case law it cites from the Third, Fourth and Fifth District Courts of Appeal, and gets no support from the earlier decision it relies upon from the First District Court of Appeal. These cases establish the law that the evidence of a sudden stop which will dissipate the said presumption may be evidence of an illegal stop or one caused by an unexpected lane change, but that a sudden stop in a proper lane of traffic caused by the stop and go heavy traffic, is not unexpected. As a result, such evidence does not dissipate the presumption and the lead vehicle is entitled to a summary judgment or directed verdict in its favor.

4. Summation. There is no legal or factual basis for the departure from the existing case law of Florida on the application of the presumption of negligence, as traffic congestion in Florida worsens and rear end collisions unfortunately become an even more expected happening.

ARGUMENT

I THE CERTIFIED QUESTION

Eppler v. Tarmac, 695 So.2d 775 (Fla. 1st DCA 1997)

1. It is immediately apparent, from the wording of the certified question, that we did not properly explain the single issue of this appeal to the Appellate Court. In its Opinion on Motion for Rehearing, the District Court of Appeal, First District certified the following question to be one of great public importance:

> DOES THE TESTIMONY OF THE DEFENDANT OF A SUDDEN UNEXPECTED STOP IMMEDIATELY AFTER STARTING FORWARD CONSTITUTE SUFFICIENT EVIDENCE TO OVERCOME THE PRESUMPTION OF NEGLIGENCE WHICH ATTACHES IN A REAR-END COLLISION? (Underlining Supplied)
> (App-7)

The insertion of the word "UNEXPECTED", as underlined above, clearly shows that the Court misunderstood the issue of the appeal, which simply is, "Is a sudden stop in heavy, stop and go rush hour traffic on a busy highway 'unexpected'?" If the answer is affirmative, the Judgment for Tarmac was properly entered and affirmed. However, if the answer is that such a stop is foreseeable or "expected", then Eppler was entitled to the directed verdict on liability she moved for at the close of the evidence at trial, and she is now entitled to a new trial on the issue of damages, alone. We will show, in this Argument, the impropriety of the manner in which the certified question was phrased, and that the Opinion sought to be reviewed has improperly departed from the Florida case law on the subject matter of this appeal, the very case law cited in the Opinion, below.

II PRESUMPTION OF NEGLIGENCE

2. Almost forty years ago, in Bellere v. Madsen, 114 So.2d 619 (Fla. 1959), this Honorable Court adopted the rationale of McNulty v. Cusack, 104 So.2d 785 (Fla. 2d. DCA 1958), which first recognized the presumption of negligence arising from a rear-end motor vehicle collision. McNulty, supra, stated that evidence of such a happening creates a "presumption of negligence," rather than a mere "inference of negligence," and, unless the offending driver presents an excusable explanation, the lead driver is entitled to a directed verdict on that issue. A few years later, this Honorable Court further discussed the application of this rule in Gulle v. Boggs, 174 So.2d 26 (Fla. 1965), as follows:

> "[4.5] We have stated that the presumption announced in McNulty, and subsequently followed, is rebuttable. It is constructed by the law to give particular effect to a certain group of facts in the absence of further evidence. The presumption provides a prima facie case which shifts to the defendant the burden to go forward with the evidence to contradict or rebut the fact presumed. When the defendant produces evidence which fairly and reasonably tends to show that the real fact is not as presumed, then the impact of 'the presumption is dissipated'. Whether the ultimate fact has been established must then be decided by the jury from all of the evidence before it without the aid of the presumption. At this point, the entire matter should be deposited with the trier of the facts to reconcile the conflicts and evaluate the credibility of the witnesses and the weight of the evidence.
>
> [6] When the matter goes to the jury in this posture it must be without the aid of the presumption, which has been reduced to the status of a permissible inference or deduction which the jury may or may not draw from the evidence before it."
>
> (174 So.2d 28)

The question of subsequent cases then narrowed itself to what, as a matter of law, is evidence which can dissipate the presumption of negligence, reduce the rear-end collision to an inference of negligence, and

require the trier of the fact to resolve the issue of negligence?

III THE JURISDICTIONAL CONFLICT AND FLORIDA LAW

3. In it's Opinion on Motion for Rehearing, below, the First District Court of Appeal appears to rely for support, in affirming the judgment for Tarmac, upon its earlier decision of Whitworth v. Cuchens, 397 So.2d 357 (Fla. 1st DCA 1981), and goes so far as to cite that case and its possible conflict with recent decisions of the Third, Fourth and Fifth District Courts of Appeal as reason for certifying the stated questions, saying:

> We do, however, recognize that Cuchens may be interpreted to be in conflict with Tozier, Pierce and Kao.
>
> (App-7)

(Tozier is Tozier v. Jarvis, 469 So.2d 884 ((Fla. 4th DCA 1985)); Pierce is Pierce v. Progressive American Ins. Co., 582 So.2d 712 ((Fla. 5th DCA 1991)), rev. denied, 591 So.2d 183 ((Fla. 1991)), and Kao is Kao v. Laredo, 617 So.2d 775 ((Fla. 3rd . DCA 1993)).

4. We respectfully submit that the decision subjudice is mistaken in stating that Cuchens may be in conflict with Tozier, Pierce, and Kao, as actually Cuchens is in agreement with Tozier, Pierce, and Kao! It is the Opinion in the case sub judice which is in conflict with Tozier, Pierce, Kao, and Cuchens. An examination of those opinions and the factual situations in each will explain that statement.

A. We will first examine Cuchens, supra, as it is the earliest of the four, decided by the First District Court of Appeal, affirming a judgment for Defendant Cuchens, who had rear-ended Whitworth, after the trial court denied Whitworth's motion for directed verdict. As stated in that Opinion,

however, there was rebuttal evidence to the effect that Whitworth had made an illegal stop, which meets the requirement of an "unexpected" stop. Whitworth had stopped on top of a bridge when she noticed an obstruction to traffic "on the other side" of the bridge. She was just "rubbernecking", and paid the price for it, as made clear by the Cuchens Opinion:

> In the present case there existed a dispute as to whether Appellant's vehicle had stopped in a legal manner on the highway, and that issue was properly presented to the jury. (Underlining supplied)
> (397 So.2d 358)

As a further indication of its conclusion, the Cuchens Opinion distinguishes its facts from an earlier decision of the First District Court which reversed a judgment for the rear-ending Defendant, saying:

> In the case of Cowart v. Barnes, 370 So.2d 103 (Fla. 1st DCA 1979) relied on by Appellant, the Plaintiff was lawfully stopped at a red light when struck by the Defendant. (Underlining supplied)
> (397 So.2d 358)
>
> (It is to be noted that certeorari was denied in Cowart v. Barnes, supra, 379 So. 2d 202 ((Fla. 1997)).

Thus, Cuchens holds that evidence of an unlawful or illegal stop is evidence of an "unexpected" stop, which will dissipate the presumption of negligence of a rear-end collision. In the case sub judice, the evidence elicited from Tarmac's driver was of a sudden stop by Eppler in her proper lane of traffic, after she had started forward from a stopped position in traffic backed up for a traffic light in heavy rush- hour traffic. There was not the slightest hint of an illegal stop or sudden lane change. Accordingly, the Opinion sub judice has no support from and is in conflict with Cuchens.

B. Tozier, supra, reversed a judgement for Defendant Jarvis and his insurer for failure of the trial court to grant Tozier's motion for a directed verdict. Tozier was struck from behind by,

of all things, a cement truck, when he had stopped on a Fort Lauderdale street before making a right-angle turn into a restaurant driveway. According to the Defendant's testimony, two-thirds of the car was in the curb lane and one-third in the driveway. After a careful review of the Florida case law application of the rule of the presumption of negligence arising from a rear-end collision, the Tozier Opinion states:

> "[4] After analyzing the above cases we conclude that the facts in the instant case warrant a directed verdict for the plaintiffs on the issue of liability. Reduced to its essence, the defendant's testimony consists merely of saying, ""I didn't see another car in front of me; I looked in my rear view mirror for two to six seconds; I looked back to the lane in front of me and I then saw the vehicle for the first time but it was too late to avoid the collision."" Such testimony cannot be considered ""substantial and reasonable."" Nor can the defendant's sheer speculation that perhaps the plaintiff was backing out of the restaurant, rather than entering the restaurant, rise to the level of affirmative testimony (much less the kind of substantial testimony) necessary to rebut the presumption of negligence.
>
> [5] Finally, we cannot agree with Jarvis that the Toziers were illegally stopped in the roadway. When one makes an approximate 90 degree turn into one of the many business establishments along a busy thoroughfare, it is reasonable, foreseeable, and expected that one would slow his vehicle even to a stop to make such a turn."
>
> (469 So.2d 888)

Accordingly, the Opinion sub judice is in absolute conflict with Tozier., but Cuchens, supra, interestingly, is not.

C. Pierce, supra, an En Banc decision of the Fifth District Court of Appeal, affirmed a summary judgment against a motorcyclist who had run into a car which had come to a quick stop behind a quick-stopping car in front of it in moderately heavy traffic on a divided highway. The motorcyclist sought damages on allegations of negligence by the car drivers ahead of him. This Opinion explains the application of the rule on presumption of negligence arising from a rear-end collision and

when it is not dissipated by evidence of a sudden or abrupt stop, as follows:

> "[3-6] The third argument by appellant is the one found persuasive by the dissent. The fallacy in that argument is that it oversimplifies the burden placed upon the rear driver to overcome the presumption of negligence against him. It is not merely an "abrupt stop" by a preceding vehicle (if it is in its proper place on the highway) that rebuts or dissipates the presumption that the negligence of the rear driver was the sole proximate cause of a rear-end collision. See *Cowart v. Barnes*, 370 So.2d 103 (Fla. 1st DCA), *cert. denied*, 379 So.2d 202 (Fla. 1979). It is a sudden stop by the preceding driver at the time and place where it could not reasonably be expected by the following driver that creates the factual issue. *Burton v. Powell*, 547 So.2d 330 (Fla. 5th DCA 1989). As we said in *Baughman v. Vann*, 390 So.2d 750 (Fla. 5th DCA 1980):
>
> > When a leading vehicle is located within its proper place on the highway, proof of a rear-end collision raises a presumption of negligence on the part of the overtaking vehicle. *Stephens v. Dichtenmueller*, 207 So.2d 718 (Fla. 4th DCA 1968); *Rianhard v. Rice*, 119 So.2d 730 (Fla. 1st DCA 1960). This presumption provides a prima facie case which shifts to the defendant the burden to come forward with evidence to contradict or rebut the presumed negligence. If the defendant produces evidence that fairly and reasonably shows that he was not negligent, the effect of the presumption disappears and negligence then becomes a jury question. *Gulle v. Boggs*, 174 So.2d 26 (Fla. 1965); *Shaw v. York*, 187 So.2d 397 (Fla. 1st DCA 1966). The burden on the defendant is not to come up with just explanation, but on which is 'substantial and reasonable.' *Brethauer v. Brassell*, 347 So.2d 656 (Fla. 4th DCA 1977).
>
> As a matter of law, it is not a substantial and reasonable explanation by Pierce to merely say that the vehicles ahead of him — whether Boone, Reaves, or Tiroff -- stopped abruptly. Such stops had to be reasonably anticipated at the time and place where they occurred according to Pierce's own testimony: in a crowded lane of traffic approaching a busy intersection controlled by a traffic signal which was in view of all four drivers at the time of the collisions."
>
> (582 So.2d 714)

Accordingly, the Opinion sub judice is in absolute conflict with Pierce, supra, but Cuchens, supra, interestingly, is not.

D. Kao, supra, reversed a judgment for defendant Lauredo, based on the trial court's failure to grant a directed verdict for plaintiff Kao, who was rear-ended by defendant Lauredo. This Opinion, as those above, reiterates the application of the rule of the presumption of negligence as follows:

> "[2] In a rear-end collision, there is a presumption of negligence on the part of the rear driver. The defendant, however, may rebut this presumption by "'produc[ing] evidence that fairly and reasonably shows that he was not negligent.'" *Pierce v. Progressive Am. Ins. Co.*, 582 So.2d 712 (Fla. 5th DCA) *review denied*, 591 So.2d 183 (Fla. 1991) (citing *Baughman v. Vann*, 390 So.2d 750 (Fla. 5th DCA 1980)). "[A]ffirmative testimony of a sudden and *unexpected* stop . . . is sufficient evidence to rebut the presumption." *Liriano v. Gonzales,* 605 So.2d 575 (Fla. 3rd DCA 1992)(emphasis supplied). ""It is not merely an 'abrupt stop' by a preceding vehicle (if it is in its proper place on the highway) that rebuts or dissipates the presumption that the negligence of the rear driver was the sole proximate cause of a rear-end collision. It is a sudden stop by the preceding driver *at a time and place where it could not reasonably be expected* by the following driver that creates the factual issue."" *Pierce*, 582 So.2d at 714 (emphasis added).
>
> [3] In the instant case, the defendant testified that he was driving in a careful manner, but that the plaintiff stopped in an abrupt manner, and that therefore, Gwendolyn caused the accident. The defendant's version of the collision is not sufficient to rebut or dissipate the presumption that his negligence was the sole proximate cause of the accident. Under the circumstances of this case, Gwendolyn's sudden stop happened at a place and time where it was reasonably expected--on a heavily congested city street during rush hour in stop and go traffic. Accordingly, we find that the trial court erred in denying the plaintiffs' renewed motion for directed verdict."
>
> (617 So.2d 776)

Accordingly, the Opinion sub judice is in absolute conflict with Kao, supra, but Cuchens, supra, interestingly is not.

5. As shown above, the reliance by the Opinion sub judice on its earlier decision in Cuchens, supra, is completely misplaced, and it is only the Opinion sub judice which is out of step with and in conflict with the earlier case law of Florida on the application of the presumption of negligence of a rear-end collision. To dissipate that presumption and present a jury question, evidence of a sudden or abrupt stop is not enough. The evidence must be of an "unexpected stop", which can be evidence of an illegal stop or unexpected lane change. An abrupt or sudden stop in heavy, stop and go traffic is an "expected" and foreseeable occurrence of every day life, and evidence of such does not dissipate the presumption of negligence. If that is the entire substance of the defendant's reply, a directed verdict for the plaintiff is required.

IV SUMMATION

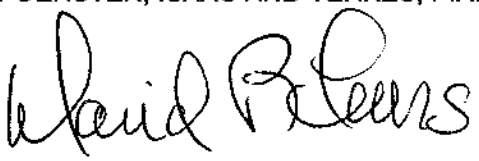
6. It is quite apparent that the Eppler Opinion sought to be reviewed departs from the Florida case law of almost forty years on the application of the presumption of negligence arising from a rear-end collision. It has improperly concluded that every abrupt or sudden stop in traffic is "unexpected", regardless of the traffic conditions and the highway involved. This Eppler Opinion is thus contrary to the established case law of Florida, consisting not only of decisions specifically recognized in its Opinion on Motion for Rehearing from the Third District Court of Appeal (Kao, supra), Fourth District Court of Appeal (Tozier, supra), and Fifth District Court of Appeal (Pierce, supra), but, interestingly, also from the First District Court of Appeal, itself (Cuchens, supra). All of these cases clearly show that evidence of an illegal stop, being "unexpected" will dissipate that presumption of negligence, but a legal, though sudden stop in heavy, stop and go traffic on a busy highway in the immediate vicinity of a traffic light is quite "expected", and evidence of such a stop has no effect upon the presumption of negligence. Unfortunately, traffic on Florida highways is worsening daily, and, as much as we'd like to, we can't return to more peaceful traffic of earlier days. Rear-end collisions are an expectation of our rush hours, as shown by the Federal requirements for front and rear bumpers which will not disintegrate upon the expected impact of such collisions. In conformity with the earlier and continuing case law of Florida, the Opinion sought to be reviewed should be quashed. Giving Tarmac the benefit of its driver's version of the rear-end collision, the presumption of negligence of the Tarmac driver was not dissipated, and Eppler was entitled to a directed verdict on liability in the trial court.

CONCLUSION

Based upon the expressed and direct conflicts with decisions of the Third, Fourth and Fifth District Courts of Appeal and the question certified by the First District Court of Appeal, this Honorable Court has jurisdiction of this matter. Based on the departure of the Opinion sought to be reviewed from the established Florida case law of the Second, Third, Fourth and Fifth District Courts of Appeal, and even earlier decisions of the First District Court of Appeal, it is submitted that this Honorable Court should quash Eppler v. Tarmac, supra,, reverse the judgment for Tarmac in the Circuit Curt of Duval County and remand this case to the trial court with instructions to grant a new trial for Eppler limited to the issue of her damages.

Very respectfully submitted,

FOERSTER, ISAAC AND YERKES, P.A.



DAVID R. LEWIS, ESQUIRE
Florida Bar No.: 047095
2468 Atlantic Boulevard
Jacksonville, Florida 32207
904/398-7100
Attorneys for Petitioner

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Eppler v. Tarmac, 695 So.2d 775 (Fla. 1st DCA 1997)

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SYBIL EPPLER,

Appellant/Cross Appellee,

v.

TARMAC AMERICA, INC.,

Appellee/Cross Appellant.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 96-3518

Opinion filed April 28, 1997.

An appeal from the Circuit Court for Duval County.
Judge Henry F. Martin, Jr.

David R. Lewis of Foerster, Isaac & Yerkes, P.A., Jacksonville, for appellant.

Frank W. Hession of Matthews & Hession, Jacksonville, for appellee.

WOLF, J.

This appeal and cross appeal grew out of a traffic accident wherein appellant's vehicle was struck from the rear by a Tarmac cement mixer truck. We affirm the denial of appellant's motion for directed verdict and motion for new trial because Tarmac presented sufficient evidence to overcome the presumption of negligence that arises and attaches to the driver of a rear vehicle involved in a rear-end collision.[1] We reverse the summary denial of Tarmac's posttrial motion to compel appellant to pay an expert witness fee

[1]The jury's verdict in this case could have been based on a finding that the Tarmac driver was not negligent. Consequently, we do not reach appellant's argument that the jury's zero damage award was contrary to the evidence presented regarding the injuries sustained by appellant as a result of the collision.

for the deposition of one of Tarmac's expert witnesses, which was raised as an issue on cross appeal.

At trial, both appellant and the Tarmac truck driver agreed that appellant had stopped due to a red light, but their testimony differed as to the cause of the accident once the traffic signal changed to green. Appellant testified that she was hit by the Tarmac truck before she started moving forward; however, the Tarmac driver testified that appellant started forward and then stopped suddenly in front of him which caused him to rear-end her vehicle and push it into the vehicle ahead of her. The only other witness to the collision, the driver of the lead vehicle struck by appellant, testified only that he had not started moving forward after the light change when appellant struck him from behind. Both parties put on substantial evidence including the testimony of health-care experts, appellant's treating chiropractor, and appellant's treating psychiatrist. Appellant's motion for a directed verdict on the issue of Tarmac's liability, filed at the close of all the evidence, was denied.

The jury returned a verdict in favor of Tarmac, finding that there was no negligence on the part of Tarmac which was the proximate cause of injury to appellant. Appellant moved for a new trial based on the denial of her motion for directed verdict and the jury's finding that Tarmac was not liable for appellant's injuries despite evidence that she had been injured in the collision. The trial court denied that motion and entered a final judgment in favor of appellee.

The presumption of negligence that arises and attaches to the driver of a rear vehicle involved in a rear-end collision only entitles the driver of the leading vehicle to a directed verdict on the issue of liability if the driver of the rear/following vehicle is unable to provide a reasonable explanation for the collision. Davis v. Chips Express, Inc., 676 So. 2d 984, 986 (Fla. 1st DCA 1996); Edward M. Chadbourne, Inc. v. Van Dyke, 590 So. 2d 1023, 1024 (Fla. 1st DCA 1991). When the driver of the rear/following vehicle produces some evidence which fairly and reasonably tends to show that the presumption may not be factually accurate, the presumption dissipates and becomes only a permissible inference which the jury may or may not draw from the evidence before it. Gulle v. Boggs, 174 So. 2d 26, 29 (Fla. 1965); McCloud v. Swanson, 681 So. 2d 898, 900 (Fla. 4th DCA 1996); Davis, 676 So. 2d at 986; Sistrunk v. Douglas, 468 So. 2d 1059, 1060 (Fla. 1st DCA 1985). Evidence that a leading vehicle unexpectedly slowed or stopped at a time and place where it could not reasonably be expected to do so can constitute a reasonable explanation for the rear/following vehicle's inability to stop prior to striking the leading vehicle. McCloud, 681 So. 2d at 900; Davis, 676 So. 2d at 986. Thus, the Tarmac driver's testimony that appellant had started forward when the signal light turned green and then stopped suddenly in front of him precluded a directed verdict because it created a factual question on the issue of fault which was best left to the trier of fact.

On the issue raised in the cross appeal, appellant/cross appellee concedes that Tarmac's expert witness, James R. Turner, III, was entitled to a reasonable fee for his deposition appearance. She seems only to dispute the reasonableness of the fee charged by this witness. The trial court's failure to require appellant/cross appellee to pay any fee to this expert witness was error. See Fla. R. Civ. P. 1.390(c) (1996)("An expert or skilled witness whose deposition is taken shall be allowed a witness fee in such reasonable amount as the court may determine."); Hyster Co. v. Stephens, 560 So. 2d 1334, 1337 (Fla. 1st DCA), rev. denied, 574 So. 2d 141 (Fla. 1990) (determining that expert witness fee may be taxed as cost against deposing party). On remand, the trial court is directed to determine and award a reasonable expert witness fee for this witness.

AFFIRMED as to the issues raised in the direct appeal; REVERSED and REMANDED with directions as to the issue raised in the cross appeal.

BOOTH and VAN NORTWICK, JJ., concur.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SYBIL EPPLER,

Appellant/Cross Appellee,

v.

TARMAC AMERICA, INC.,

Appellee/Cross Appellant.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 96-3518

Opinion filed June 25, 1997.

An appeal from the Circuit Court for Duval County.
Henry F. Martin, Jr., Judge.

David R. Lewis of Foerster, Isaac and Yerkes, P.A., Jacksonville, for appellant/cross appellee.

Frank W. Hession of Matthews & Hession, Jacksonville, for appellee/cross appellant.

OPINION ON MOTION FOR REHEARING

WOLF, J.

Appellant moves for rehearing arguing that this court incorrectly determined that the presumption of negligence that attaches in a rear-end collision was overcome by an unexpected stop of appellee. Appellant asserts that our decision conflicts with Tozier v. Jarvis, 469 So. 2d 884 (Fla. 4th DCA 1985); Pierce v. Progressive American Ins. Co., 582 So. 2d 712 (Fla. 5th DCA), rev. denied, 591 So. 2d 183 (Fla. 1991); and Kao v. Lauredo, 617 So. 2d 775 (Fla. 3d DCA 1993).

In Tozier v. Jarvis, the court found that the defendant's explanation that he was looking into his rearview mirror, coupled with his speculation that plaintiff was backing out onto the roadway rather than turning into a driveway from the roadway, was not substantial and reasonable evidence to overcome the presumption, but that it was reasonable to expect a party to slow down or stop when making a 90-degree turn into a business establishment along a busy thoroughfare. See Tozier, 469 So. 2d at 888. The Tozier court, however, did recognize that "courts have determined that positive testimony of a sudden unexpected stop or an unexpected switching of lanes by the car in front is sufficient evidence to rebut the presumption. Id. at 886 (emphasis added).

In Pierce, the court said that an abrupt stop along a busy roadway was insufficient to overcome the presumption of negligence but a "sudden stop by the preceding driver at a time and place where it could not reasonably be expected" creates a factual issue for the jury. Pierce, 582 So. 2d at 714.

In Kao v. Lauredo, the court held that a sudden stop happening at a place and time where it would reasonably be expected--on a heavily congested city street during rush hour stop-and-go traffic--was insufficient to overcome the presumption of negligence. Kao, 617 So. 2d at 777.

In Whitworth v. Cuchens, 397 So. 2d 357 (Fla. 1st DCA 1981), however, this court held that evidence of a sudden unexpected stop at the top of a bridge was sufficient to overcome the presumption of negligence to allow the jury to find that the defendant was not

negligent.

In the instant case, the evidence viewed in the light most favorable to the defendant established an unexpected stop immediately after starting to move when the signal light changed. We, therefore, readopt our previous opinion in this case. We do, however, recognize that Cuchens may be interpreted to be in conflict with Tozier, Pierce, and Kao. We, therefore, certify the following question to be one of great public importance:

> DOES THE TESTIMONY OF THE DEFENDANT OF A SUDDEN UNEXPECTED STOP IMMEDIATELY AFTER STARTING FORWARD CONSTITUTE SUFFICIENT EVIDENCE TO OVERCOME THE PRESUMPTION OF NEGLIGENCE WHICH ATTACHES IN A REAR-END COLLISION?

BOOTH and VAN NORTWICK, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 21st day of August, 1997 to Frank W. Hession, Esquire, P.O. Box 16718, Jacksonville, Florida 32245-6718.

ATTORNEY