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 REPLY BRIEF ON THE MERITS

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

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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 Petitioner's Initial Brief will be "PIB--", references to Respondent's Answer Brief will be "RAB--", 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?

SUMMARY OF ARGUMENT

The parties to this cause are in agreement that the law of Florida is that a rear-end motor vehicle collision raises a presumption of negligence on the part of the following vehicle, which may be rebutted by evidence of a legal excuse for the collision. Eppler submits that Opinions of the Third, Fourth and Fifth District Courts of Appeal are in direct and express conflict with the Opinion of the First District Court of Appeal which certified the question of what evidence rebuts said presumption, indicating therein that it was probably in conflict with those other District Courts' Opinions.

Eppler's position is that a sudden or abrupt stop in heavy, stop and go rush-hour traffic on a heavily traveled urban thoroughfare is not only not "unexpected," but is "expected."

We find no case law support for Tarmac's contrary position that evidence of any abrupt or sudden stop, no matter what the surrounding traffic conditions may be, rebuts said presumption.

Further, we find no factual or legal basis for Tarmac's position that the jury's verdict could be based on a proper finding of lack of proof of the causation of Eppler's permanent injuries.

To be consistent with the Opinions of the other District Courts of Appeal and its own earlier decisions, this decision of the First District Court of Appeal should be quashed, the Judgment for Tarmac set aside and the cause remanded to the Circuit Court of Duval County with appropriate directions. The certified question should be answered in the negative.

ARGUMENT

I GENERAL STATEMENT

1. The general statements of law on the doctrine of the presumption of negligence arising from a motor vehicle rear-end collision by both Eppler and Tarmac are in agreement, to the effect that the presumption may be rebutted 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. Upon the presentation of such evidence, the "presumption" is reduced to an "inference" of negligence, and the issue of fault must be determined by the trier of fact (PIB--8, RAB--4). As a result, the issue on appeal is severely narrowed to the factual circumstances which constitute the required evidence.

2. Prior to this case sub judice, it was held, as a matter of law, that the Defendant's evidence of a sudden or abrupt stop by the forward vehicle in its proper lane of traffic in heavy stop and go urban traffic controlled by nearby traffic signals is not sufficient evidence to rebut or dissipate the said presumption of negligence and the Plaintiff is entitled, under those circumstances, to a summary judgment or directed verdict on the issue of fault. More than just a sudden or abrupt stop is needed, such as in the earlier First District Court of Appeal case of Whitworth v. Cuchens, 397 So.2d 357 (Fla. 1st DCA 1981), which held that the presumption dissipated upon evidence of an illegal stop; the Fourth District Court of Appeal case of Tozier v. Jarvis, 469 So.2d 884 (Fla. 4th DCA 1985), holding that evidence of a sudden stop to make a right-angle turn into a restaurant's driveway was insufficient to rebut the presumption; the Fifth District Court of Appeal case of Pierce v. Progressive Am. Ins. Co., 582-So.2d. (Fla. 5th DCA, 1991), holding that an abrupt stop by a vehicle in its proper place on highway in heavy, busy traffic is "expected", rather than "unexpected", and insufficient to rebut the presumption; and the Third District Court of Appeal case of Kao v. Lauredo, 617 So.2d 775 (Fla. 3rd DCA 1993), holding that a sudden stop on a heavy congested city street during rush hour in stop and go traffic was "reasonably expected" and insufficient to rebut the presumption.

3. In view of the above, not only is the case for review, Eppler v. Tarmac, jurisdictionally in conflict with its own and at least three of the other District Courts of Appeal, but it is unrealistic in today's world of heavy urban traffic and an improper interpretation of the application of the presumption of

negligence arising from a rear-end collision. We do not argue that every rear-end collision merits a directed verdict. We do argue, however, that evidence of a sudden or abrupt stop in heavy, stop and go traffic behind another stopped vehicle ahead is insufficient to rebut that presumption.

II TARMAC'S CASES

4. We do not agree with Tarmac's analysis of the cases it cites for support of its position herein, as follows:

A. At RAB--5, Tarmac states that the case sub judice is similar to the First District Court of Appeal case of Whitworth v. Cuchens, supra, wherein the trial court's denial of the plaintiff's motion for directed verdict was affirmed. Tarmac's reliance is misplaced, as the Cuchens Opinion clearly differentiated between legally stopped cars such as in Cowart v. Barnes, 370 So.2d 103 (Fla. 1st DCA 1979), wherein the lead car stopped for a light changing from yellow to red, and Brethauer v. Brassell, 347 So.2d 656 (Fla. 4th DCA 1977), wherein the lead car was stopped in a lane of traffic and obstructed by an intervening vehicle, and the action of Mrs. Whitworth, who stopped illegally on the crest of a bridge to look at construction and stopped cars in the opposite direction. Eppler, on the other hand, stopped suddenly behind a vehicle in front of her after she had started forward, after a stop light change, and into which she was knocked by Tarmac's truck (T-231)(App--14). There was nothing illegal about her stop.

B. At RAB--6, Tarmac correctly summarizes a recent ruling in McCloud V. Swanson, 21, FLW D 2289 (Fla. 4th DCA, October 23, 1996), wherein a directed verdict on liability was reversed. However, Tarmac fails to point out that the essence of the holding was:

> The cases have held that where there is at least some evidence of negligence on the part of the lead car driver, the issue of fault should be resolved by the jury. *E.g., Edward M. Chadbourne, Inc. v. Van Dyke*, 590 So.2d 1023 (Fla. 1st DCA 1991). More specifically, where there is positive evidence that the lead driver has made a sudden stop or has suddenly switched lanes at a time and place where it could not reasonably be expected, a fact issue is created as to the degree of that driver's fault in causing the accident. *See Tozier v. Jarvis*, 469 So.2d 884, 886 (Fla. 4th DCA 1985) 21 FLW D22290. (Underlining supplied.)

That Opinion concisely explains the area of contention herein, by stating "at a time and place where it could not reasonably be expected." We respectfully submit that the evidence before the trial court in Eppler v. Tarmac, below, was to the effect that this was rush-hour afternoon, stop and go traffic on one of the busiest thoroughfares in Jacksonville, making frequent sudden, abrupt stops very much expected.

As a result, Tarmac's evidence rebutted nothing.

C. At RAB--8, Tarmac cites Catir v. Roberson, 423 So.2d 454 (Fla. 1st DCA 1982) in support of its argument that Eppler was "illegally" stopping in her lane of traffic behind the car that was stopped ahead of her. The holding in Catir, supra, gives no support to that argument, as it reversed a summary judgment in favor of the defendants whose bus may have been obstructing traffic by being parked in violation of several Florida Statutes. We respectfully disagree with Tarmac's view that Eppler illegally stopped behind the car ahead of her into which she was pushed by the Tarmac truck, under any reasonable view of the evidence.

Appendix

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 30th day of September, 1997 to Frank W. Hession, Esquire, P.O. Box 16718, Jacksonville, Florida 32245-6718.

David R. Lewis
ATTORNEY