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Case No. 92,603

Supreme Court of Florida

COLLETTA P. CLAMPITT,

Petitioner,

vs.

DJ SPENCER SALES, RELIABLE PEAT CO., JV, AND CARL ROBERT HETZ

Respondents.

PROCEEDINGS INVOKING DISCRETIONARY JURISDICTION TO REVIEW THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, CASE NO: 96-4394

RESPONDENTS' BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF CITATIONS AND AUTHORITIES..... ii

PREFACE..... iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT..... 4

ARGUMENT

I. THE FIRST DISTRICT COURT OF APPEAL CORRECTLY REVERSED THE TRIAL COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT ON THE QUESTION OF LIABILITY AND PROPERLY REMANDED THIS CAUSE FOR A NEW TRIAL ON ALL ISSUES..... 5

II* THE FIRST DISTRICT COURT OF APPEAL IN CONSIDERING CLAMPITT'S MOTION FOR CLARIFICATION, WAS CORRECT WHEN IT CLARIFIED THAT THE NEW TRIAL, ON REMAND, WAS TO BE A TRIAL ON ALL ISSUES..... 19

CONCLUSION..... 29

CERTIFICATE OF SERVICE..... 30

TABLE OF CITATIONS AND AUTHORITIES

I. **CASES** **PAGE(S)**

American Aerial Lift, Inc. v. Perez,
629 So.2d 159 (Fla. 3rd DCA 1993 . . . . . 22, 23, 24

Baughnan v. Vann,
390 So.2d 750 (Fla. 5th DCA 1980) 12

Bellere v. Madsen,
114 So.2d 619 (Fla. 1959) 6

Cassoutt v. Cessna Aircraft Co.,
660 So.2d 277 (Fla. 1st DCA 1995) 17

Chiles v. Beaudoin,
384 So.2d 175 (Fla. 2d DCA 1980) 8, 9

Currie v. Palm Beach County,
578 So.2d 760 (Fla. 4th DCA 1991) 28

Davis v. Chips Exp., Inc.,
676 So.2d 984 (Fla. 1st DCA 1996) 17

D.J. Spencer Sales v. Clampitt,
704 So.2d 60 (Fla. 1st DCA 1997) . . 1,4,5,14,15,20,23,29,30

Eppler v. Tarmac America. Inc.,
695 So.2d 775 (Fla. 1st DCA 1997) 11

Fabre v. Marin,
623 So.2d 1182 (Fla. 1993) 4, 5, 22, 23, 24, 25, 26

Frazier v. Ross,
225 So.2d 451 (Fla. 4th DCA 1969) 8

Griefer v. DiPietro,
625 So.2d 1226 (Fla. 4th DCA 1993) 22, 29

Gulle v. Boggs,
174 So.2d 26 (Fla. 1965) 7, 8, 10

Kao v. Lauredo,
617 So.2d 775 (Fla. 3rd DCA 1993) 13, 15

Lindos Rent A Car v. Standley,
590 So.2d 1114 (Fla. 4th DCA 1991) 28

McCloud v. Swanson,
681 So.2d 898 (Fla. 4th DCA 1996) 10

McNaulty v. Cusack,
104 So.2d 785 (Fla. 2d DCA 1958) 6, 7, 10

Moore v. Morris,
475 So.2d.666, (Fla. 1985) 16

Nash v. Wells Fargo Guard Service,
678 So.2d 1262 (Fla. 19966) ... 4, 20, 22, 24, 25, 26, 29

Pierce v. Progressive American Ins. Co.,
582 So.2d 712 (Fla. 5th DCA 1991).. 5, 11,13,14,15,17, 30

Purvis v. Inter-County Telephone & Telegraph Co.,
173 So.2d 679 (Fla. 1965) 20. 21

Rowlands v. Signal Construction Co.,
549 So.2d 1380 (Fla. 1989) 26, 28, 29

Schindler Elevator Corp. v. Vierra,
644 So.2d 563 (Fla. 3rd DCA 1994) . . . . . *.* 22, 23

Schindler Corp. v. Ross,
625 So.2d 94 (Fla. 3rd DCA 1993)..... 22, 23, 24

Shaffran v. Holness,
93 So.2d 94 (Fla. 1957)..... 16

Sistrunk v. Douglas,
468 So.2d 1059 (Fla. 1st DCA 1985)..... 6, 7, 9

Stark v. Vasquez,
168 So.2d 140 (Fla. 1964)..... 8

Tozier v. Jarvis,
469 So.2d 884 (Fla. 4th DCA 1985)..... 12

Tropical Exterminators, Inc. v. Murray,
171 So.2d 432 (Fla 2nd DCA 1965)..... 26

Waters v. Williams,
696 So.2d 386 (Fla. 1st DCA 1997) . . . . . **. 29

Williams v. Lake City,
62 So.2d 732 (Fla. 1953)..... 16

Wills v. Sears Roebuck & Co.,
351 So.2d 29 (Fla. 1997)..... 16

STATUTORY PROVISIONS AND OTHER AUTHORITY

U.S. CONST., amend. VIII 20
Setion 768.81 (3) Florida Statutes 22, 25
Art. I, §22, Fla. Const. 28

PREFACE

The Respondents adopt the symbols and references utilized by the Petitioner in her Brief on the Merits, to wit:

R.v._ p._ -Record on Appeal - Instruments as listed in the Index to the Record, by volume and page number.

DJ Spencer Sales, Reliable Peat Co., JV., and Carl Robert Hetz, Respondents are referred to collectively as Hetz, et al.

References to the deposition testimony of Carl Robert Hetz and Charles Timothy Huguley will be made by name and page number, e.g. Huguley, p.__. Huguley's deposition is Volume XIII in the record, and Hetz's deposition is volume XIV.

STATEMENT OF THE CASE

The litigation involves a personal injury claim as a result of a three vehicle accident which occurred on August 30, 1993. The lead vehicle was a pick-up truck and trailer whose owner/operator was dismissed from the case prior to trial. The middle vehicle was driven by the Petitioner. The third vehicle was a tractor-trailer rig owned and operated by Hetz, et al. R.v.I. p.23-26; DJ Spencer Sales v. Clampitt, 704 So.2d 601 (Fla. 1st DCA, 1997). Prior to Trial, Clampitt moved for and was granted a partial summary judgment on the issue of liability. R.v.I p.74-75, 107-108.

Following the grant of partial summary judgment, the matter proceeded to trial and to entry of a judgment against Hetz, et al in the sum of $842,997.00. R.v.I p.197. At no point during the trial was the jury appraised of the accident mechanics. Following the entry of judgment in favor of Clampitt, Hetz, et al appealed to the First District arguing that the judgment be reversed and the case remanded for new trial on all issues because of the Trial Court's error in granting summary judgment on the issue of liability.

On October 15, 1997, the First District Court of Appeal reversed the Trial Court's Judgment and remanded the case for new trial. In reversing the Trial Court, the Appellate Court held that the negligence question should have been submitted to the jury. Because the First District Court of Appeal's decision was silent as to the scope of issues to be retried, Clampitt filed a Motion for Clarification. In her motion, petitioner urged that the retrial

be limited to issues of comparative fault and apportionment. On February 19, 1998, the First District ruled that the new trial would include both the issues of liability and damages. Following this clarification, petitioner filed her Notice to Invoke Discretionary Jurisdiction and on September 21, 1998, this honorable court entered its Order accepting such jurisdiction.

STATEMENT OF FACTS

On May **16, 1996,** a hearing was held by the Trial Court on Clampitt's Motion for Partial Summary Judgment on the issue of her comparative fault which had been raised as an affirmative defense in the pleadings and by way of opposition to the Clampitt Motion. R.v.XVII; R.v.I p. 29-30. In support of her motion, Clampitt filed the deposition transcripts of Carl Hetz and the lead driver, Charles Huguley, along with Mr. Hetz' Answers to Interrogatories in support of her motion. Clampitt did not further support her motion with her own Affidavit, deposition testimony or discovery responses. She did, concede, however, in her Memorandum of Law that as she was heading south from Bronson, Florida, on Alternate U.S. Highway 27, that she failed to stop as a preceding motor vehicle attempted to turn right off of the roadway and that her car collided with that lead vehicle and then immediately stopped.

The accident occurred between 10:30 and 11:00 in the morning at a point approximately one mile south of the City of Bronson on Alternate U.S. Highway 27. Hetz p.18; Huguley p.12,43. The speed limit on this two lane highway at the point of the accident was 55 mph. Huguley p. 13. In and around the area of the accident site

were commercial and residential structures but no traffic control devices such as signal lights or stop signs. Huguley p.43. Both Hetz and Huguley describe the roadway in the area of the accident as having a degree of "incline" or "upgrade". Huguley p. 7 and Hetz p.20.

Charles Huguley, the lead vehicle, was driving a 1981 Dodge Pick-up which he had purchased used and which was pulling a trailer with ramps to accommodate vehicle transport. Huguley p.9, 10 and 14. Although Huguley did all of the maintenance and mechanical repairs to his vehicle, he could not advise as to when his brakes were last serviced and he 'also was unable to identify the mileage on the vehicle as his odometer did not work, Huguley p.15 and 17. Behind Huguley that morning on U.S. 27 was petitioner's automobile and Mr. Hetz' commercial truck estimated to be 55 to 60 feet long. Hetz p. 15-16. Although Mr. Hetz recalled seeing both petitioner and Mr. Huguley ahead of him in traffic, Mr. Huguley had no recollection of observing the Hetz truck in his rear view mirror as he was departing Bronson. As he traveled south, Mr. Hetz maintained an approximate two truck lengths following distance behind the Clampitt vehicle. Hetz p.21, 36-37.

Mr. Huguley was in route to his place of business on U.S. 27. He testified that about 150 yards from his driveway to his place of business that he signaled, applied his brakes and prepared to turn right. Huguley p. 20, 44. As Mr. Hetz's focus was more properly on the Clampitt vehicle directly ahead of him, he was unable to confirm or deny the Huguley testimony that Huguley's brake lights

or turn signal were in use. Clampitt's observation in this regard were not in evidence. Hetz p.23, 24.

As Huguley had almost completed his right hand turn and at a point when his truck was almost completely off of the road, he was struck by the Clampitt vehicle. Huguley p.25-26. According to Huguley, he heard screeching tires, he heard a loud crash and he felt an impact, all of which occurred, "all at one time." Huguley p.22-25. Interestingly, and although he claimed that his truck was already off the road at the point of impact, Mr. Huguley claimed that he could see the Hetz vehicle directly behind him in his rear view mirror.

Mr. Hetz first realization of a problem occurred when the Clampitt vehicle "dead stopped" in front of him. Hetz p.23. Prior to her "dead stop" before him in the road, Hetz did not observe activated brake lights on the Clampitt vehicle. Hetz p.26. Realizing that petitioner was stopped in the middle of the road, Hetz, forcefully applied his brakes, leaving skid marks in excess of 100 feet. As he was unable to switch lanes because of oncoming traffic, Mr. Hetz collided with the Clampitt vehicle. Hetz p.22, 32 and 47.

SUMMARY OF ARGUMENT

Petitioner contends that the Clampitt holding is in conflict with this Court's holding in Nash v. Wells Farqo Guard Services, Inc. 678 So.2d 1262 (Fla. 1966). As respondent will show in the argument to follow, the Clampitt decision is not governed by Nash which refined the rule of law announced in Fabre that in

determining non-economic damages that fault must be apportioned among all responsible entities who contribute to an accident, even though not all of them may have been joined as Defendants. Unlike the juries in Nash and the cases cited by Nash with approval, the Clampitt jury was not allowed to pass along the question of comparative fault of the petitioner.

Petitioner also alleges that the Clampitt decision below, reversing the grant of summary judgment on the issue of comparative fault, is in conflict with Pierce v. Progressive American Insurance Co. 582 So.2d 712 (Fla. 5th DCA, 1991). As will be shown, the First District Court properly distinguished on the facts, the Pierce decision but did not stray from the principal of law embraced by it.

ARGUMENT

I. THE FIRST DISTRICT COURT OF APPEAL CORRECTLY REVERSED THE TRIAL COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT ON THE QUESTION OF LIABILITY AND PROPERLY REMANDED THIS CAUSE FOR A NEW TRIAL ON ALL ISSUES.

Petitioner argues to this court that her case is one of first impression for the Supreme Court of Florida. Petitioner's car was the middle vehicle in a three vehicle, chain collision; she sued to recover damages for injuries she sustained as a consequence of the alleged negligent driving of the first and third vehicle in the chain. Prior to the hearing on summary judgment, Mr. Huguley, the operator of the lead pick-up truck and trailer, had been dismissed from the action. Clampitt filed her Motion for Partial Summary Judgment on the question of liability asserting that there was no evidence that she was negligent to rebut the presumption of

negligence of Respondent Hetz as the driver of the rear vehicle in the chain. R.v.I. p. 89-91. Before the Court for purposes of the Summary Judgment hearing,' was the Hetz deposition wherein he described the emergency situation **that he was confronted with by** Clampitt's failure to apply her brakes **before striking the** Huguley trailer coupled with her resulting "dead stop" in the middle of Hetz' lane of travel. R.v.XVII. p. 24-35. While the trial court held that Respondents had presented no reasonable and substantial explanation sufficient to rebut the presumption of Hetz' negligence, the First District Court of Appeal disagreed **and in so** doing relied upon a long line of Florida jurisprudence which has developed around the rebuttable presumption of negligence which arises and attaches to the driver of a rear vehicle.

The first Florida case to recognize the presumption of negligence at issue in this appeal was McNaultv v. Cusack, 104 So.2d 785 (Fla. 2d DCA 1958). McNaultv held that where a defendant runs into the rear of plaintiff's car while plaintiff is stopped for a traffic light or at an intersection, (Emphasis Added), there is a presumption of negligence of the defendant on which the plaintiff would be entitled to recover in the absence of an explanation by the defendant. (Emphasis Added). Interestingly, and as the court in Sistrunk v. Douglas, 468 So.2d 1059 (Fla. 1st DCA 1985) noted, "it should be kept in mind that the presumption rule in Florida was borne in a case in which there was a total absence of any explanation by the following driver. Id. at 1060. The rationale of McNaultv **was** adopted by this court in Bellere v.

Madsen, 114 So.2d 619 (Fla. 1959).

In Gulle v. Boggs, 174 So.2d 26 (Fla. 1965), this court reaffirmed the rule and further discussed its application. "We have stated that the presumption announced in McNaulty, 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. (Emphasis Added). The presumption provides a prima facia case which shifts to the defendant the burden to go forward with evidence to contradict or rebut the fact presumed. When the defendant produces evidence which clearly 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 fact to reconcile the conflicts and evaluate the credibility of the witnesses and the weight of the evidence." Id. at 28-29. Accordingly, and as directed by Gulle v. Boggs, in order to present the issue of negligence to the jury, the rear ending defendant driver must produce evidence which "fairly and reasonably tends to show" that the presumption is invalid. The litmus test for the presumption is whether or not the following driver has offered a substantial and reasonable explanation. In order to create a jury issue, the following driver is not required to prove that the accident was unavoidable. Sistrunk v. Douglas, 468 So.2d 1059, 1060 (Fla. 1st DCA 1985).

In the cases that have followed Gulle v. Boggs, Florida courts have recognized three general categories of affirmative explanations that will serve to rebut the presumption of negligence. As was the situation in Gulle v. Boggs, Florida courts have held that affirmative testimony regarding a mechanical failure is sufficient to rebut the presumption. In Stark v. Vasquez, 168 So.2d 140 (Fla. 1964), this court held that the presumption was successfully rebutted by the affirmative testimony of the defendant and she applied her brakes to avoid the collision but was unable to determine why her automobile failed to stop. The second general category of affirmative explanation recognized by Florida decisions occurs in cases where the lead vehicle has been illegally and, therefore, unexpectedly,stopped in the roadway. In Frazier v. Ross, 225 So.2d 451 (Fla. 4th DCA 1969), the court affirmed a judgment entered upon a jury verdict in favor of the defendant who had affirmatively explained that the rear end accident occurred because plaintiff had parked her vehicle in such a fashion that it improperly protruded into his travel lane.

The third and final general category of affirmative explanation, and the one most frequently litigated, is the scenario where positive testimony of a sudden unexpected stop or an unexpected switching of lanes by the car in front is found sufficient to rebut the presumption. In a case virtually on all fours with the one before the court, the Second District Court of Appeal in Chiles v. Beaudoin, 384 So.2d 175 (Fla. 2d DCA 1980) discussed the "quick stop" exception to the presumption of rear-end

negligence and reached the same conclusion that the First District Court of Appeals reached below that the partial summary judgment for the preceding driver on the issue of liability was improperly granted. In Chiles, the defendant driver testified that he was the third vehicle in a line stopped for a red light. Once the light changed, the three vehicles moved through the intersection when the first vehicle suddenly stopped and turned left without giving any signal causing the middle driver plaintiff to make a sudden stop immediately in the path of the defendant who had taken his eyes from the road for a second prior to perceiving the taillights on plaintiff's van. The Chiles court held that the affirmative testimony of the defendant with regard to the sudden stop of the vehicle ahead of him satisfied the defendant's burden to rebut the presumption, In Sistrunk v. Douglas, 468 So.2d 1059 (Fla. 1st DCA 1985), the defendant driver was proceeding on a four lane highway and his attention was diverted to the presence of a tractor-trailer parked just off of the edge of the roadway. While defendant driver **was** being distracted by this potential highway hazard, the vehicle immediately ahead of him was applying his brakes in order to avoid a collision with a vehicle emerging onto the highway from an adjacent fast food outlet. Having been distracted by the parked truck, the defendant driver was unable to stop in time to avoid the collision with the suddenly stopping vehicle ahead of him. The appellate court agreed that the trial court had properly denied plaintiff's Motion for Directed Verdict on liability as such was a jury issue under the facts adduced during the course of the trial.

In finding that a jury issue was presented, the court again noted that "the rule does not require the rear-car driver to eliminate every possible inference of negligence on his part in connection with the accident before he is entitled to have the jury decide the case. Obviously, if he carried his burden, then no rear-end accident case would be submitted to a jury, since under such circumstances the rear car driver would be entitled to a directed verdict of non-liability. He is required only to produce evidence from which his exercise of reasonable care under the circumstances could properly be inferred by the jury. Id. at 1060, 1061.

The principles elucidated in McNaulty, Gulle and the cases cited above continue to be applied by Florida Courts of Appeal in the "quick stop" exception cases. In the case of McCloud v. Swanson, 681 So.2d 898 (Fla. 4th DCA 1996), the trial court directed a defense verdict which was reversed on appeal with the appellate court holding that the rear-ending plaintiff was entitled to have the question of the defendant's negligence submitted to the jury. In so doing, the Fourth Circuit Court of Appeal noted that "the plaintiff in the instant case presented positive testimony, albeit slight, of a sudden change of lanes and unexpected stop. The plaintiff testified that even though she **was** paying full attention to the road before her, she did not see the defendant's vehicle until he pulled out in front of her and that he seemed to 'appear out of nowhere.' The defendant then stopped in front of her, and the plaintiff slammed on her brakes, but was unable to prevent the collision." Id. at 900. The Fourth District went on

to note that although there were inconsistencies in the plaintiff's testimony that "the import of these inconsistencies was for the jury to consider. The believability of the plaintiff's explanation of the accident and the question of defendant's negligence were matters for the trier of fact, **and** the trial jury erred in taking this decision away from the jury." Id. at 900, 901. In Eppler v. Tarmac America, Inc., 695 So.2d 775 (Fla. 1st DCA 1997), there was positive testimony by the defendant rear-ending driver that he **was** behind the plaintiff, stopped due to a red traffic light, which changed to green. The defendant driver further testified that the plaintiff started forward and then stopped suddenly in front of him causing him to rear end her and push her into the vehicle ahead. The plaintiff offered contrary testimony that she was rear ended before she had begun to move forward following the traffic signal change. Following the denial of the plaintiff's Motion for Directed Verdict, the jury returned a verdict in favor of the defendant rear-ending driver which **was** affirmed on appeal. The Court of Appeals found that the positive testimony of the defendant driver about the driving actions of the plaintiff created a factual question on the issue of fault properly reserved for the trier of fact. Noting a possible conflict with Pierce v. Prosressive American Ins. Co., 582 So.2d 712 (Fla. 5th DCA 1991), the First Circuit did certify the legal question presented by the case to this court.

There have, of course, been cases where this court and others have held that the rear-ending driver failed to rebut the

presumption of negligence. However, such cases are either distinguishable or reconcilable. As noted above, the presumption itself grew out of a case where the defendant failed to testify at trial. In Baushnan v. Vann, 390 So.2d 750 (Fla. 5th DCA 1980), a jury verdict for the defendant was reversed and the case remanded with the direction that a directed verdict be entered on the issue of liability. The court ruled that reversal was necessary because the only "explanation" offered to rebut the presumption of negligence was inadmissible evidence in the form of a traffic accident report and a police officer's opinion based on hearsay. In Tozier v. Jarvis, 469 So.2d 884 (Fla. 4th DCA 1985), the Court of Appeals again agreed that a directed verdict on the issue of liability should have been entered as the court found that the testimony of the rear-ending driver insufficient to rebut the presumption of negligence. In Tozier, the plaintiff preceding driver testified that he had slowed and stopped prior to turning right into the entrance of a restaurant and that he was rear-ended by the defendant in that process. The defendant driver testified that at no time did he see the plaintiff in his lane of travel, although he had been behind the vehicle for at least 600 feet, and that he took no evasive action to avoid the accident from the first time that he saw the plaintiff's vehicle until he struck it. The defendant driver's only "explanation" to rebut the presumption was his "speculation" that the plaintiff was backing out of a drive onto the roadway at the time of impact although the defendant driver further admitted that he never saw the plaintiff's vehicle

in motion going in either direction. In Kao v. Lauredo, 617 So.2d 775 (Fla. 3rd DCA 1993), a jury verdict in favor of a rear-ending defendant was reversed with instructions that a directed verdict on the question of liability be entered on behalf of the rear-ended plaintiff. Factually, Kao involved an accident that occurred on a rainy day on a heavily congested city street during rush hour in stop and go traffic. The plaintiff testified that she braked quickly because the vehicle in front of her was quickly stopping. She further testified that although her vehicle skidded, she was able to stop without hitting the vehicle in front of her. It was after she successfully stopped that she was rear-ended by the defendant and pushed into the vehicle ahead of her. The defendant's only testimony to rebut this presumption of negligence was that the plaintiff had stopped abruptly when he was not expecting such a stop and that had the pavement been dry that he would have had ample room to bring his vehicle to a stop before impact. Citing Pierce v Progressive American Ins. Co., 582 So.2d 712 (Fla. 5th DCA 1991), the Third District Court of Appeal found that defendant had shown that there was an "abrupt stop" by the preceding vehicle but had failed to show that such sudden stop occurred at a time and place where it could not be reasonably expected.

Petitioner asserts that the dispositive question for review by this Honorable Court is whether or not a rear-ending driver in a three car chain who rear ends the vehicle ahead may rebut the presumption of negligence by alleging and proving that the vehicle

he hit, rear ended the lead vehicle. Contrary to the assertions of the Petitioner, Respondents urge that the dispositive question is whether or not, under the specific factual circumstances presented, the defendant driver's positive testimony of a sudden, unexpected and unlawful stop by Clampitt provided the requisite substantial and reasonable explanation for the collision sufficient to overcome the presumption of negligence and create a factual issue for the jury's determination. The Petitioner asserts that the case is controlled by Pierce v. Progressive American Ins. Co., 582 So.2d 712 (Fla. 5th DCA 1991) and that the holding of the case is in conflict with the ruling of the First District Court of Appeals below. Contrary to such assertion, the Clampitt court did carefully consider and apply the holding of Pierce but in so doing, distinguished the Pierce decision on its facts.

In Pierce, the driver of a fourth vehicle involved in a chain collision sued his uninsured motorist carrier arguing that the uninsured operators of the two vehicles immediately preceding him came to abrupt stops thus creating a jury question as to his negligence as a rear-ending party. In Pierce, the court took great pain to describe the accident roadway and scene. The court noted that the accident occurred on busy Highway 50 in Orange County which was described as being a divided highway with moderately heavy traffic. The accident occurred as the four vehicles approached a busy intersection controlled by a traffic signal, viewable by all drivers, which had turned red. In the context of these facts, the Pierce court upheld the trial court grant of

summary judgment. In so doing, the court held that "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. (Citations omitted). It is a sudden stop by a preceding driver at a time and place where it could not reasonably be expected by the following driver that creates the factual issue". Id. at 714. Implicit in the Pierce holding is its finding that the "abrupt stops" at issue were stops which were reasonably appreciated given the accident's factual setting.

In the case below, the court was again presented with a factual scenario involving multiple vehicle rear-end collisions. There, however, all factual similarities between Clampitt and Pierce come to an end. As painstakingly pointed out by the Clampitt court, the collision at issue occurred on a two lane road which had a posted speed of 55mph. Although there were some residences and businesses located along the country highway, there were no traffic signals in and around the area where the accident occurred. Unlike the facts in Pierce and Kao v. Lauredo, the Clampitt court was concerned with an accident on a rural highway, not a heavily congested city street with stop and go traffic and periodically occurring traffic signals.

In addition to contrasting the starkly different accident settings, the court below also noted the positive testimony from the defendant driver that the Petitioner's brake lights did not

come on at any point prior to her "dead stopping" in front of him and that Petitioner, by her own admission in pleadings, had admitted striking the rear of the vehicle preceding her. Still additional testimony from the defendant driver established that he did attempt to avoid the accident by forcefully applying his brakes resulting in excess of 100 feet of skid marks prior to his actual impact with the petitioner,

Equally important to this court's disposition of this matter is the fact that the case involved the grant of a partial summary judgment by the trial court on the issue of liability. It is hornbook law that a party moving for summary judgment must prove conclusively the absence of any genuine issue of material fact and the court must draw all reasonable inferences in favor of the party against whom a summary judgment is sought. Wills v. Sears Roebuck & co., 351 So.2d 29 (Fla. 1997). A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. Shaffran v. Holness, 93 So.2d 94 (Fla. 1957) . If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it. Williams v. Lake City, 62 So.2d 732 (Fla. 1953); Moore v. Morris, 475 So.2d 666, (Fla. 1985). It has been held that particular caution should be exercised in the grant of summary judgment in negligence or malpractice actions. It has also been held that a party seeking a summary judgment in a negligence action has a more onerous burden

than that borne in any other type of case. Davis v. Chips Exp., Inc., **676** So.2d 984 (Fla. 1st DCA 1996); Cassoutt v. Cessna Aircraft Co., **660** So.2d 277 (Fla. 1st DCA 1995).

Although Pierce was decided in a summary judgment setting, the overwhelming body of case law in this area concerns cases which were actually tried and where evidence from all sources was received before the case either was resolved by directed verdict **or** proceeded to jury deliberation. This is undoubtedly so because of the onerous burden that a movant for a summary judgment must shoulder. As indicated by Petitioner's own statement of the case, and the record before this Honorable Court, it is certainly questionable whether the quality and quantity of proof offered by Clampitt established conclusively the requisite absence of any genuine issue of material fact,

As indicated previously, the only evidence offered by Clampitt in support of her Summary Judgment motion was the deposition transcript of Hetz and Huguley along with Hetz' answers to interrogatories. The court did not have available for review either a discovery deposition or an affidavit from Clampitt setting forth her version of the incident. Petitioner suggests in her brief that it was incumbent upon the Respondents to file additional affidavits or other discovery materials to rebut the attaching presumption of negligence. As the dissent in Pierce so accurately noted, however, "it is not necessary at a hearing on summary judgment for the non-moving party to produce evidence to prove its case as it would at trial; available inferences may allow the case

to survive on Motion for Summary Judgment." Id. at 716. The unrefuted testimony of Hetz and his interrogatory answers established dual issues of material fact. The first is whether or not Clampitt was inattentive and thus negligent in failing to decelerate gradually as the driver before slowed for his turn. The second issue was whether or not Clampitt had the opportunity to take evasive action which she did not do to remove her vehicle from a position of danger in the middle of the roadway once she struck the vehicle ahead of her. As Mr. Hetz indicated in his interrogatory answers properly before the trial court as evidence, it was Mr. Hetz' opinion that the Clampitt vehicle "was solely responsible for the chain of events that had taken place. If the car would not have rear-ended with the trailer and had not stopped in the middle of the highway, I could have possibly had time to completely stop or go around the car. The reason I say that is because the car had completely knocked the pick-up truck with trailer clear off the highway and the car could have kept moving and pulled off the highway - but instead the car stopped dead in the middle of that road." R.v.I. p. 92-104. The question of Clampitt's opportunity to take evasive action would also go to the issue of damages, as the jury, had it been permitted to hear all of the evidence, could have concluded that evasive action was not undertaken because Clampitt had already sustained an injury in the first impact with her preceding vehicle rendering her physically unable to take such action. Again, no evidence whatsoever was put forth by Clampitt to refute the inference that she was negligent by

failing to move her vehicle from its place in the roadway when she had the opportunity to do so.

In her concluding remarks, Clampitt urges this court to consider that the operation of a commercial rig such as the one driven by Mr. Hetz requires a "heightened duty of care" toward drivers of other vehicles. This argument is not supported by a single reference to Florida statutory or case law. Respondents urge this Honorable Court that the Appeals Court below applied the applicable law to the facts of the case and in so doing correctly found that the Respondents had provided a substantial and reasonable explanation for the collision by Mr. Hetz' positive unrefuted testimony of Colletta Clampitt's sudden and unexpected stop on the rural highway at the time of this accident. Because of such positive and unrefuted evidence, the court below correctly found that the respondents were entitled to have the jury decide the question of negligence in this case.

ARGUMENT

II. THE FIRST DISTRICT COURT OF APPEAL WAS CORRECT WHEN IT CLARIFIED THAT THE NEW TRIAL, FOLLOWING REMAND, WAS TO INCLUDE ALL ISSUES.

The First District Court of Appeal granted Respondents a new trial as to both liability and damages finding that the trial court, in granting partial summary judgment, had improperly taken the entire question of negligence for the accident from the jury. As the First District noted, "At the Pre-Trial Hearing, the trial court cautioned appellant's counsel that any arguments for reduction of damages based on appellees comparative negligence

would be objectionable." D.J. Spencer Sales v. Clampitt, 704 So.2d 601 (Fla. 1st DCA 1997) . Petitioner puts forth two separate arguments as to why the First District determination that the new trial should include the question of damages was improper. In brief to this court, Petitioner argues that Respondents expressly limited the scope of requested appellate review and in support of that position she notes to the court that the argument heading in Respondent's initial brief below read "Trial Court's Granting of Plaintiff's Partial Summary Judgment was in Error.". Petitioner claims that because no review was sought of the damage award that the Seventh Amendment to the United States Constitution and the case of Purvis v. Inter-County Telephone & Telegraph Co., 173 So.2d 679 (Fla. 1965) deny retrial on that issue. As her alternate basis for arguing that the retrial be limited to liability issues only, petitioner cites the court to its own case of Nash v. Wells Fargo Guard Services, Inc., 678 So.2d 1262 (Fla. 1996). Contrary to petitioner's assertions, appellate review of all issues was sought and the Nash v. Wells Fargo line of cases are simply not controlling.

Petitioner argues that Purvis v. Inter-County Telephone & Telegraph Co., 173 So.2d 679 (Fla. 1965) and the Seventh Amendment to the United States Constitution deny retrial on the damage issue as respondents allegedly did not raise the issue on appeal. As the Clampitt court below noted, following the jury verdict in favor of petitioner, motions for new trial or remittitur were filed but denied. Clearly the Respondents filing of a Motion for Remittitur

incorporated the question of the propriety of the damage award. In Respondents' Amended Initial Brief in the court below, there was a section which very specifically was entitled "Request for Relief". In it the respondents recited "Appellants respectfully request that this Honorable Court reverse the trial court's granting of Appellee's Motion for Partial Summary Judgment and remand this matter for a new trial on all issues. (emphasis added). In Respondents' Reply Brief to Appellee's Motion for Clarification in the court **below,** Respondents again, at two separate places in the brief, request remand for a new trial on all issues. As respondents' entitlement to a new trial on all issues was urged in brief in the court below, there is no violation of the Seventh Amendment. Likewise, Purvis v. Inter-County Telephone & Telegraph is inapplicable. In Purvis, the court granted Plaintiff's Motion for Summary Judgment on liability issues. On appeal, the District Court reversed and remanded for trial on both liability and damages. This court quashed the appellate decision insofar as it remanded for a new trial on damages. In reaching its holding, the Purvis court found that respondents "assignment of error" referred only to the issue of liability and not **damages.** As this court is well aware, the "assignment of error" pleading requirement is no longer used. However, and as previously noted, even if the rationale of Purvis is applicable, it is clear that Respondents' pleadings in the court below did raise the issue for the court's consideration.

Petitioner contends that the First District Court of Appeals

decision below expressly conflicts with Nash v. Wells Fargo Guard Services, Inc., 678 So.2d 1262 (Fla. 1996), Schindler Elevator Corp. v. Viera, 644 So.2d 563 (Fla. 3rd DCA 1994), American Aerial Lift, Inc. v. Perez, 629 So.2d 159 (Fla. 3rd DCA 1993), Schindler Corp. v. Ross, 625 So.2d 94 (Fla. 3rd DCA 1993) and Griefer v. DiPietro, 625 So.2d 1226 (Fla. 4th DCA 1993). As respondents will demonstrate in the argument to follow, all of the cases relied upon by petitioner as allegedly presenting conflict are not controlling with the exception of the Griefer v. DePietro case which is distinguishable.

In Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), this court resolved a conflict between the districts as to the proper interpretation of Section 768.81(3), Florida Statutes, which directed that any judgment against a defendant be based on the defendant's percentage of fault in causing any damage and not on joint and several liability. The specific question decided in Fabre was whether or not only those joined in the lawsuit as party defendants could be included on the verdict form. The court held that in determining non-economic damages, that fault must be apportioned among all responsible entities who contribute to an accident even though not all of them had been or could have been joined as defendants. Factually, the plaintiff in Fabre was injured while a guest passenger in an automobile operated by her husband. She sued the defendant claiming that the defendant had negligently changed lanes in front of her vehicle causing it to swerve into a guardrail. The defendant denied being the offending

vehicle and at the jury charge conference requested that the verdict form be drafted so as to allow the jury to apportion blame for the accident between plaintiff's husband and the defendant. Although the trial court denied the request, it did agree to submit the requested issues of negligence to the jury subject to a post-trial determination of whether any affirmative finding on the negligence issue would result in a reduction of Mrs. Marin's recovery. Although the jury found each driver to be 50% at fault, the trial court thereafter refused to reduce the non-economic damage award in favor of the plaintiff. Accordingly, and as clearly stated by the Fabre court, "On appeal, the issue was whether the liability for non-economic damages should be apportioned to the Fabres on the basis of the percentage of fault attributed to them." Id. at 1183. Thus, a "Fabre apportionment of fault error", is the failure to permit the jury to assess the fault of those who may have contributed to the occurrence of an accident even though those entities are not before the jury as party defendants. As Fabre involved a non-negligent plaintiff, it did not address the implications of removal from jury consideration the question of a claimant's comparative negligence.

The Fabre Rule was applied in the cases of Schindler Elevator Corp. v. Viera, 634 So.2d 563 (Fla. 3rd DCA 1994), American Aerial Lift, Inc. v. Perez, 629 So.2d 169 (Fla. 3rd DCA 1993), and Schindler Corp. v. Ross, 625 So.2d 94 (Fla. 3rd DCA 1993), all allegedly in conflict with the Clampitt decision. In Viera, the court remanded because the trial court erred in failing to instruct

the jury to apportion the liability of a settling co-defendant; in Perez, a products liability case, the court remanded so that all of the entities in the product distribution chain could be considered; in Ross, the court remanded because the jury did not assess the negligence of the plaintiff's employer. Respondents concede that in each of these three cases that the scope of retrial was limited to liability question. However, and most importantly, in each of the cases relied upon by the Petitioner, the original jury was permitted to assess the comparative negligence of the claimant, a situation not present in the case below.

In Nash v. Wells Fargo Services, Inc., 678 So.2d 1262 (Fla. 1996), this court refined and explained its holding in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993). "The instant case provides us with the opportunity to address the extent of the pleading and proof required under Fabre in order for a defendant to have non-economic damages apportioned against a non-party." Id. at 1264. In Nash, the court held that in order to include a non-party on a verdict form pursuant to Fabre that the defendant must affirmatively plead the negligence of the non-party who must be identified. Having thus explained the pleading and proof requirements, Nash thereafter held that a retrial necessitated by Fabre errors would not extend to a redetermination of damages. Nash, like Fabre, involved a non-negligent plaintiff employee of a hospital who sued the hospital's guard service for injuries she sustained in an assault in the hospital parking garage. Nash did not sue her employer as a defendant but at the close of testimony

the guard service's motion to apportion non-economic damages by including the hospital on the verdict form was denied. By the time the matter reached the District Court of Appeal, Fabre had been decided and, accordingly, the First District reversed the judgment and remanded for new trial. This court reversed that decision finding that the guard service had failed to meet the pleading and proof requirements outlined in the Nash opinion and, in fact, that the guard service had waived the defense because of the posture it took during the course of the trial arguing that the hospital's negligence was not an issue as it was not a defendant.

In deciding Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), this court explored the legislative intent behind the enactment of Section 768.81. Noting that this section was enacted as part of the Tort Reform and Insurance Act of 1986, the court observed that "the legislature intended that damages be apportioned among all participants to the accident. The abolition of joint and several liability has been advocated for many years because the doctrine has been perceived as unfairly requiring a defendant to pay more than his or her percentage of fault." Id. at 1185. Thus, the focus of the opinion was to interpret the statute in accordance with the obvious intent of the legislature which was to reform certain inequities in the state's tort system one of which was the continued applicability of the doctrine of joint and several liability in all scenarios.

Not addressed by Fabre, Nash and its prodigy was the question of whether depriving the trier of fact of the opportunity to assess

the comparative negligence of the claimant would necessitate a different result as far as the scope of retrial was concerned. As to the question unanswered by Fabre, Nash and its prodigy, respondent would point to a separate line of cases for the resolution of the issue.

In Tropical Exterminators, Inc. v. Murray, 171 So.2d 432 (Fla. 2d DCA 1965), a case factually similar to the one before the court, the defendant appealed from a final judgment entered in favor of the plaintiffs on the issue of liability in a personal injury case. In finding that the summary judgment had been improperly entered, as the defendant had presented evidence of a sudden loss of consciousness from an unforeseen cause, the Second Circuit held that the new trial should include both the issues of liability and damages. In so doing, the court noted that "a new trial may be limited to the question of liability only when it is clear that the course can be pursued without confusion, inconvenience, or prejudice to the rights of any party." Id. at 434, 435.

This court was to address the question of scope of new trial in the case of Rowlands v. Signal Const. Co., 549 So.2d 1380 (Fla. 1989). In Rowlands, the plaintiff was injured while bicycling on a public sidewalk. Although she did not see the object that caused her fall, she did notice following the fall cable and rope doubled up on the sidewalk. She thereafter sued a construction company that had been working in the area. During the course of the trial, the extent of injuries sustained by Rowlands in her fall was also seriously contested. When the jury returned its verdict, it found

that Rowlands was 10% negligent and that the construction company was 90% negligent but failed to complete the verdict form to award damages. The judge thereafter instructed the jury to return to its deliberations and when it did it awarded the claimant and her husband almost $300,000 in judgment.

The construction company filed post-trial motions for a new trial, or, in the alternative, for remittitur which was granted. In granting the remittitur, it was unclear from the record whether the trial court felt it was necessitated because of juror error in assessing liability or because the award made was so excessive as to shock the conscience of-the court. The issue before this court was the propriety of the trial court's ruling. Finding an insufficient record to evaluate that, this Honorable Court remanded. In so doing, the court noted that "the problem posed by this case is that, from the Trial Court's statements and the District Court's analysis, the impropriety identified by the Trial Court and the District Court involved the percentages of liability, not merely excessiveness of the verdict." Id. at 1382. Because of the possibility that the jury error went to the issue of liability as compared to the excessiveness the verdict, this court questioned whether remittitur was appropriate. In so doing, the court noted that it was compelled to such a conclusion by three factors. "First, the clear weight of authority in Florida supports applying remittitur exclusively to subtract from the verdict.... Second, we find this rule more in harmony with the settled principle that the apportioning of liability is a matter peculiarly within the

province of the jury.... Third, we conclude that the determination of liability falls within the right to trial by jury guaranteed by articles I, section 22 of the Florida Constitution. Since liability is inextricably bound up with the apportionment of damages under the doctrine of comparative negligence, this matter must be left to the jury. When the percentages of liability are contrary to the manifest weight of the evidence, the trial court must treat this defect as an error in the finding of liability itself. The only remedy is to order a new trial on all issues affected by the error." (emphasis added). In Rowlands, this court recognized the principle that the determination of liability is interwoven with and impossible to separate from the question of apportionment of damages.

The principle from Rowlands was thereafter applied in the case of Currie v. Palm Beach County, 578 So.2d 760 (Fla. 4th DCA 1991). In Currie the question again presented to the court was the scope of a new trial which had been granted by the trial court. In upholding the trial court grant of new trial as to all issues, the court in Currie noted "one of the issues tried to the jury was whether Michele was comparatively negligent. Evidence on this issue necessarily impacts both liability and damages. The trial court properly ordered a new trial on both. See Rowlands v. Signal Constr. Co., 539 So.2d 1380 (Fla. 1989)." Id. at 734. See also Lindos Rent A Car v. Standley, 590 So.2d 1114 (Fla. 4th DCA 1991) where the court held that "if the jury was improperly prejudiced in assessing liability, it is reasonable to conclude that it assessed

damages based on its faulty assessment of liability. Thus, the trial court did not err in finding that appellee was entitled to a new trial on damages as well as liability." Id. at 1116. In the case before this Honorable Court, the jury was "improperly prejudiced" in assessing liability because the jury was completely deprived of the opportunity to conduct such an assessment, Although the First District Court of Appeal did not cite Rowlands and its prodigy when it decided Waters v. Williams, 696 So.2d 386 (Fla. 1st DCA 1997) it is obvious that the principles embraced by those cases were before the court. In Waters, as in Clampitt, the Court of Appeals found that the trial court had erred in removing the negligence question from the jury. Because this error fundamentally impacted the jury's ability to assess damages, new trial on both issues was ordered. Clearly distinguishable is the case relied upon by petitioner, Griefer v. DiPietro, 625 So.2d 1226 (Fla. 4th DCA 1993), where the jury was permitted to assess liability of all parties.

CONCLUSION

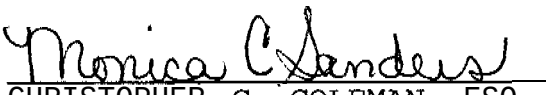
In light of the above, it is clear that the First District Court of Appeals was correct in reversing the Trial Court grant of Partial Summary Judgment on the question of liability and was further correct in remanding this matter for trial on all issues. As developed, Nash v. Wells Fargo and its prodigy does not limit the scope of this new trial to liability issues as Nash simply does not apply where a jury was improperly denied the opportunity to assess the negligence of the plaintiff. Likewise, there is no

conflict between Clampitt and Pierce as clearly the Clampitt court applied the Pierce rule and found the petitioner's sudden stop occurred where it could not have been reasonably expected by the respondent driver. Accordingly, the judgment of the First District Court of Appeals should be upheld and this case permitted to go forward for a retrial on all issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Eric C. White, Esquire, P. 0. Box 1322, Gainesville, Florida 32602; this 10th day of November, 1998.

CAMERON, MARRIOTT, WALSH,
HODGES & COLEMAN, P.A.



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