Case No. 92,603

Supreme Court of Florida

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COLLETTA P. CLAMPITT,

Petitioner,

vs.

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

Respondents.

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

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PETITIONER, COLLETTA P. CLAMPITT'S BRIEF ON THE MERITS

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PREFACE

The following symbols and references will be used throughout:

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 shall be referred to, collectively, as Hetz, et al.

References to 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

In May, 1994 Petitioner Colletta Clampitt, sued Respondents, DJ Spencer Sales, Reliable Peat Co., JV, and Carl Robert Hetz, for injuries sustained in a three vehicle collision which occurred in August, 1993. R.v.I. p. 23-26. In May, 1996, Mrs. Clampitt moved for partial summary judgment on the issue of her alleged comparative fault, and the trial court granted the motion. R.v.I. p. 74-75, 107-108. The case was tried in September, 1996.

An $842,997 judgment was entered following a verdict for Mrs. Clampitt, awarding past and future economic and non-economic damages. R.v.I. p. 197. Respondents appealed the judgment raising one issue on appeal. Respondents argued that the trial court erred by granting summary judgment, and by ruling as a matter of law that Mrs. Clampitt was free of fault.

On October 15, 1997, the First District Court of Appeal reversed the judgment, holding that the negligence question between Petitioner and Respondents should have been submitted to the jury. The district court ordered a new trial, but the opinion was silent on the scope of issues to be retried.

Petitioner Clampitt filed a Motion for Clarification based on Nash v. Wells Fargo Guard Services, Inc, 678 So.2d 1262 (Fla. 1996), Purvis v. Inter-County Telephone and Telegraph Co., 173 So.2d 679 (Fla. 1965), and decisions of the Third and Fourth District Courts of Appeal. Petitioner urged that retrial should be limited to the comparative fault and apportionment issue. On February 19, 1998, the First District Court of Appeal ruled that the new trial would include the issues of liability and damages, citing Waters v. Williams, 696 So.2d 386 (Fla. 1st DCA 1997). DJ Spencer Sales v. Clampitt, 704 So.2d 601 (Fla. 1st DCA 1997). Following the clarification, Clampitt filed her Notice to Invoke Discretionary Jurisdiction on March 18, 1998, and on September 21, 1998, this Court entered its order accepting jurisdiction.

STATEMENT OF THE FACTS

On May 16, 1996, the trial court held a hearing on Colletta Clampitt's Motion for Partial Summary Judgment on the issue of comparative fault. R.v. XVII. Hetz, et al., raised the affirmative defense of Mrs. Clampitt's comparative fault below, as opposition to Clampitt's motion. R.v.I. p. 29-30. Colletta Clampitt filed the deposition transcripts of Carl Robert Hetz and Charles Timothy Huguley, and Mr. Hetz's Answers to Interrogatories in support of her motion. R.v.I. p. 92-104; v. XIII; v. XIV. Hetz, et al., filed no affidavits or other discovery with the lower court to rebut the presumption of negligence attendant Mr. Hetz's collision with the rear of Mrs. Clampitt's car.

The accident occurred on a clear, sunny day between 10:30 and 11:00 o'clock in the morning. Hetz p. 18. Hetz operated his 55-60 feet-long commercial truck carrying a load of bark with a gross vehicle weight estimated at 76,000 pounds. Hetz p. 15-16, 26. Traveling south, Mr. Hetz was aware of the two vehicles ahead of him as he left the Bronson city limit, maintaining his "rule of thumb" approximate two truck-lengths following-distance behind Mrs. Clampitt's car. Hetz p. 21, 36-37.

Although Mr. Hetz's view was unobstructed as the lead vehicle driven by Huguley began its turn, Mr. Hetz did not recall seeing Mr. Huguley's turn signal or brake lights; yet Huguley specifically recalled braking and signaling to turn. Hetz p. 24, 25, 28; Huguley p. 20. During the Florida Highway Patrol's investigation immediately following this accident, Mr. Hetz learned that Mr. Huguley's brake lights and turn signals were, in fact, operational. Hetz p. 43.

South of Bronson on Alternate U.S. 27, toward the accident site, was a store, some apartments, Pardon's Farm Supply, Central Florida Junior College and Pineview Villas, among the commercial and residential structures. Huguley p. 43. Mr. Huguley estimated that about 150 yards from the driveway to his place of business, he signaled, applied his brakes, and prepared to turn

right. Huguley p. 20, 44. Mr. Huguley further testified that his top speed when traveling from Bronson to his business would have been 45-50 mph, at which point he would prepare to turn, downshifting his manual transmission pick-up truck from fourth to third gear. Huguley p. 16, 21.

Just as Mr. Huguley began his turn, he heard screeching tires, he heard a loud crash, and he felt an impact which he described as occurring, "All at one time." Huguley p. 22-25. Upon hearing the screeching of tires, Mr. Huguley glanced into his rear-view mirror unconcerned about the location of Mrs. Clampitt's car, in his words "[B]ecause I was looking at the semi." Huguley p. 25. Once Mr. Huguley heard sounds and observed the semi, he immediately stepped on the accelerator trying to get out of the way. Huguley p. 31. Although Mr. Huguley was unable to tell if there were one or more impacts as a result of the events noted above, Huguley estimated that from the time he heard the first noise until his truck came to a rest, "It seemed like a second". Huguley p. 25, 28. During the sequence noted above, Huguley described Hetz's truck and trailer as being, "...real close...". Huguley could see Mrs. Clampitt's car between his vehicle and the semi tractor-trailer. Huguley p. 29.

Mr. Hetz testified that once Mrs. Clampitt's vehicle contacted the trailer pulled by Mr. Huguley's pick-up truck, she stopped in the middle of the road. Hetz p. 26, 30, 31. As Mr. Huguley began his turn, Hetz stated that it was just a matter of seconds before his commercial rig collided with Mrs. Clampitt's vehicle. Hetz p. 29. Knowing the impact was severe, Hetz stated, "I thought I killed her." Hetz p. 34-35. Mr. Huguley repaired his trailer after the collision estimating the repair cost for labor and materials at $400. Huguley p. 32.

Mr. Hetz stated that the road where the accident occurred had a ditch or ravine to the right. Hetz p. 47. Facing oncoming traffic to his left, following the vehicles ahead at a distance of two

truck lengths, and traveling at 45 to 50 miles per hour, Mr. Hetz testified that he could not avoid

colliding with Mrs. Clampitt's car. Hetz p. 22, 47. Hetz acknowledged that the skid marks left by his truck were "[A] hundred feet...or a hundred and a couple of feet." Hetz p. 32.

SUMMARY OF ARGUMENT

The First District Court of Appeal reversed the trial court's entry of summary judgment for Petitioner Clampitt on the issue of comparative fault. The trial court ruled that Mrs. Clampitt's alleged collision with Mr. Huguley's truck ahead was legally insufficient to rebut Hetz et al.'s presumed negligence for rear-ending Mrs. Clampitt's vehicle.

Under the rationale of Pierce v. Progressive American Insurance Company, 582 So.2d 712 (Fla. 5th DCA 1991), evidence of a reasonably anticipated, abrupt stop by a vehicle ahead is legally insufficient to rebut the presumed negligence arising from a rear-end collision. This rule follows the scope of the legal duty owed by operators of dangerous instrumentalities to drivers of other vehicles.

In reversing the trial court's entry of summary judgment, the district court found that the deceleration and turns of lead vehicles were reasonably anticipated in this case. DJ Spencer Sales v. Clampitt, 704 So.2d 601 (Fla. 1st DCA 1997). Applying the Pierce rule of law, however, the First District's finding below is legally insufficient to rebut Hetz et al.'s presumed negligence for rear-ending Mrs. Clampitt.

Mr. Hetz was familiar with the roadway where the accident occurred, and the forward vehicles driven by Mrs. Clampitt and Mr. Huguley were in plain view. Hetz p. 21. Mr. Hetz was accelerating when Mr. Huguley began to turn. Hetz p. 22, 28. Mr. Hetz testified that Mrs. Clampitt came to an abrupt, sudden stop, trying to allow Mr. Huguley's turn. Hetz p. 23-24. Hetz claimed that Mrs. Clampitt's car struck Mr. Huguley's trailer, but Mr. Hetz admitted that he could not avoid

colliding with Mrs. Clampitt's car. Hetz p. 47. Hetz et al., therefore followed too closely and are

solely responsible for rear-ending Mrs. Clampitt, and for the resulting damages and injuries. The decision of the district court below should be reversed, and the final judgment reinstated.

After the district court below reversed the trial court, Petitioner Clampitt filed a Motion for Clarification citing Nash v. Wells Fargo Guard Services, Inc., 678 So.2d 1262 (Fla. 1996). Since the First District's October 15, 1997 decision was silent on the scope of issues to be retried and the only appellate issue was a Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), - type question, Mrs. Clampitt urged clarification of the First District's ruling that the new trial should be limited to apportionment of fault, and that it should not include damages.

The First District clarified, citing Waters v. Williams, 696 So.2d 386 (Fla. 1st DCA 1997), that the new trial ordered would include liability and damages. DJ Spencer Sales v. Clampitt, 704 So.2d 601. However, Waters provides no authority for this proposition. Further, controlling precedent of this Court, Nash v. Wells Fargo Guard Services Inc., 678 So.2d 1262 unequivocally directs that any new trial ordered should not include damages. Id. at 1263-4. Although this appeal should be resolved by a reversal of the First District Court of Appeal's decision on the presumption of negligence issue, any retrial must be limited to liability and apportionment questions. Id.

ARGUMENT

I. THE FIRST DISTRICT COURT OF APPEAL ERRED WHEN IT REVERSED THE TRIAL COURT'S SUMMARY JUDGMENT FOR PETITIONER CLAMPITT, AND REMANDED THIS CAUSE FOR A NEW TRIAL.

This case poses an issue of first impression for the Supreme Court of Florida. Petitioner Colletta P. Clampitt sued to recover damages for injuries sustained when she was rear-ended by a semi-tractor trailer owned and operated by Respondents. R.v.I. p. 23-26. Petitioner's car was the

middle vehicle in a three-vehicle, chain collision, and Respondents, who were Defendants at trial,

claimed that Clampitt collided with the vehicle ahead and stopped abruptly before Respondent's truck rear-ended Mrs. Clampitt's car. Hetz p. 23-24. Respondents argued that Mrs. Clampitt negligently collided with the pick-up truck and trailer ahead, and that this fact rebutted the presumption of Respondent's negligence for rear-ending Mrs. Clampitt's car. R.v.XVII. P. 24-35.

Clampitt moved for partial summary judgment arguing that Mrs. Clampitt, as a matter of law, was free of negligence regarding Respondents' rear-end collision with Mrs. Clampitt's car. R.v.I. p. 89-91. The dispositive question for review herein is whether the rear-most 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.

Mrs. Clampitt relied upon Pierce v. Progressive American Insurance Company, 582 So. 2d 712, as the legal basis for her Motion for Partial Summary Judgment. In Pierce, the Fifth District Court of Appeal summarized the law of rear-end collisions:

> 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 any explanation, but one which is "substantial and reasonable". Brethauer v. Brassell, 347 So. 2d 656 (Fla. 4th DCA 1977). Pierce, 582 So. 2d 714.

Mrs. Clampitt argued that liability was based on the presumed negligence of the following

driver, Carl Robert Hetz. R.v. XVII. p. 7-8. Invoking this presumption, the burden shifted to Mr. Hetz to come forward with evidence to contradict or rebut his negligence. However, counsel for Mr. Hetz filed no affidavits, depositions or other discovery alleging facts to rebut the presumption. Instead, Hetz's counsel relied on the record at the hearing, arguing that the presumption of negligence was overcome by the claim that Mrs. Clampitt followed Mr. Huguley too closely, and when she struck Mr. Huguley's trailer, she contributed causing Hetz's collision with Mrs. Clampitt's car. R.v. XVII. p. 25-28.

The only issues framed by the pleadings concerning Mrs. Clampitt's motion, were the negligence of Colletta Clampitt, and the negligence of Carl Robert Hetz. R.v.I. p. 29-30. The record before the trial court included Mr. Hetz's and Mr. Huguley's depositions and Mr. Hetz's Answers to Interrogatories. Thus, the dispositive issue on the merits of this appeal is whether the depositions and answers created any genuine issue of material fact sufficient to rebut the presumption that Respondents were liable for rear-ending Mrs. Clampitt's car.

Florida law uniformly recognizes the presumption of negligence when a following driver collides with the preceding vehicle. This presumption may be rebutted by evidence of brake failure, an unexpected lane change by a forward vehicle, or an illegal and thus, unexpected stop by the lead vehicle. Klipper v. Government Employees Insurance Company, 622 So. 2d 1141, 1143 (Fla. 2d DCA 1993); Gulle v. Boggs, 174 So. 2d 26, 29 (Fla. 1965); Conda v. Plain, 222 So. 2d 417 (Fla. 1969); Holden v. Dye, 224 So. 2d 350 (Fla. 1st DCA 1969); Frazier v. Ross, 225 So. 2d 451 (Fla. 4th DCA 1969); Liriano v. Gonzalez, 605 So. 2d 575 (Fla. 3d DCA 1992). The First District Court of Appeal has also held that industrial equipment traveling slower than the posted speed, or questionable lighting on the vehicle ahead, may entitle a trier of fact to conclude that the following

vehicle was not the sole cause of a rear-end collision. Chadbourne v. Van Dyke, 590 So. 2d 1023, 1024 (Fla. 1st DCA 1991); Johnson v. Deep South Crane Rentals, Inc., 634 So. 2d 1113, 1114 (Fla. 1st DCA 1994). Mr. Hetz argued that he did not see brake lights on Mrs. Clampitt's vehicle and she came to an unexpected, sudden stop. Hetz p. 26. This was Hetz, et al.'s only explanation to rebut the presumption of negligence attendant Hetz's driving, and this explanation was specifically rejected by the Pierce court. Applying the Pierce rule of law, the trial court granted the motion, ruling that Respondents were solely responsible for the collision with Mrs. Clampitt's car. R.v.I. p. 107-108.

The only disputed fact relating to Clampitt's Motion for Partial Summary Judgment is not material and concerns whether Mrs. Clampitt struck the rear of Mr. Huguley's trailer, causing minor damage, immediately prior to, or at the same instant Mr. Hetz's commercial rig crushed her car. Under either factual scenario, applying Pierce, as a matter of law, the putative negligence of Mrs. Clampitt, is unrelated to Mr. Hetz's negligence in colliding with her car. The trial court correctly applied Pierce, granting Mrs. Clampitt's Motion for Partial Summary Judgment, as emphasized by the trial judge's rhetorical inquiry to Respondents' counsel at the hearing:

> Suppose she hadn't -- it wouldn't make any difference to your client whether Clampitt hit Huguley or whether she didn't. If she had managed to stop a quarter of an inch from Huguley, your client still runs into her. Her negligence has nothing to do with whether Hetz hits her or whether he doesn't it seems to me. R.v.XVII. p. 31.

Indeed, the only arguments advanced by Hetz, et al. at the trial court, were that Mrs. Clampitt was not in her "proper place" on the roadway, and that her stop could not have been reasonably anticipated. R.v.XVII. p. 30-32. The case proceeded to trial.

A judgment was entered following a verdict for Clampitt, awarding past and future economic

and non-economic damages, and Respondents appealed. R.v.I. p. 197. The only appellate issue was

whether the trial court erred when it granted Clampitt's Motion for Partial Summary Judgment. The appeal was limited to whether Mrs. Clampitt's alleged negligence by striking the vehicle ahead of hers was, as a matter of law, legally sufficient to rebut Respondents' presumed negligence for rear-ending Mrs. Clampitt's car.

DJ Spencer Sales v. Clampitt, 704 So. 2d 601 (Fla. 1st DCA 1997), reversed the trial court's summary judgment which ruled that Mrs. Clampitt was not responsible, as a matter of law, for the rear-end collision between Respondents' truck and Petitioner's car. Id. The First District held that evidence of Mrs. Clampitt's collision with the lead vehicle overcame the presumption of Respondents' negligence. Id. The First District stated:

> [W]e conclude appellant Hetz's affirmative testimony concerning appellee's "dead-stop" in front of him and her seeming failure to use her brakes prior to the impact with the lead vehicle, constitutes sufficient evidence to overcome the presumption of negligence which attaches to the driver of the rear vehicle involved in a collision. Since the lead driver testified that he used his turn indicators to signal his turn into his business, a jury could reasonable infer that appellee was negligent in failing to decelerate gradually as the lead driver slowed and turned in front of her vehicle. Id.

However, Pierce holds that reasonably anticipated, sudden stops are, as a matter of law insufficient to overcome the presumption of negligence. On this point, the First District stated, "Consequently, drivers on the highway reasonably could be expected to anticipate the possible deceleration and turn of lead vehicles into the various establishments." DJ Spencer Sales, at 604. Contrary to Pierce, the District Court held that Mrs. Clampitt's alleged "dead-stop", even though reasonably anticipated, overcame the presumption of negligence. Id.

The First District expressly holds that Mrs. Clampitt's negligence in striking the lead vehicle

inures to the Respondents' benefit, and finds that fact sufficient to overcome the presumption of

negligence. DJ Spencer Sales, at 604. In Pierce, the Fifth District specifically rejected this exact legal reasoning, where the last driver in a chain collision sought to utilize a rear-end collision ahead to rebut the presumption of his own negligence, in colliding with the car immediately ahead:

> The second argument is ... fallacious. The presumption of negligence arising from the collision between Boone and Reaves inured only in favor of Boone, and against Reaves. Likewise, any presumption of negligence against Tiroff and in favor of Reaves arising from a second collision could not benefit Pierce in regard to the third collision when he struck Tiroff. Pierce, 582 So. 2d 714.

Pierce rejected the argument that a middle driver's collision with a preceding car can be used to rebut the presumption of negligence of a following vehicle's rear-end collision with the middle car. Id.

The Pierce rule of presumptions for a chain collision directs that any of Mrs. Clampitt's negligence inured to the driver of the vehicle ahead of hers', but not to Respondents. Id. Under Pierce, Mrs. Clampitt owed a duty ahead, but under the facts presented, traveling in the same direction as Respondents, she did not owe a duty to the driver of the following vehicle.

In Florida, an automobile is considered a dangerous instrumentality, and although a driver does not insure the safety of others, he is charged with the responsibility of having his vehicle under control at all times, commensurate with the circumstances and locale. Nelson v. Ziegler, 89 So. 2d 780, 783 (Fla. 1956); Anderson v. Southern Cotton Oil, Co., 74 So. 975 (Fla. 1917). An operator of a dangerous instrumentality is required, "[T]o maintain a sharp and attentive lookout in order to keep himself prepared to meet the exigencies of an emergency within reason and consistent with reasonable care and caution." Id. at 783. Thus, the scope of the legal duty owed by an operator of a dangerous instrumentality includes allowing for emergencies which can be reasonably expected. Id.

In Lynch v. Tennyson, 443 So. 2d 1017 (Fla. 5th DCA 1983), Lynch, the last driver in a

chain collision, received an adverse summary judgment on the liability issue and the Fifth District reviewed whether any issue of fact existed which would permit recovery by Lynch. Id. Lynch followed Tennyson's automobile at a distance of four or five car lengths. Id. at 1018. Tennyson stopped suddenly after colliding with the rear of the car in front of her, which stopped for an emergency vehicle. Id. Lynch skidded into Tennyson, and Lynch testified that she never observed brake lights on Tennyson's vehicle. Id. The issue in Lynch concerned whether Lynch was the sole cause of the last collision, as a matter of law, thereby discharging Tennyson from liability. Id.

The Fifth District observed that, "It is beyond dispute that Lynch was negligent, as a matter of law, and such has been conceded on appeal." Id. (Citing Baughman v. Vann, 390 So. 2d 750 (Fla. 5th DCA 1980)). The Lynch court held that there was an available inference that Tennyson followed the preceding car too closely and when she ran into it, she contributed, at least in part to the second impact by Lynch's vehicle. Id. However, in Pierce v. Progressive American Insurance Company the Fifth District Court of Appeal specifically receded from this Lynch holding, recognizing that if sudden stops may be reasonably anticipated, such stops do not rebut the rear-end collision presumption. Pierce, 582 So.2d 715.

In Pierce, the Fifth District Court of Appeal ruled that it is more than an abrupt stop by a preceding vehicle located 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). Id. at 714. It is a sudden stop by the preceding vehicle at a time and place where it could not reasonably be expected by the following driver that creates the factual issue. Id. (citation omitted).

Reviewing the issue of whether forward vehicles in a chain collision were *not* liable, as a

matter of law, to the rear driver in the chain, the Pierce court, sitting en banc ruled:

> 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.
>
> Other than the fact that Reaves and Tiroff each collided with the preceding car, there is no evidence whatsoever of any negligence by either of them to rebut the presumption of Pierce's negligence in regard to the third collision. The burden to produce that evidence was upon Pierce. (citation omitted.) Id. at 714.

The Pierce court concluded its discussion noting that Pierce never contended there was any material evidence of negligence by Tiroff or Reaves other than the fact that each ran into the vehicle ahead. Id. at 715.

Justice Cowart of the Fifth District concurred with the majority in Pierce, and authored a dissent in Lynch, supra, which outlined the rationale to conclude, as a matter of law, that any negligence of Colletta Clampitt by failing to stop before striking Mr. Huguley's trailer, is not comparative negligence as to the collision between Mr. Hetz's commercial rig and the rear of Mrs. Clampitt's' car. Lynch, 443 So.2d 1020.

The dissent in Lynch, tacitly recognizing the duty language of Nelson v. Ziegler, supra, stated, "Traffic control laws provide that no person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions, having regard for existing and potential hazards." Id. at 1020. Continuing, Justice Cowart wrote, "The law, in effect, places the duty on every driver to control the speed of a driven vehicle so that it can be stopped before it collides with any object ahead

of it." Id. The opinion continues, "Every driver has the duty and concomitant right to stop as may

be necessary to avoid colliding with any object ahead." Id.

Justice Cowart further clarified his discussion,

> In effect the law requires all drivers to push ahead of themselves an imaginary clear stopping distance or assured stopping space or adequate zone within which the driven vehicle can come to a stop. Failure to maintain such a zone is normally the sole proximate cause of injuries and damages resulting from the collision of a vehicle with an object ahead. Id. at 1020-21.

These passages outline the legal duty owed by operators of dangerous instrumentalities and the rationale for the presumed negligence of overtaking or following vehicles which collide with objects ahead.

Mrs. Clampitt's Motion for Partial Summary Judgment sought a ruling on the issue of comparative fault as between Mrs. Clampitt and Respondents, for the rear-end collision with Mrs. Clampitt's car. However, the First District Court of Appeal reversed the trial court's ruling based on a finding that Mrs. Clampitt was negligent by failing to adequately decelerate and allow the lead driver to turn in front of her car. Pierce correctly rejects the First District's conclusion, and a careful analysis of the district court's legal reasoning below exposes an obvious flaw.

The Pierce rule of law is that a reasonably anticipated, abrupt stop by a preceding vehicle does not rebut the rear-end collision presumption of negligence. Pierce, 582 So.2d 714. The rule is compatible with and consistent with the duty language for dangerous instrumentalities which requires a driver to maintain a sharp lookout to keep prepared to meet the exigencies of reasonably anticipated emergencies. Nelson v. Ziegler, 89 So. 2d 783.

After a review of the Pierce quote, which concludes that the abrupt stop ahead did not rebut

the presumption of Pierce's negligence, the First District contrasts the facts of the case at bar. DJ

Spencer Sales, at 604. The court stated:

> In contrast to the situation in Pierce, the collision which is the subject of this case occurred on a 2 lane highway with a posted speed of 55 miles per hour. There were no traffic signals, and the area was described as a country road. There was additional testimony that a junior college, apartments, and a few businesses are located along this stretch of highway. Id. at 604.

The First District then reaches its penultimate conclusion, "Consequently, drivers on the highway reasonably could be expected to anticipate the possible deceleration and turn of lead vehicles into the various establishments." Id. The court then reversed the trial court's summary judgment, and remanded for a new trial. Id. After appearing to factually distinguish Pierce on the "reasonably anticipated, abrupt stop" question, the district court finds that the deceleration and turns of lead vehicles were reasonably expected. Under Pierce, that finding does not rebut the presumption of Respondents' negligence. Pierce, at 714. Further, that same finding is the basis to conclude that Respondents are solely responsible for rear-ending Mrs. Clampitt's car, and that the trial court's summary judgment on the issue of comparative fault was correct.

The fallacy in the district court's reasoning is that because Mrs. Clampitt arguably was legally negligent in colliding with Mr. Huguley's pick-up truck and trailer, Mrs. Clampitt should be legally responsible to Respondents for the sudden stop that occurred as a result the alleged collision between Clampitt and Huguley. However, Respondents did not collide with Mrs. Clampitt because Mrs. Clampitt collided with Huguley, but because Mrs. Clampitt stopped and Respondents could not stop in time to avoid colliding with Clampitt.

Mrs. Clampitt had two choices. She could stop by colliding with Mr. Huguley's truck ahead,

or she could stop before colliding with the truck. By allegedly colliding with Huguley, Mrs. Clampitt

did not stop sooner or more suddenly than she would have stopped had she stopped *before* colliding with Huguley. (emphasis added). Mrs. Clampitt was part of a connected sequence of events, starting with Mr. Huguley's deceleration and preparation to turn. The last event in the sequence, whose cause is being sought is Respondents' inability to meet their duty to stop before colliding with Mrs. Clampitt. This is why a rear-end collision raises a presumption of negligence on the part of the overtaking or following vehicle, and why the Respondents are solely responsible for rear-ending Mrs. Clampitt's car.

When Mr. Huguley slowed, and began his turn, he set a limit within which both Petitioner Clampitt and Respondents were required to stop or collide. Concerning causation, a necessary condition is one, in the absence of which the event cannot take place. A sufficient condition is one in the presence of which the event is certain to occur. Hetz et al.'s driving at such a speed and distance that they could not, under all conditions, stop without colliding with Mrs. Clampitt is, without more, a sufficient condition of Respondents' collision with Mrs. Clampitt. In the language of duty, Respondents breached their duty of care not to collide with objects ahead. Stated differently, Respondents followed Mrs. Clampitt's vehicle too closely, and are therefore liable for her damages from this rear-end collision.

Once the district court found that the deceleration and turns of lead vehicles into the various establishments were reasonably anticipated, Respondent's attempt to rebut the presumption of negligence fails. Hetz saw the lead vehicle prepare to turn and testified that Mrs. Clampitt's dead-stop created an emergency such that Hetz laid down over 100 feet of skid marks prior to impact with Mrs. Clampitt's car. Hetz p. 32. The alleged abrupt stop was within reason according to Hetz's

own testimony, and Hetz et al., breached their duty to follow at a safe distance.

In Tozier v. Jarvis, 469 So.2d 884, 888 (Fla. 4th DCA 1985), the district court reviewed facts illustrative of whether or not Mrs. Clampitt's alleged, abrupt stop was reasonably anticipated. The court considered whether a vehicle, stopping to turn right from a thoroughfare into a restaurant driveway, which was blocked by a vehicle leaving the restaurant, was reasonably anticipated. Id. at 885. Against Jarvis's claim that the Tozier's were illegally stopped in the roadway, the Fourth District aptly observed, "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." Id. at 888. Therefore, under Pierce and Tozier, efforts to rebut the presumption of negligence by pointing to Mrs. Clampitt's abrupt stop, is not substantial and reasonable enough to rebut the presumed negligence of Hetz, et al.

As the three vehicles involved in this motor vehicle collision left the small town of Bronson, Florida, Mr. Hetz observed the vehicles ahead driven by Mrs. Clampitt and Mr. Huguley. Hetz p. 20-21. Mr. Hetz accelerated as he left the city limit, gaining momentum as he approached a stretch of roadway with a speed limit of 55. Hetz p. 21-22. Mr. Hetz estimated his speed at forty-five to fifty miles an hour as the events leading up to the instant collision unfolded. Hetz p. 22.

Mr. Hetz testified that on the clear morning of the accident with both vehicles ahead in plain view, Mr. Huguley began to turn. Hetz p. 28-30. Therefore, Mr. Hetz had to at least follow at a distance sufficient to allow Huguley's vehicle ahead to decelerate and turn off the roadway. Mr. Hetz also saw Mrs. Clampitt's vehicle following Mr. Huguley's pick-up truck and trailer. Hetz p. 21. Thus, Mr. Hetz owed a duty to at least follow at a distance sufficient to allow Huguley's turn, and to allow vehicles between Respondents' and Huguley's to slow or stop to allow Huguley's turn.

This Hetz failed to do, and he is therefore liable for resulting damages and injuries.

Since the vehicles ahead were in plain view and the roadway at issue was lined with residential and commercial driveways, Mr. Huguley's turn, as the district court found, was reasonably anticipated. Likewise, the deceleration, and even the abrupt stop of Mrs. Clampitt's vehicle, to allow Mr. Huguley's turn was reasonably anticipated in view of Hetz's own testimony.

Viewing the facts in the light most favorable to Respondents, Mrs. Clampitt arguably followed Mr. Huguley too closely, and struck the rear of his vehicle. This created an emergency. As outlined above, however Mr. Hetz as the operator of a dangerous instrumentality owed a duty to be prepared for reasonably anticipated emergencies. Hetz was familiar with the roadway, he was aware of the vehicles ahead, and he observed Mr. Huguley begin his turn. Hetz p. 14, 20-21, 28-30. Mr. Hetz admitted that he could not avoid the collision with Mrs. Clampitt's car. Hetz p. 47. By admitting he could not avoid the accident, Mr. Hetz admitted following too closely. Hetz observed the vehicles ahead, but failed to allow for the reasonably anticipated emergency involving the forward vehicles. Respondents are therefore solely responsible for Petitioner's damages from this rear-end collision.

For the same reason the First District found, viewing the evidence in the light most favorable to Respondents, that Mrs. Clampitt might be found to be negligent in striking the vehicle ahead, Hetz et al., are the sole, proximate cause of the collision with Mrs. Clampitt's car. As Pierce teaches and as the finding in DJ Spencer Sales v. Clampitt concerning reasonably anticipated, sudden stops suggests, Respondents' negligence stands unrebutted. The Pierce court succinctly explains why this result is correct, highlighting the flaw in the First District's legal reasoning below:

> The presumption of negligence arising from the collision between

> Boone and Reaves inured only in favor of Boone, and against Reaves. Likewise, any presumption of negligence against Tiroff and in favor of Reaves arising from a second collision could not benefit Pierce in regard to the third collision when he struck Tiroff. Pierce, 582 So.2d

714; supra, p. 10.

As the Fifth District correctly ruled, if an abrupt stop is reasonably anticipated, the presumption of negligence for rear-end collisions inures only to the car rear-ended in a multi-car, chain-collision. Id. Mrs. Clampitt may have been negligent for colliding with the rear of the car ahead, but such negligence would only inure to Mr. Huguley. Id. Under Pierce, the Respondents' negligence was the sole cause of the collision with Mrs. Clampitt's car, and the trial court's entry of partial summary judgment on the issue of comparative fault, is correct.

As a footnote, Petitioner directs this Court's attention to Supanchick v. Pfaff, 756 P.2d 146 (Wash. Ct. App. 1988). Although not legal precedent, the similarity of facts and issues to the instant case, warrants consideration.

Supanchick reviewed a chain collision involving four vehicles, focusing on the rear-end collision between the third and fourth vehicles in the chain. Id. at 148. Pfaff was the rear-most driver, and he urged that the third vehicle's collision with the car ahead rebutted Pfaff's presumed negligence for colliding with Supanchick. Id. at 149. Significantly, Mr. Pfaff testified he was familiar with the roadway where the accident occurred, and he saw the lead vehicle stop and signal to turn. Id.

Focusing on the duty of following drivers and citing a Supreme Court of Washington case, the Supanchick Court observed:

> Where two cars are traveling in the same direction, the primary duty of avoiding a collision rests with the following driver. In the absence of an emergency or unusual conditions he is negligent if he runs into

> the car ahead. The following driver is not necessarily excused even in the event of an emergency, for it is his duty to keep such distance from the car ahead and maintain such observation of that car that an emergency stop may be safely made. (Citations omitted). Id. at 148.

The Washington Court of Appeals then concludes:

> We hold it was error for the trial court to deny Mr. Supanchick's motion for a directed verdict on the issue of Mr. Pfaff's negligence. We also hold there was insufficient evidence presented on the issue of comparative fault to warrant submitting that issue to the jury. Id. at 149.

Although Petitioner Clampitt urges reversal of the district court's conclusion below based on a pedantic legal argument, one public policy concern relates to this Court's consideration of the merits herein. The collision at issue involved a 76,000 pound commercial tractor-trailer rig which crushed Mrs. Clampitt's full-sized passenger car. As outlined above, a duty analysis concerning the operation of dangerous instrumentalities inevitably leads to the conclusion that the district court's decision below should be reversed.

Ultimately, what is the legal duty owed to preceding passenger vehicles by a fully-burdened commercial truck? Such a motor vehicle is a potentially lethal dangerous instrumentality, and Petitioner suggests that the operation of such commercial rigs arguably requires a heightened duty of care toward drivers of other motor vehicles. This Court should consider Respondents' attempt to rebut their negligence for the rear-end collision with the car ahead in light of a loaded, commercial vehicle's substantial capacity to cause injury, and destruction of property. Such is precisely what occurred in this case and the photographs in the record graphically demonstrate this fact. R.v.IV. p. 746-754. For the reasons articulated above, the decision below should be reversed, and judgment on the verdict reinstated.

II. ON PETITIONER'S MOTION FOR CLARIFICATION, THE FIRST DISTRICT COURT OF APPEAL ERRED WHEN IT CLARIFIED THAT THE NEW TRIAL, FOLLOWING REMAND, WAS TO INCLUDE LIABILITY AND DAMAGES.

The First District Court of Appeal reviewed and reversed an $842,997 negligence judgment in favor of Petitioner, based solely on an apportionment of fault issue. DJ Spencer Sales v. Clampitt, 704 So.2d 601. At trial, the jury did not determine liability issues, but did award damages on Petitioner Clampitt's's negligence claim.

The Respondents expressly limited appellate review at the district court. The argument heading in Respondents' initial brief below, reads "Trial Court's Granting of Plaintiff's Partial Summary Judgment Was in Error." However, no review was sought of the damage award.

The First District's October 15, 1997 decision finds error in the granting of partial summary judgment and reversed on the comparative fault issue, but the opinion was silent as to the scope of issues to be retried. Id. Petitioner Clampitt filed a Motion for Clarification urging, as argued in her brief at the district court below, that any reversal on an apportionment of fault question required a new trial only on liability issues.

On February 19, 1998 the district court ordered a new trial on both liability and damages citing Waters v. Williams, 696 So.2d 386 (Fla. 1st DCA 1997). Thus, the First District's decision expressly conflicts with Nash v. Wells Fargo Guard Services Inc., 678 So.2d 1262 (Fla. 1996), Purvis v. Inter-County Telephone and Telegraph Company, 173 So.2d 679 (Fla. 1965), Schindler Elevator Corp., v. Viera, 644 So.2d 563 (Fla. 3d DCA 1994), American Aerial Lift, Inc., v. Perez, 629 So.2nd 159 (Fla. 3rd DCA 1993), Schindler Corp., v. Ross, 625 So.2d 94 (Fla. 3d DCA 1993), and Griefer v. DiPietro, 625 So.2d 1226 (Fla. 4th DCA 1993).

Negligence law in Florida has evolved to a system of liability based on the percentage of an

entities' fault. Messmer v. Teacher's Insurance Company, 588 So. 2d 610, 612 (Fla. 5th DCA 1991); Fabre v. Marin, 623 So. 2d 1182, 1185 (Fla. 1993); Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262 (Fla. 1996). This legal framework requires apportionment of non-economic damages, but retains the validity of joint and several liability as to economic damages. Id. Significantly in this case, the Respondents did not submit a verdict form which proposed to apportion fault, Respondents' counsel did not object when the trial court instructed that Respondents were liable as a matter of law, and counsel for Respondents proposed Florida Standard Jury Instruction 3.1, the preemptive negligence charge when a court directs a verdict in a claimants' favor. R.v. I. p. 158-188.

Under the rationale of Nash, the Respondents failed to preserve the apportionment issue at trial and therefore the issue is waived. Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1264. In Nash v. Wells Fargo Guard Services, Inc., this Court held that a reversal based on a Fabre v. Marin, apportionment of fault issue did not effect the determination of damages, and reversal "should not" require a new trial on damages. Id. at 1264. Nash therefore directs, without equivocation, that the new trial ordered below should not include damages. Id.

Previously, in Wells Fargo Guard Services, Inc. v. Nash, 654 So.2d 155 (Fla. 1st DCA 1995), the district court reversed a trial court's decision, remanded for a new trial, and, as in the instant case, the opinion did not limit the scope of new trial. Id. This court then granted discretionary review noting direct and express conflict concerning the scope of new trial following a reversal based on an apportionment question, between the First and Third districts. This court clarified at 678 So.2d 1263-4, expressly ruling that the new trial order should not have been extended to a new trial on

damages. Nash v. Wells Fargo Guard Services, Inc. In her answer brief at the district court, on page 7, Petitioner Clampitt urged that any reversal based on a Fabre apportionment of fault issue should

not result in a new trial on damages, since the only assignment of error on appeal related to liability. Purvis v. Inter-County Telephone and Telegraph Co., 173 So.2d 679 (Fla. 1965). The district court below ignored the teachings of Nash and erroneously clarified based on Waters v. Williams, 696 So.2d 386 (Fla. 1st DCA 1997), that the new trial ordered should include liability and damages. DJ Spencer Sales, at 604.

Waters involved a motor vehicle rear-end collision, where the trial court imposed liability based on the presumption of negligence. 696 So.2d 387. Unlike this case, it was the Plaintiff in Waters who sought a new trial on damages after the trial court took the issue of liability away from the jury. Id. The First District reversed the Waters trial court, finding error in the directed verdict on liability and remanded for a new trial on liability and damages. Id. Waters is therefore distinguishable from Nash and from the instant case, since the Waters appeal involved a request by the Plaintiff for a new trial on damages. Id. The Waters court found it unnecessary to review the trial court's grant of Plaintiff's request for a new trial on damages, in view of the reversal on liability and apportionment of fault. Id. However, Waters provides no authority that the reversal in this case requires a retrial on damages.

In this case, faced with an apportionment of fault issue, the First District Court of Appeal relied on Waters and improperly charted a new jurisprudential course on Mrs. Clampitt's Motion for Clarification. The First District utilized a Fabre analysis, yet reversed and required a new trial on damages. DJ Spencer Sales, at 604. That was done absent any claim of error on appeal regarding damages and was in total disregard of Nash. Id. To require retrial of an issue not raised as error on

appeal, or reviewed by the appellate court sua sponte is fundamental error, and violates a basic tenet of our United States' Constitutional jurisprudence embodied in the seventh amendment:

> In suits at common law, ... no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

If an issue arising following a jury trial is not found to be appellate error, the seventh amendment precludes retrial of the issue. This appeal should be resolved by a reversal on issue I which would require reinstatement of the judgment below. However, the principle of stare decisis mandates that any new trial ordered be limited to apportionment of fault issues.

CONCLUSION

For the reasons articulated in argument I herein, the First District Court of Appeals' decision should be reversed and the judgment entered on the verdict at trial, should be reinstated. Alternatively, for the reasons articulated in argument II herein, although unnecessary, any new trial ordered should only include the liability and apportionment questions.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been sent by

U.S. Mail to Christopher C. Coleman, Esquire, Monica C. Sanders, Esquire and James A. Chereskin, Esquire, Attorneys for Respondents, 18 NE 1st Avenue, Ocala, Florida 34478-5549 this 16th day of October, 1998.

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