4-20

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

PETITIONER'S JURISDICTIONAL BRIEF WITH APPENDIX

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STATEMENT OF THE CASE AND THE FACTS

Petitioner, Colletta P. Clampitt was the Plaintiff at trial, and sued to recover damages for injuries sustained when she was rear-ended by a semi-tractor trailer, owned and operated by Respondents. DJ Spencer Sales v. Clampitt, 22 Fla.L.Weekly D2421a (Fla. 1st DCA October 15, 1997). (Appendix, Tab 1). Petitioner's car was the middle vehicle in a three vehicle accident, and Respondents, the trial court Defendants, claimed that Clampitt was comparatively negligent by colliding with the preceding vehicle before Respondents' truck rear-ended Petitioner's car. Id. Petitioner moved for partial summary judgment based on Pierce v. Proaressive American Insurance Company, 582 So.2d 712 (Fla. 5th DCA 1991), arguing that Mrs. Clampitt, as a matter of law, was not responsible for her vehicle being rear-ended by Respondents' truck. Id. The trial court granted the motion, and the case proceeded to trial. Id.

An $842,997 judgment was entered following a verdict for Clampitt, awarding past and future economic and non-economic damages. Id. Respondents appealed the judgment to the First District Court of Appeal. The sole appellate issue was whether the apportionment of fault and comparative negligence issue was improperly resolved by summary judgment. Id.

On October 15, 1997, the First District reversed the plaintiffs judgment, finding sufficient evidence to overcome the presumption of negligence attributable to Respondents, who rear-ended Petitioner's car. Id. The District Court held that the negligence issue between Petitioner and Respondents should have been submitted to the jury, and ordered a new trial, but the opinion was silent on the scope of issues to be retried. Id.

Petitioner Clampitt filed a Motic for Clarification based on Nash v. Wells Fargo Guard Services, Inc., 678 So.2d 1262 (Fla. 1996), Purvis v. Inter-County Telephone and Telearaph Co., 173 So.2d 679 (Fla. 1965), and decisions of the Third and Fourth District Courts of Appeal. (Appendix, Tab 3). Petitioner urged that retrial should be limited to the comparative fault and apportionment issue. (Appendix, Tab 3). 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. 1 st DCA 1997). See, DJ Spencer Sales v. Clampitt, 23 Fla.L.Weekly 0550. (Appendix, Tab 2). Following the clarification, Clampitt filed her Notice to Invoke Discretionary Jurisdiction on March 18, 1998.

JURISDICTIONAL STATEMENT

The Supreme Court of Florida has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V § 3(b)(3) Fla.Const. (1980).

SUMMARY OF ARGUMENT

The Court should invoke its discretionary jurisdiction under Article V, §3(b)(3), Fla. Const., to review DJ Spencer Sales v. Clampitt, 23 Fla.L.Weekly D550 (Fla. 1st DCA February 19, 1998) original opinion, 22 Fla.L.Weekly D2421a (Fla. 1st DCA October 15, 1997), based on express and direct conflict with 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), 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), rev. denied,

659 So.2d 1085 (Fla. 1995), Schindler Corp.. v. Ross, 625 So.2d 94 (Fla. 3rd DCA 1993), and Griefer v. DiPietro, 625 So.2d 1226 (Fla. 4th DCA 1993). The plain rule of law, as stated by this court in Nash, is that a reversal based on a Fabre, apportionment of fault error does not affect the jury's determination of damages. Nash, 678 So.2d 1263-4. The District Court in Clampitt ignored this Court's mandate in Nash on this question of law, reversed, and ordered a new trial on all issues. 23 Fla.L.Weekly D550. As stated by this court in Nash, a new trial following remand must be restricted to apportionment of fault. Nash, at 1264.

The Clampitt decision found that evidence of Petitioner's colliding with the preceding vehicle rebutted Respondents' presumed negligence for the rear-end collision with Clampitt's car. 22 Fla.L.Weekly D2421a. Clampitt holds that Petitioner's negligence inures to Respondents' benefit and the legal basis for this holding expressly and directly conflicts with Pierce v. Progressive American Insurance Company, 582 So.2d 712. (Fla. 5th DCA 1991). See also Eppler v. Tarmac America. Inc., 695 So.2d 775 (Fla. 1 st DCA 1997), ques. certified, 22 Fla.L.Weekly #48 (Supreme Court Case No. 91,066, presently pending).

ARGUMENT

I. THE DECISION BELOW, DJ Spencer Sales v. Clampitt, 23 Fla.L.Weekly D550 (Fla. 1 st DCA February 19, 1998), original opinion, 22 Fla.L.Weekly D2421a (Fla. 1 st DCA October 15, 1997), DIRECTLY AND EXPRESSLY CONFLICTS WITH 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 WITH DECISIONS OF THE THIRD AND FOURTH DISTRICT COURTS OF APPEAL.

In DJ Spencer Sales v. Clampitt, 22 Fla.L.Weekly D2421a, the First District Court of Appeal reversed an $842,997 negligence judgment in favor of Petitioner, based solely

on an apportionment of fault issue. Id. However, the District Court ordered a new trial on both liability and damages. Clampitt, 23 Fla.L.Weekly D550. Requiring a new trial on all issues, when the only appellate issue is apportionment of fault on a negligence claim, expressly and directly conflicts with Nash v. Wells Farao Guard Services. Inc., 678 So.2d 1262, (Fla. 1996), Purvis v. Inter-County Telephone and Telegraph Co., 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.2d 159, (Fla. 3d 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). This court has jurisdiction under Article V, §3(b)(3), of the Constitution of the State of Florida.

In Nash v. Wells Fargo Guard Services, Inc., this Court held that a reversal based on a Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), apportionment of fault error did not affect the determination of damages, and reversal "should not" require a new trial on damages. 678 So.2d 1264. The District Court below reversed the trial court's order granting summary judgment in Petitioner's favor on the issue of comparative negligence. Clampitt, 22 Fla.L.Weekly D2421a. The only appellate issue raised by Respondents at the District Court was the summary judgment, manifested as an apportionment of fault, or Fabre issue. Id. Nash therefore directs, without equivocation, that the new trial ordered below should not include damages.

The District Court's October 15, 1997 opinion reversed the final judgment and remanded this cause for a new trial. Clampitt, 22 Fla.L.Weekly D2421a. On clarification, the District Court ignored Nash and remanded for a new trial on the issues of liability and damages. (Appendix Tab 3). DJ Spencer Sales v. Clampitt, 23 Fla.L.Weekly D550. No

error was found, however, on any damage question. The District Court based its decision, erroneously, on Waters v. Williams, 696 So.2d 386 (Fla. 1 st DCA 1997).

Waters involved a motor vehicle rear-end collision, where the trial court imposed liability based on the presumption of negligence. Id. at 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 distinguishable from Nash and from Clampitt, 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 plaintiffs request for a new trial on damages, in view of the reversal on liability and apportionment of fault. Id. Waters provides no authority that the reversal in Clampitt requires a retrial on damages. The Waters plaintiff and defendant each obtained the relief requested - the defendant, a new trial on liability; the plaintiff, a new trial on damages. Id.

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. DJ Spencer Sales v. Clampitt, 23 Fla.L.Weekly D550. Here, the First District utilized a Fabre analysis, yet reversed and required a new trial on damages Id. That was done absent any claim of error on appeal regarding damages and was in total disregard of Nash. Id. ire retrial of an issue not raised 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 examined in any court of the United States, than according to the rules of the common law.

The principle is simple. If an issue arising following a jury trial is not found to be error on appeal, the seventh amendment precludes retrial of the issue.

The DJ Spencer Sales v. Clampitt, 22Fla.L.Weekly 2421 a, decision directly conflicts with Nash v. Wells Farao Guard Services. Inc., 678 So.2d 1262, Purvis v. Inter-County Telephone and Telegraph Co., 173 So.2d 679, and with decisions of the Third and Fourth District Courts of Appeal. This court should invoke its discretionary jurisdiction to review the merits of the First District Court of Appeal's decision in this case, and resolve. the express and direct conflicts of law outlined above.

II. THE DECISION BELOW, DJ Spencer Sales v. Clampitt, 23 Fla.L.Weekly D550 (Fla. 1st DCA February 19, 1998), original opinion, 22 Fla.L.Weekly D2421a (Fla. 1st DCA October 15, 1997), DIRECTLY AND EXPRESSLY CONFLICTS WITH Pierce v. Progressive American [redacted] Company, 582 So.2d 712 (Fla. 5th DCA 1991).

DJ Spencer Sales v. Clampitt, 22 Fla.L.Weekly D2421a, 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. In this case, 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 reasonably infer that appellee was negligent in failing to decelerate gradually as the lead driver slowed and turned in front of her vehicle. Id.

The opposite is stated in Pierce:

> As a matter of law, it is not a substantial and reasonable explanation by Pierce to merely say that the vehicle 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 a 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. Pierce, 582 So.2d 714.

Pierce holds that sudden stops, if reasonably anticipated, are, as a matter of law insufficient to overcome the presumption of negligence. Id. 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." Clampitt, 22 Fla.L.Weekly D2421a. Contrary to Pierce, the District Court held that Mrs. Clampitt's "dead-stop" overcame the presumption of negligence. Id. That holding directly and expressly conflicts with Pierce. Accordingly, this Court has jurisdiction under Article V, §3(b)(3), of the Constitution of the State of Florida.

The First District expressly holds that Mrs. Clampitt's negligence in striking the lead vehicle inures to the Respondents' benefit, and finds that sufficient to overcome the presumption of negligence. Clampitt, 22 Fla.L.Weekly D2421a. 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. Yet this is precisely the holding of DJ Spencer Sales v. Clampitt, 22 Fla.L.Weekly 02421 a.

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. 582 So.2d 714. Under Pierce Mrs. Clampitt owed a duty ahead, but she owed no duty to the Respondents in the following vehicle.

On this very question, the First District Court of Appeal has certified, as a question of great public importance, the issue regarding a rear-end collision where the actions of a forward driver are suggested to rebut the negligence of the following driver who rear-ends the car ahead. Eppler v. Tarmac America. Inc., 695 So.2d 775, 778 (Fla. 1st DCA 1997), ques. certified, 22 Fla.L.Weekly #48, (December 5, 1997). The Eppler court recognized conflict with Pierce, and the First District cited Eppler as support for its conclusion in DJ Spencer Sales v. Clampitt, 22 Fla.L.Weekly D2421a. Id. Thus, the First District expressly acknowledged that Eppler, and by implication acknowledged that Clampitt, conflicts with Pierce.

This court should invoke its discretionary jurisdiction to review the merits of this case and resolve the direct and express conflict between DJ Spencer Sales v. Clampitt, 22 Fla.L.Weekly 02421 a and Pierce v, Progressive American Insurance Company, 582 So.2d

712, on the point of law outlined above.

CONCLUSION

Based on the express and direct conflicts created by DJ Spencer Sales v. Clampitt, 23 Fla.L.Weekly D550 (Fla. 1st DCA February 19, 1998), original opinion 22 Fla.L.Weekly D2421a (Fla. 1st DCA October 15, 1997), with Nash v. Wells Fargo Guard Services. Inc., 678 So.2d 1262, Purvis v. Inter-Countv Telephone and Telegraph Co., 173 So.2d 679, Schindler Elevator Corp.. v. Viera, 644 So.2d 563, American Aerial Lift, Inc. v. Perez, 629 So.2d 169, Schindler Corp.. v. Ross, 625 So.2d 94, Griefer v. DiPietro, 625 So.2d 1226, and Pierce v. Proaressive American Insurance Company, 582 So.2d 712, on the points of law outlined above, this Court should invoke it discretionary jurisdiction to review the merits of this case from the First District Court of Appeal.

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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 and James A. Chereskin, Esquire, Attorneys for Respondents, 18 NE 1st Avenue, Ocala, Florida 344786549 this 26 day of March, 1998.

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

D.J. SPENCER SALES, RELIABLE PEAT CO. JV, and CARL ROBERT HETZ,

Appellants,

v.

COLLETTA P. CLAMPITT,

Appellee.

_____/

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

CASE NO. 96-4394

Opinion filed October 15, 1997.

An appeal from the Circuit Court for Levy County.
Osee R. Fagan, Judge.

Christopher C. Coleman and James A. Chereskin of Cameron, Marriott, Walsh, Hodges & Coleman, P.A., Ocala, for Appellants.

Huntley Johnson, Jr. and Eric C. White of Huntley Johnson & Associates, Gainesville, for Appellee.

JOANOS, J.

This cause is before us for review of a trial court order granting a motion for partial summary judgment on the issue of fault with regard to a traffic accident. The first vehicle was a pickup truck and trailer driven by a party'who was dismissed from the action prior to trial. The middle vehicle was an automobile

driven by appellee, The following vehicle was a tractor-trailer rig driven by appellant Carl Hetz, and owned by appellant D.J. Spencer Sales and Reliable Peat Company JV. Appellants contend the trial court erred in granting appellee's motion for partial summary judgment on the issue of comparative fault. We agree, and reverse.

In her motion for partial summary judgment, appellee asserted there was no evidence that she was negligent to rebut the presumption of negligence of appellant Hetz as the driver of the rear vehicle in this rear-end collision case. Appellee further argued that under the rationale expressed in Pierce v. Progressive American Insurance Co., 582 So. 2d 712 (Fla. 5th DCA 1991), her abrupt stop in front of the vehicle driven by appellant Hetz did not rebut or dissipate the presumption that the negligence of the rear driver was the sole proximate cause of the rear-end collision. The trial court found appellants presented no reasonable and substantial explanation for the rear-end collision caused by appellant Hetz, and failed to rebut the presumption that appellant was the sole cause of the accident.

At the pre-trial hearing, the trial court cautioned appellants' counsel that any argument for reduction of damages based on appellee's comparative negligence would be objectionable. The jury returned a verdict awarding damages to appellee in the total amount of $857,997.00. Pursuant to a stipulation of the parties,- the jury verdict was reduced by $15,000.00 for collateral source benefits previously paid to appellee, Following its denial

of appellants' motion for new trial or remittitur, the trial court entered final judgment, awarding appellee damages in the amount of $842,997.00, to be paid by appellants.

In rear-end collision cases, a rebuttable presumption of negligence arises and attaches to the driver of the rear vehicle. Waters v. Williams, 696 So. 2d 386 (Fla. 1st DCA 1997); Eppler v. Tarmac America, Inc., 695 So. 2d 775 (Fla. 1st DCA 1997); Davis v. Chips Express, Inc., 676 So. 2d 984, 986 (Fla. 1st DCA 1996); Johnson v. Deep South Crane Rentals, Inc., 634 So. 2d 1113, 1114 (Fla. 1st DCA 1994); Edward M. Chadbourne, Inc. v. Van Dyke, 590 so. 2d 1023, 1024 (Fla. 1st DCA 1991). Unless rebutted, the presumption entitles the driver of the lead vehicle to a directed verdict on the issue of liability.

The presumption dissipates and becomes only a permissible inference if the rear driver provides a substantial and reasonable explanation for the collision. Gulle v. Boggs, 174 So. 2d 26 (Fla. 1965); Waters, 696 So. 2d at 387; Eppler, 695 So. 2d at 777; Davis, 676 So. 2d at 986; Edward M, Chadbourne, Inc., 590 So. 2d at 3.024; Sistrunk v. Douglas, 468 So, 2d 1059, 1060 (Fla. 1st DCA 1985); Bauahman v. Vann, 390 So. 2d 750 (Fla. 5th DCA 1980). The rule does not require the rear vehicle driver to eliminate every possible inference of negligence on his part before he is entitled to have the jury decide the case. "He is required only to produce evidence from which his exercise of reasonable care under the circumstances could properly be inferred by the jury." Sistrunk,

468 So. 2d at 1060-1061. A sudden' unexpected stop or sudden unexpected lane -switch is one of the general categories of affirmative explanation deemed sufficient to rebut the rear-end presumption. See Eppler, 695 So. 2d at 777; McCloud v. Swanson, 681 So. 2d 898, 900 (Fla. 4th DCA 1996); Liriano v. Gonzalez, 605 So. 2d 575, 576 (Fla. 3d DCA 1992); Tozier v. Jarvis, 469 So. 2d 884, 886 (Fla. 4th DCA 1985).

In this case, appellant Hetz, the driver of the rear vehicle, testified that appellee "dead-stopped" in front of him in an area with a posted speed limit of 55 miles per hour. He also testified that after leaving the Bronson city limits, he remained two truck lengths behind appellee's car. Appellant Hetz then stated that when he saw appellee stop on the highway, he hit his brakes and put down 110 feet of skid marks. He further testified that appellee's brake lights did not come on prior to the collision. Appellant's testimony was corroborated, in part, by appellee's memorandum of law in support of her motion for partial summary judgment on liability. The memorandum states that "[p]laintiff's car collided with the vehicle ahead and then stopped in the roadway. At the same instant or immediately thereafter Defendant's vehicle collided with the rear of Plaintiff's car." Appellant Hetz stated that the lead driver's brake lights and turn indicators were checked at the accident site, and were found to be operational. Unfortunately, appellee has no memory of the moments immediately before and after the accident.

The trial court accepted appellee's argument that since appellee's car was in its proper place on the highway, the presumption of negligence was not rebutted merely because her vehicle stopped suddenly. See Pierce v. ProgAmerican Insurance, 582 So. 2d 712, 714 (Fla. 5th DCA), review denied, 531 so. 2d 183 (Fla. 1991). In Pierce, the court held:

> As a matter of law, it is not a substantial and reasonable explanation by Pierce to merely say that the vehicles ahead of him--whether Boone, Reaves, or Tiroff--stopped abruptly. Such stops had to be reasonably anticipated at the time and place where they occurred according to Pierce's own testimony: in a crowded lane of traffic approaching a busy intersection controlled by a traffic signal which was in view of all four drivers at the time of the collisions.

582 So. 2d at 714.

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. Consequently, drivers on the highway reasonably could be expected to anticipate the, possible deceleration and turn of lead vehicles into the various establishments.

Viewing the evidence in a light most favorable to appellants, we 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 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 reasonably infer that appellee was negligent in failing to decelerate gradually as the lead driver slowed and turned in front of her vehicle. In these circumstances, we conclude the trial court erred in granting the motion for partial summary judgment and in removing the question of negligence from the jury.

Accordingly, the final judgment is reversed and this cause is remanded for a new trial.

BOOTH and WOLF, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

D.J. SPENCER SALES,
RELIABLE PEAT CO. JV, and
CARL ROBERT HETZ,

Appellants,

v. CASE NO. 96-4394

COLLETTA P. CLAMPITT,

Appellee.

_____/

Opinion filed February 19, 1998.

An appeal from the Circuit Court for Levy County.
Osee R. Fagan, Judge.

Christopher C. Coleman and James A. Chereskin of Cameron, Marriott, Walsh, Hodges & Coleman, P.A., Ocala, for Appellants.

Huntley Johnson, Jr. and Eric C. White of Huntley Johnson & Associates, Gainesville, for Appellee.

ON MOTION FOR CLARIFICATION

JOANOS, J.

Appellee seeks clarification of the opinion filed in the above-styled cause on October 15, 1997, in which we reversed a final judgment for appellee, and remanded, the matter for a new trial. As grounds for clarification, appellee asserts the opinion

is silent: regarding the scope of the issues to be retried, and asks us to clarify that the decision does not require a redetermination of the issue of damages. We grant the motion and clarify the final sentence of the opinion by amending it to read as follows:

> Accordingly, the final judgment is reversed and this cause is remanded for a new trial on the issues of liability and damages. See Waters v. Williams, 696 So. 2d 386 (Fla. 1st DCA 1997).

In all other respects, the motion for clarification is denied.

BOOTH and WOLF, JJ., CONCUR.

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

D.J. SPENCER SALES,
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COLLETTA P. CLAMPITT,

Appellee,

_____/

CASE NO: 96-4394

MOTION FOR CLARIFICATION

The Appellee, Colletta P. Clampitt, by counsel, and pursuant to Florida Rule of Appellate Procedure 9.330 (a), respectfully moves this Court for clarification of its October 15, 1997 decision, and as grounds states:

1. This appeal reviewed and reversed the trial court's order granting partial summary judgment on the issue of fault in a traffic accident.

2. The trial court's order found Colletta P. Clampitt without fault and imposed liability against Appellants, based on the presumption of negligence attendant rear-end collisions.

3. At trial, the jury did not determine liability issues, but did award damages on Colletta P. Clampitt's negligence claim.

4. Appellants expressly limited the review sought to the lower court's order on summary judgment, arguing in their initial brief, "Trial Court's Granting of Plaintiff's Partial Summary Judgment Was in Error", No review was sought of the jury's damage award.

5. On October 15, 1997, this Court concluded that the trial court erred granting partial summary judgment on the issue of liability, thereby removing the question of negligence from the jury.

6. This Court's October 15, 1997 decision finds error in the granting of partial summary judgment on the basis that a jury could reasonably infer that Colletta P. Clampitt was negligent, and reversed solely on the comparative fault issue.

7. Although this Court's October 15, 1997 opinion acknowledges the limited scope of appellate review, the last line of the opinion reads, "Accordingly, the final judgment is reversed and this cause is remanded for a new trial."

a. The October 15, 1997 opinion is silent as to the scope of issues to be retried.

9. Previously, in Wells Fargo Guard Services. Inc., v. Nash, 654 So.2d 155 (1995), this Court reversed a trial court's decision, remanded for a new trial, and, as in this case, the Court's opinion did not limit the scope of the new trial. Noting direct and express conflict concerning the scope of new trial between the First and Third

Districts, the Supreme Court of Florida 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., 678 So.2d 1262 (1996).

10. In her answer brief at page 7, Colletta Clampitt urged that any reversal on a Fahre v. Marin, 623 So.2d 1182 (Fla. 1993), apportionment of fault issue should not result in a new trial on damages since the only assignment of error on appeal related to liability. See Nash v. Wells Fargo Guard Services, Inc., 678 So.2d 1262; Purvis v. Inter-County Telephone and Telegraph Co., 173 So.2d 679 (Fla. 1965); Ridley v. Safety Kleen Corp., 22 FLW S167 (March 27, 1997).

11. Colletta P. Clampitt submits that a clarification of this Court's October 15, 1997 opinion is appropriate to prevent confusion in the post-mandate proceedings at the lower court. District Courts of Appeal have granted motions for clarification or rehearing under the same circumstances. Griefer v. DiPietro, 625 So.2d 1226 (4th DCA 1993); American Aerial Lift, Inc., v. Perez 629 So.2d 169 (3rd DCA 1993).

12. Colletta P. Clampitt submits that a clarification of this Court's October 15, 1997 opinion is appropriate to confirm that this Court's decision does not require a jury redetermination of damages, which is independent of the error claimed in this appeal.

13. Colletta P. Clampitt respectfully submits that this Court's October 15, 1997 opinion overlooks settled law concerning the scope of retrial on a negligence claim

following reversal on a comparative fault issue.

14. If this Court's decision were construed to require a new trial on damages, such a requirement would conflict with the Supreme Court of Florida's opinion in Nash v. Wells Fargo Guard Services Inc., 678 So.2d 1262, and the Third District Court of Appeal cases cited with approval in Nash, which lirnited new trials to liability issues and directed that damages not be considered at retrial.

15. Colletta P. Clampitt submits that a retrial should be limited to a determination of the negligence issues raised on appeal, since no error was raised concerning the damages awarded herein.

WHEREFORE Colletta P. Clampitt moves this Court to clarify its October 15, 1997 opinion, and in so doing, stating that the retrial should only include the issues of negligence, comparative negligence and apportionment of fault, if any, of the parties herein.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Christopher C. Coleman, Esquire and James A. Chereskin, Esquire, Attorneys for Appellants, 18 NE 1 st Avenue, Ocala, Florida 34478-5549 this 22 day of October, 1997.

JOHNSON, VIPPERMAN &WHITE, P.A.
Attorneys for Colletta P. Clampitt

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IN THE DISTRICT COURT OF APPEAL
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D.J. SPENCER SALES,
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Appellee,

CASE NO: 96-4394

RESPONSE TO APPELLEE'S MOTION FOR CLARIFICATION

COMES NOW Appellants, D.J. SPENCER SALES, RELIABLE PEAT CO., JV., and CARL ROBERT HETZ, by and through their undersigned attorneys and does hereby respond to Appellee's pending Motion For Clarification. In support therein Appellants would respond as follows:

1. This Honorable Court filed an opinion in this matter on October 15, 1997, wherein it reversed Final Judgment and remanded this case for a new trial.

2. Appellee argues that the Appellants limited review in this appeal to the erroneously entered Partial Summary Judgment and the trial court's establishment of liability for this accident. However, Appellee's assertions are incorrect. Close review of Appellants' Amended Initial Brief reflect in their "Summary Of Argument" at Page 8 that Defendants were severely prejudiced by their inability to explain to the fact finders the actual mechanics of the accident involved which ultimately resulted in an award that could be construed punative in nature. Appellants further requested that the Final Judgment entered below should be reversed

and the case remanded for a new trial on 'all issues. At Page 17 of Appellants* Brief in their "Request For Relief" Appellants also requested this Honorable Court remand this matter for a new trial on all issues.

3. In their Reply Brief, Appellants also asserted at Page 7 and 8 that they were severely prejudiced in the damages awarded at the trial because of their inability to explain potential fault of other parties. The jury only heard about a collision between a semi-tractor/trailer and a passenger sedan operated by Appellee. Appellants asserted that the damages awarded were prejudiced by Defendant's inability to explain the full facts of the accident. Appellants further cited Rowlands v. Signal Construction Comnanv, 549 So.2d 1380 (Fla. 1989) for the proposition that when an improper assessment of liability was presented at trial a court must order a new trial on all issues reasonably affected by such impropriety. The Florida Supreme Court found that the determination of liability is inexplicably bound up with the apportionment of damages under the doctrine of comparative negligence.

4. Finally, by separate pleading, Appellants filed a Notice Of Filing Supplemental Authority under the authority of Florida Rule Of Appellate Procedure 9.210(g). Citing Walters, Skinner v, Williams, 22 FLWD 1304 (1st DCA, May 22, 1997), Appellants further asserted that if the appellate court were to remand this matter to the trial court a new trial should be had on all issues relative to liability and damages. The Williams opinion offered by this Honorable Court stands for such a proposition.

5. Appellee argues in their Motion For Clarification that Wells Fargo Guard Services, Inc., v. Nash, 654 So.2d 155 (1995) stands for the proposition that this Honorable Court has no authority to remand a trial on all issues. Appellees reading of Nash is incorrect,

6. The Florida Supreme Court in Nash addressed conflict among the districts regarding apportionment of Plaintiff's damages to non-parties who may have responsibility for damages complained of. It agreed with the Third District Court Of Appeals that a reversal precipitated by Fabre/Messmer errors would not affect the determination of damages. In that particular case such error did not require a new issue on damages.

7. However, in the instant appeal, the error committed related directly to Defendant's ability to properly explain the mechanics of the accident in question. The erroneous trial court ruling prevented Defendant from explaining the actions of the Plaintiff or the involvement of the operator of the lead vehicle. In essence, the trial proceeded entirely upon Plaintiff's ability to "point the finger" to the following semi-tractor/trailer but precluding the operator of that tractor/trailer from explaining actions of other parties, The facts of this instant appeal are much different from Nash.

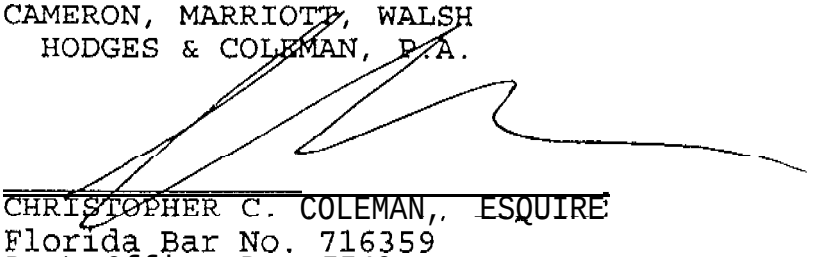
a. Appellants would assert that the facts involved in this appeal are more closely related to this Court's opinion in Waters, Skipper v. Williams, supra. This Court determined that when the rear-end presumption is improperly applied at the trial level then remand of the case for a new trial on issues of liability and

damages is appropriate. This is more consistent with the Florida Supreme Courts holding in Rowlands v. Signal Construction Company, Supra, and is consistent with the Supreme Courts holding in Nash.

WHEREFORE, Appellants respectfully request that this Honorable Court deny Appellee's Motion For Clarification as it is quite clear, that the Appellate Court intended that there be a new trial on all issues relative to liability and damages.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Huntley Johnson, Esquire, attorney for Appellee, Post Office Box 1322, Gainesville, Florida 32602-1322, Eric C. White, Esquire, attorney for Appellee, Post Office Box 1322, Gainesville, Florida 32602-1322, and R. Franklin Ritch, Esquire, Post Office Box 1143, Gainesville, Florida 32602-1143, this 30th day of October, 1997.

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



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