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

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND THE FACTS

The litigation concerns a personal injury claim as the result of a three vehicle accident on August 30, 1993. The lead vehicle was a pick-up truck and trailer whose owner/operator was dismissed case prior to trial. The middle vehicle was driven by Petitioner. The third vehicle was a tractor-trailer rig owned and operated by Respondents. Prior to trial, Petitioner moved for and was granted partial summary judgment as to the defendants' affirmative defense of comparative fault. Petitioner argued the case was controlled by Pierce v. Progressive American Insurance Co., 582 So.2d 712 (Fla. 5th DCA 1991). The court agreed Pierce controlled and found Respondents had not overcome the presumption of negligence attaching to the actions of Respondent driver as a result of his rear-end collision with Petitioner.

Following the grant of partial summary judgment, the matter proceeded to trial and to entry of a judgment against Respondents in the sum of $842,997.00. At no point during the trial was the jury apprised of the accident mechanics. Respondents thereafter appealed to the First District arguing that the judgment be reversed and the case remanded for new trial on all issues because of error in the grant of summary judgment.

In October, 1997, the First District reversed the judgment and remanded for a new trial. Following Petitioner's Motion for Clarification as to the new trial's scope, the First District ruled that the new trial would address liability and damages.

In reversing the trial court, the First District distinguished

the Pierce accident scene noting that its multi-vehicle accident occurred in a crowded lane of traffic approaching a busy intersection controlled by a red light whose existence was known to all drivers, By contrast, the subject accident occurred on a two lane country road with a posted speed limit of 55 MPH. There were no traffic signals and some businesses and residences in the area. D.J. Spencer Sales v. Clampitt, 22 Fla.L. Weekly D2421(Fla. 1st DCA October 15, 1997). In addition to distinguishing the Pierce accident scene, the First District noted the testimony of Respondent driver that Petitioner had "dead stopped" with no visible brake lights and that the Petitioner, in her pleadings, had conceded that her vehicle collided with the pick-up truck ahead either at the same time or just prior to the rear impact to her vehicle. Id. Viewing the totality of the evidence, the First District found error in removing the question of negligence from the jury. Petitioner now seeks to invoke this court's discretionary jurisdiction to review that decision.

SUMMARY OF ARGUMENT

Petitioner seeks to invoke this Court's discretionary jurisdiction pursuant to Art.V§3(b)(3)(Fla.Const.(1980) to review DJ Spencer Sales v. Clampitt, 23 Fla. L. Weekly D550 (Fla. 1st DCA Feb. 19, 1998) original opinion, 22 Fla. L. Weekly D2421a (Fla. 1st DCA Oct. 15, 1997) as that opinion allegedly conflicts with certain decisions of this Court and District Courts of Appeal.

Petitioner argues that the Clampitt Decision, in granting a new trial on all issues, is in direct conflict with Nash v. Wells

Fargo Guard Services, Inc., 678 So.2d 1262 (Fla. 1996) which holds that a reversal based on a Fabre apportionment of fault error is not to affect the prior jury damage determination. Petitioner also alleges that the Clampitt decision, 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 seen in the following argument, the Clampitt decision is not governed by Nash which refined the rule 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 Fabre, Nash and the cases cited by Nash with approval, the Clampitt jury was not allowed to pass on the question of comparative fault of the Petitioner. Likewise, Respondents will show that the First District properly distinguished, on the facts, Pierce v. Progressive American Insurance Co., but did not stray from the principal of law embraced by that decision.

ARGUMENT

I* THE DECISION BELOW, DJ SPENCER SALES v. CLAMPITT, 23 Fla. L. Weekly D550 (Fla. 1st DCA Feb. 19, 1998), original opinion, 22 Fla.L.Weekly D2421a (Fla. 1st DCA Oct. 15, 1997), is not in 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) and other decisions of the Third and Fourth District Courts of Appeal.

Petitioner urges this Court to exercise its discretionary jurisdiction claiming conflict between the District Court's ruling in Clampitt and the holding in Nash v. Wells Fargo Guard Services,

Inc. In Clampitt, the First District granted new trial as to both liability and damages finding that the trial Court had improperly taken the entire question of negligence from the jury. Petitioner contends that Nash limits re-trial to liability issues only. However, Nash and the other cases relied upon by Petitioner are not controlling.

In Nash v. Wells Fargo Guard Services, Inc., 678 So.2d 1262 (Fla. 1996) this Court held that in order to include a non-party on the verdict form pursuant to Fabre, the Defendant must affirmatively plead the negligence of the non-party who must be identified. Nash further held that a re-trial necessitated by Fabre errors would not extend to a re-determination of damages. Petitioner argues that the Clampitt decision reversing the grant of summary judgment on the issue of comparative negligence, was a reversal based upon a "Fabre apportionment of fault error" and therefore, Nash would mandate there be no retrial of damages. such argument, however, is a mis-appreciation of holding of Fabre v. Marin, 623 So.2d 1182 (Fla. 1993).

In Fabre, this Court resolved a conflict between the districts as to the proper interpretation of 5768.81, Fla. 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, fault must be

apportioned among all responsible entities who contribute to an accident even though not all of them have been joined as Defendants." Id. 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. Fabre did not address 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, 644 So.2d 563 (Fla. 3d DCA 1994), American Aerial Lift, Inc., v. Perez, 629 So.2d 169 (Fla. 3d DCA 1993), and Schindler Corp., v. Ross, 625 So.2d 94 (Fla. 3d DCA 1993), all allegedly in conflict with Clampitt according to Petitioner. 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. In each case, the Third Circuit held that Fabre necessitating the re-trial. Importantly, in each case, the original jury was permitted to **assess** comparative negligence of the claimant and therefore the re-trial was limited to a determination of liability as to all other responsible parties. In Nash, this Court approved the result of each case as to the appropriate scope of re-trial. In so doing, Nash did not extend the holdings of these opinions to situations

where the jury was deprived of an opportunity to assess the fault of the plaintiff.

In granting new trial on all issues, Clampitt obviously considered that a determination of comparative negligence necessarily impacts on the issue of damages. In granting a complete new trial, Clampitt relied on Waters v. Williams, 696 So.2d 386 (Fla. 1st DCA 1997), a case factually similar to the one before it. Although Nash was argued in Petitioner's Motion for Clarification, the First District did not refer to it in its opinion obviously because of its inapplicability to the case before the Court.

Petitioner also argues that Purvis v. Inter-county Telephone and Telegraph Co., 173 So.2d 679 (Fla. 1965) and the Seventh Amendment to the United States Constitution deny re-trial on the damage issue as Respondents allegedly did not raise the issue on appeal. 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 in so far as it remanded for new trial on damages. In reaching its holding, the Purvis court found that Respondent's "assignment of error" referred only to the issue of liability and not to damages. Such is not the case here. As noted in Respondent's response to Appellee's Motion for Clarification (Petitioner's Jurisdictional Brief, Appendix, Tab 3), Respondents did, at two separate places in the brief, request remand for a new trial on all issues. As Justice Roberts noted in

his special concurrence in Purvis, "I concur for the reason that the question of damages is not properly brought up by assignment of error or argued in the briefs. Ordinarily, in my opinion, the ends of justice are best served when the same jury determines both liability and damages". The "assignment of error" pleading requirement is no longer used. Respondent's entitlement to a new trial on all issues, however, was urged in brief in the court below and, accordingly there is no violation of the Seventh Amendment.

In light of the above, there is no basis for this Court's exercise of its discretionary jurisdiction as there is no conflict with either Nash v. Wells Fargo or the Purvis opinions.

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) is not in conflict with Pierce v. Progressive American Insurance Company, 582 So.2d 712 (Fla. 5th DCA 1991).

Petitioner seeks to invoke the discretionary jurisdiction of this Court to review Clampitt as it allegedly is in conflict with Pierce v. Progressive American Insurance Co., 582 So.2d 712 (Fla. 5th DCA 1991). Contrary to Petitioner's argument, the Clampitt court did carefully consider and then distinguish Pierce on its facts.

In Pierce, the driver of a fourth vehicle involved in a chain collision sued the insurer of the first vehicle arguing that the operators of the two vehicle 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 pains to describe the accident roadway and scene. The Court noted that the

accident took place on Highway 50 in Orange County. The highway was described as being a divided highway with moderately heavy traffic. The accident occurred as all 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 the preceding driver at a time and place where it could not reasonably be expected by the following driver that creates the factual issue". Id. 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 DJ Spencer Sales v. Clampitt, the Court was again presented with a factual scenario involving multiple vehicle rear-end collisions. There, however, all factual similarity between Clampitt and Pierce came 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 55 MPH. Importantly, although there were some residences and businesses located along the country highway, there were no traffic signals in the area where the accident occurred. In addition to contrasting the starkly different accident settings, Clampitt also noted evidence that Petitioner "dead stopped", having

failed to apply her brake lights because, by her own admission, she had struck the rear of the vehicle preceding hers. Viewing the totality of the evidence in the light most favorable to Respondents, as it was required to do, the Clampitt Court found that Respondents had presented sufficient evidence to overcome the presumption of negligence which had attached to the Respondent driver. Implicit in the Clampitt holding was the conclusion that the abrupt stop by Petitioner took place at a place and time where Respondent driver could not have been expected to have anticipated its occurrence. There is no conflict between Clampitt and Pierce as they are factually dissimilar.

Petitioner also argues the conflict between the Clampitt and the Pierce decisions is acknowledged by the First District in its opinion in Epsler v. Tarmac America, Inc., 695 So.2d 775 (Fla. 1st DCA 1997). A careful reading of Eppler, however, fails to reveal any conflict. Eppler concerned a multi vehicle accident which occurred while the plaintiff and the defendant truck driver were both stopped at a red light. According to Plaintiff, she **was** rear-ended by the truck driver before she began to move forward once the light turned green. The truck driver, whose version of the accident was heard by the jury, testified that Eppler had started forward once the traffic light turned green but then stopped immediately which caused him to rear-end her. The jury in Eppler returned a verdict in favor of the truck driver. Eppler appealed to the First District arguing error in the denial of her motions for directed verdict and new trial. In upholding the trial Court, the

First District held that the defendant driver had overcome the presumption of negligence by his testimony of Eppler's sudden unexpected stop immediately after she had proceeded forward on the green light. In connection with its holding, however, the First District did certify to this Court the following question: "Does the testimony of the defendant of a sudden unexpected stop immediately after starting forward constitute sufficient evidence to overcome the presumption of negligence which attaches in a rear-end collision?" Clearly, the question as certified is factually different from the fact patterns of both Pierce and Clampitt. Accordingly, it cannot be said that Eppler, by implication, is an acknowledgment by the First District of a conflict between Clampitt and Pierce.

CONCLUSION

In light of the above, it is clearly unnecessary for this Court to exercise its discretionary jurisdiction to review this case as there are no conflicts to be resolved. As developed above, Nash v. Wells Fargo 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 Petitioner's sudden stop occurred where it could not have been reasonably expected by Respondent driver. Accordingly, the Judgment of the First District Court of Appeal should be upheld and this case permitted to go forward to re-trial 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: Huntley Johnson, Esquire, P.O. Box 1322, Gainesville, Florida 32602; this 17th day of April, 1998.

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