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 REPLY BRIEF

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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.

References to argument in Respondents' Brief on the Merits will be made by the symbol RB, by page number, e.g. RB p _.

ARGUMENT

I. RESPONDENTS FAILED TO SHOW THAT HETZ ACTED WITH DUE CARE TO REBUT THE PRESUMPTION OF NEGLIGENCE AND THE ENTRY OF PARTIAL SUMMARY JUDGMENT WAS CORRECT.

The trial court correctly entered summary judgment since Respondents failed to show that Hetz, et al. acted with due care to rebut the presumption of negligence. R.v.I p. 107-108. The only evidence offered by Respondents to rebut the presumption, is Mr. Hetz's testimony that Mrs. Clampitt came to an unexpected, sudden stop. RB p. 15-16. Without pointing to objective, record facts which support Respondents' conclusory assertion that Clampitt stopped unexpectedly, Mr. Hetz's testimony is legally insufficient to rebut the presumption. Further, the record on Petitioner's motion demonstrates that the turn and stop ahead were reasonably foreseeable, that Respondents followed Petitioner's car too closely, and that the trial court's entry of partial summary judgment, under the facts presented, was correct.

Petitioner's motion shifted the burden of proof to Respondents to offer a substantial and reasonable explanation for the instant rear-end collision which tended to show that Hetz, et al. acted with due care, specifically that they were not following too closely. Gulle v. Boggs, 174 So. 2d 26, 28-29 (Fla. 1965). Respondents were required to produce evidence from which the exercise of reasonable care under the circumstances could be inferred by a jury. Id.

The operator of a dangerous instrumentality owes a duty of care to other drivers which includes allowing for emergencies which can be reasonably expected. Nelson v. Ziegler, 89 So. 2d 780, 783 (Fla. 1956); Bellere v. Madsen, 114 So. 2d 619, 621 (Fla. 1959). As Pierce v. Progressive American Insurance Co., 582 So. 2d 712 (Fla. 5th DCA 1991), holds, consistent with the scope of duty announced in Nelson v. Ziegler, it is only a sudden stop which could not be reasonably expected by the following driver that rebuts his presumed negligence. Pierce, 582 So. 2d 714. A following driver must first show that he allowed a safe stopping distance. Then, if a stop could not be reasonably anticipated, an inference of due care may arise. However, the conclusory assertion by a following driver that the vehicle ahead stopped unexpectedly is legally insufficient to rebut the presumption. Testimony of a rear-ending driver that he expected the stop ahead tacitly acknowledges that he followed too closely. That driver must point to objective facts in the record which tend to prove that the stop at issue was not reasonably foreseeable. Only then does the presumption dissipate, leaving liability questions for a jury to reconcile.

The summary judgment record belies Respondents' claim that Mrs. Clampitt's stop was not reasonably anticipated. Mr. Hetz observed the vehicles ahead on a roadway lined with residential and commercial driveways. Hetz p. 21, 28-30; Huguley p. 43. Accelerating toward the accident site where the speed limit is 55 mph, Mr. Hetz

testified that he reached a top speed of 45-50 mph immediately prior to braking before impact. Hetz p. 22. Mr. Hetz followed the forward vehicles out of town, driving his commercial rig approximately two truck-lengths behind Petitioner's passenger car. Hetz p. 47.

By his testimony, Mr. Hetz followed Mrs. Clampitt's car at a distance of approximately 120 feet. Hetz p. 36. Mr. Hetz testified that within seconds, Mr. Huguley started to turn, Mrs. Clampitt stopped and Hetz "jumped" on his brakes, leaving slightly over 100 feet of skid marks before crushing Petitioner's car. Hetz p. 28-29, 32. Hetz followed at a distance of 120 feet, he quickly applied his brakes upon seeing the turn and stop ahead and left over 100 feet of rubber on the roadway before striking Mrs. Clampitt's car. Hetz p. 32. The only clear inference is that he followed too closely. At 45 mph, Hetz traveled 66 feet per second. R.v. XVII p. 20. Under maximum braking on a dry road, he could not stop his truck within his standard, two truck-lengths following distance. Hetz p. 18, 47-48. Mr. Hetz's deposition testimony affirms the presumption of negligence and the trial court's entry of partial summary judgment was correct.

A following driver must allow sufficient distance to stop under ideal conditions, plus a safety margin allowing added stopping distance based on factors such as speed, rain, visibility, traffic, roadway access, traffic control devices, pedestrians, and other

exigent circumstances. Nelson v. Ziegler, 89 So. 2d 783. The operator of a dangerous instrumentality must expect the unexpected including reasonably foreseeable emergencies to meet the duty owed to vehicles ahead. Id.

The only legal precedent which Respondents' cite for the rule of law that a defendant, following driver's claim of sudden stop ahead is sufficient to rebut his presumed negligence for a rear-end collision is Chiles v. Beaudoin, 384 So. 2d 175 (Fla. 2d DCA 1980). The Fifth District's Lynch v. Tennyson, 443 So. 2d 1017, 1018 (Fla. 5th DCA 1983), opinion cites Chiles for this very proposition. Id. However, in Pierce v. Progressive American Insurance Company, the Fifth District Court of Appeal recedes from Lynch, rejecting the rule urged by Respondents, and thus the express holding of Chiles. Pierce, 582 So. 2d 714-715. Pierce states the correct rule, requiring a substantial and reasonable explanation to rebut the presumption of negligence for a rear-end collision. Id.

As further evidence to rebut their presumed negligence, Respondents note Mr. Hetz's statement, "If the car would not have rear-ended with the trailer and had not stopped in the middle of the highway, I could have possibly had time to completely stop or go around the car." R.v.I p. 92-104. At 45 mph, following at a distance of 120 feet, Mr. Hetz only had 2 seconds, at most, to "[C]ompletely stop or go around the car." Id.; R.v. XVII p. 20. This sort of speculative testimony to oppose the rear-end collision

presumption was rejected by the appellate courts in Tozier v. Jarvis, 469 So. 2d 884, 888 (Fla. 4th DCA 1985) and Kao v. Lauredo, 617 So. 2d 775, 776-777 (Fla. 3d DCA 1993). The testimony that a following driver could have stopped had circumstances been different, is merely conjecture posing as a statement of fact, and thus it cannot create an inference of due care to rebut the presumption. Id. Objectively, Mr. Hetz's statement does not tend to show due care, the statement is unduly speculative, and thus it is legally insufficient to rebut Respondents' presumed negligence for the rear-end collision with Mrs. Clampitt's car.

Respondents urge that Petitioner failed to carry her burden of proof to permit the entry of summary judgment in her favor. RB p. 16-17. However, as Pierce dictates, and the evidentiary rule for presumptions confirms, the burden to produce evidence tending to show Hetz acted with due care was on Respondents. Pierce, 582 So. 2d 714; § 90.303, Fla. Stat. (1976). It was their burden to rebut the fact presumed, that Hetz was negligent. Id. Merely alleging that Mrs. Clampitt was negligent by colliding with Huguley does not satisfy Respondents' burden which was to suggest that Hetz followed at a safe distance. Her negligence, if any, relates only to the alleged collision with Mr. Huguley's trailer. Pierce, 582 So. 2d 714. After the presumption of negligence was raised by Mrs. Clampitt at the hearing, and Hetz, et al. failed to carry their burden of proof concerning evidence of due care, the trial court's entry of partial

summary judgment was correct.

Respondents argue that Petitioner Clampitt's inattentiveness and her failure to attempt evasive action are unrefuted inferences of her negligence, which should preclude summary judgment in her favor. RB p. 18. These issues relate to Mrs. Clampitt's duty owed to Huguley. Pierce, 582 So. 2d 714. Once Petitioner raised the presumption, until rebutted, the issues suggested by Respondents are not material to Hetz's collision with Clampitt's car. The burden is upon Respondents to show Hetz acted with due care, specifically, that he followed at a safe distance, to rebut the presumption of negligence. § 90.303, Fla. Stat. The evidence does suggest Hetz quickly and forcefully applied his brakes, but having followed too closely to safely allow Huguley's turn ahead, that modicum of care is insufficient. Hetz pushed Mrs. Clampitt's car into Huguley's trailer, propelling Huguley's trailer and truck off the road. Hetz p. 28-29; Huguley p. 26-30. Further, as Pierce directs, the putative negligence of Mrs. Clampitt, if any, inures only to Huguley, and is unrelated to Hetz's collision with the rear of Mrs. Clampitt's car. Pierce, at 714.

Florida law should continue to embrace the presumption of negligence for rear-end collisions as outlined in Pierce, consistent with a duty analysis for dangerous instrumentalities. Nelson v. Ziegler, supra. Brake failure, sudden lane changes, and unforeseeable, abrupt stops may rebut the presumption. In each case however, the

following driver must first suggest due care to rebut the presumed negligence for a rear-end collision. Pierce, 582 So. 2d 714. Then, evidence of brake failure or sudden stops may be relevant. However, if one follows entirely too closely in the first instance, brake problems or quick stops do not matter. Brake failure cannot be a legal cause of a rear-end collision if the following driver failed to allow adequate stopping distance with good brakes. Likewise, a sudden, unexpected stop ahead cannot be a legal cause of a rear-end collision if the offending driver followed too closely, to allow even a reasonably foreseeable stop ahead.

Petitioner suggests that one might, under unusual circumstances not present in this case, show due care to rebut the presumption and raise an issue about an unforeseeable stop merely though a following driver's conclusory testimony. However, without a limited access, multi-lane highway or interstate highway scenario where sudden stops could truly be considered unforeseeable, a following driver must show that he followed at a safe distance, and that a forward stop was unanticipated to defeat summary judgment.

The duty of the following driver includes allowing for exigencies ahead such as sudden stops. Nelson, Pierce, supra. In a line of vehicles, the rationale for the duty of following drivers to include anticipating exigencies such as sudden stops ahead, is that following drivers control following distance, and often sight is limited by the vehicles

ahead. A following driver cannot always see what the drivers ahead are dealing with, and thus his duty of reasonable care includes allowing for the potentially unseen exigencies facing drivers ahead. The trial court's entry of summary judgment, under the facts presented was correct. Judgment on the verdict should be reinstated.

II. ANY RETRIAL ORDERED, UNDER Nash v. Wells Fargo Guard Services Inc., 678 So. 2d 1262 (Fla. 1996), AND THE FACTS PRESENTED, SHOULD NOT INCLUDE DAMAGES.

Respondents did not preserve appellate review of any damage-related question in this case, nor can they point to any damage-related error without a trial transcript. Morgan v. Pake, 611 So. 2d 1315, 1316 (Fla. 1st DCA 1993); Hines v. State, 549 So. 2d 1094, 1095 (Fla. 1st DCA 1989); Starks v. Starks, 423 So. 2d 452, 453 (Fla. 1st DCA 1982). Respondents limited the district court's review to liability questions, and settled precedent of this Court would limit the scope of retrial to exclude damages. Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262.

Respondents urge that a motion for remittitur, that their request for relief in their initial brief below, and that the two places in their response to Petitioner Clampitt's Motion for Clarification at the district court preserved legal issues on damages sufficient to warrant reversal and retrial. RB p. 20-21. Without a trial transcript, however, the record will not permit review of alleged damage errors, nor will it confirm proper objections to ensure issues were preserved for review. Further, Respondents

cite no legal precedent which would permit the conclusion that any claimed damage error was raised or preserved below. The jury's damage award was not appealed and Petitioner Clampitt should at least retain that benefit of prior litigation.

Respondents argue that Purvis v. Inter-County Telephone & Telegraph, 173 So. 2d 679 (Fla. 1965), does not apply to resolve the scope of any retrial ordered. RB p. 21. Respondents suggest that Purvis is inapplicable since it involved assignments of error which have been abolished. RB p. 21. However, the rule of law still applies and directs that any retrial should not include damages, since the only appellate issues related to liability questions. Purvis, at 681.

Respondents urge that Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262 (Fla. 1996), Schindler Elevator Corp. v. Viera, 644 So. 2d 563 (Fla. 3rd DCA 1994), American Aerial Lift, Inc. v. Perez, 629 So. 2d 159 (Fla. 3rd DCA 1993), and Schindler Corp. v. Ross, 625 So. 2d 94 (Fla. 3rd DCA 1993), do not control the case at bar concerning the scope of retrial. RB p. 22. Respondents insist that the rule in these cases does not apply since each involved a jury's assessment of a claimant's comparative negligence. RB p. 24. However, the rule of law is the same as that announced in Purvis, supra, and the same as that announced in Griefer v. DiPietro, 625 So. 2d 1226 (Fla. 4th DCA 1993).

The Fourth District Court of Appeal in Griefer v. DiPietro, on rehearing, held

that a new trial on damages is not appropriate where the error complained of affects only liability. Griefer, 625 So. 2d 1229. The court bolstered its conclusion, noting that the issue precipitating reversal did not affect the calculation of damages, nor did it inflame the jury. Id. Since the issue relating to reversal herein was not tried by the jury, it could not have inflamed the verdict, and Respondents cannot show how summary judgment affected damages. As Nash and its progeny, and Griefer direct, since the liability and damage issues are separable, any new trial ordered may be appropriately limited in scope.

Purvis and the Nash line of cases unequivocally direct that any new trial ordered herein, although unnecessary, should not include damages. In Purvis this Court explained the fairness of this rule:

> The trial court can by proper instructions to the jury and supervision of the trial process avoid any inferences or implications to be drawn from the previous award of damages or, for that matter, preclude any reference to such award in the new trial, thereby avoiding prejudice to respondent in the jury's deliberations in respect to the issue of liability. 173 So. 2d 681.

Purvis, Griefer, and the Nash line of cases apply the same rule, which is dispositive of this issue. If issues are separable, and only liability questions are appealed, retrial should not include damages, unless manifest prejudice would result. Id.

Respondents urge that the basic rule discussed above should not govern the

scope of any retrial ordered in this case. Respondents postulate that a different body of law controls, requiring a retrial of all issues since the jury did not consider Mrs. Clampitt's comparative fault. RB p. 24. Absent a showing of confusion, inconvenience, or prejudice, however, the Purvis and Nash rule would not extend the scope of retrial to include damages. Purvis, 173 So. 2d 681; Nash, 678 So. 2d 1263-4.

The Second District Court of Appeal in Tropical Exterminators, Inc. v. Murray, 171 So. 2d 432 (1965), reviewed a summary judgment on liability, and reversed since the trial judge did not consider an "unforeseeable loss of consciousness" as a defense to an automobile negligence claim. Id. at 434. On a motion for clarification, the court ordered a new trial on both liability and damages. Id. at 435. Without explaining why, the district court concluded that a new trial could not be limited to liability without confusion, inconvenience, or prejudice. Id. Likewise, the Respondents offer no argument that limiting retrial to liability in this case would prejudice the litigants in any fashion. RB p. 26-29. Indeed, Purvis, supra suggests a manner to ensure fairness of a retrial on separable issues, and in the absence of damage impropriety, any retrial ordered in this case should only include liability questions. Purvis, 173 So. 2d 681.

In Rowlands v. Signal Construction Co., 549 So. 2d 1380 (Fla. 1989), this Court reviewed the use of remittitur, in the comparative fault era, to address impropriety identified by the trial court and the district court concerning the percentages of liability

and excessiveness of the verdict. Rowlands, 549 So. 2d 1381-2. In Rowlands, the trial court ordered a remittitur to correct problems the trial judge perceived concerning the jury's finding on liability and damages. Id..

In Currie v. Palm Beach County, 578 So. 2d 760 (Fla. 4th DCA 1991) and Lindos Rent-A-Car v. Standley, 590 So. 2d 1114 (Fla. 4th DCA 1991), the trial courts ordered new trials, which were reviewed by the district court on appeal. Id. Each case involved an allegation of attorney misconduct at trial which in part, formed the basis for the new trial orders. Currie, 578 So. 2d 763; Standley, 590 So. 2d 1115. In Griefer v. DiPietro, the Fourth District Court of Appeal, on rehearing, reexamined the holding in Currie v. Palm Beach County. The district court stated, "[W]e now hold that a reversal for a new trial on damages is not appropriate where the error complained of affects only the issues of liability." Griefer v. DiPietro, 625 So. 2d 1229.

Each of the three cases noted above which Respondents suggest directs a new trial on all issues, does not apply to resolve the scope of new trial in this case. Rowlands, Currie, and Standley involved trial judges attempting to correct, via remittitur or new trial, improprieties in the trial itself. Although Respondents timely filed motions for new trial and remittitur in this case, the Honorable Osee Fagan, trial judge, denied the motions. R.v.II p. 221; v. XVI p. 1-44. Concerning remittitur, Judge Fagan commented on his inability to find that the verdict was against the manifest

weight of the evidence or that the jury was influenced by matters outside of the evidence. R.v. XVI p. 40. That being so, any retrial ordered herein should not include damages.

CONCLUSION

Respondents failed to satisfy their burden to show that Mr. Hetz acted with due care to rebut the presumption of negligence for the rear-end collision at issue. Therefore, the district court's decision in D.J. Spencer Sales v. Clampitt, 704 So. 2d 601 (Fla. 1st DCA 1997), should be reversed, and the judgment entered on the verdict at trial, should be reinstated.

Although unnecessary, any new trial ordered arising from error in the trial court's entry of summary judgment, should not include damages. Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262. The First District Court of Appeals' decision on Petitioner's Motion for Clarification should be quashed.

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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 Monica C. Sanders, Attorneys for Respondents, 18 NE 1st Avenue, Ocala, Florida 34478-5549 this 4th day of December, 1998.

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Certificate

I hereby certify the size and style of type used in the Petitioner, Colletta P. Clampitt's Reply Brief is Times New Roman 14 point.

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