In the Supreme Court of Florida

CASE NO.: SC09-2238

MARIA CEVALLOS,

Petitioner,

v.

KERI ANN RIDEOUT and LINDA RIDEOUT,

Respondents.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENTS

Respectfully submitted,

KIRWAN & SPELLACY, P.A.
750 S.E. 3rd Avenue, Third Floor
Fort Lauderdale, Florida 33316
Telephone (954) 463-3008
-and-
RUSSO APPELLATE FIRM, P.A.
6101 Southwest 76th Street
Miami, Florida 33143
Telephone (305) 666-4660

Counsel for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

STATEMENT OF THE CASE AND FACTS

This case arises from a traffic accident in which Plaintiff/Petitioner Maria Cevallos, driving her Tahoe SUV, rear-ended Defendant/Respondent Keri Ann Rideout, who was driving a Chevy Equinox owned by Keri Ann and her mother, Defendant/Respondent Linda Rideout. (T 56-57, 109).[1] Notwithstanding the more lengthy statement in Plaintiff/Petitioner's Corrected Initial Brief, the ***material*** facts in the case are few. Taking all facts in the light most favorable to Plaintiff/Petitioner as the non-movant for directed verdict, the material facts are that Plaintiff/Petitioner ran into the rear of Defendants/Respondents' car after Defendant/Respondent ran into the car in front of her as the third in a line of cars that were slamming on their brakes to avoid a disabled vehicle in the lane ahead of them. (T 14-15, 112-113).

The details as to the accident are reviewed briefly below, and then a short response is provided to certain inaccuracies in Plaintiff/Petitioner's recital of the

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[1] References to the record on appeal in this brief appear by volume and page number, as follows: (R Vol 1, p 1). The trial transcript excerpts, Volume 4 of the record on appeal, have been numbered separately by the clerk as transcript pages 1 through 131, and are accordingly referenced by transcript page number, as follows: (T 1). Unless otherwise indicated, all emphasis in this brief is supplied by undersigned counsel.

facts. Nothing in these additional recitals, however, changes the bottom line that the material facts here fell directly under the controlling law cited by the trial court in granting, and by the Fourth District in affirming, a directed verdict for the Defendants/Respondents , i.e., the law which holds that there is a presumption that the negligence of a rear driver in a rear-end collision is the sole proximate cause of the rear-end collision, which presumption is *not overcome* by a showing that there was a sudden stop by the front driver due to an accident in the roadway ahead. (T 125-128, referencing *Clampitt v. D. J. Spencer Sales*, 786 So. 2d 570, 572-73 (Fla. 2001) and *Pierce v. Progressive American Insurance Co*., 582 So. 2d 712 (Fla. 5th DCA 1991)).

A. Pertinent facts and proceedings

In all, six vehicles were involved in the subject accident, and they were all in the same, westbound lane on Forest Hill Boulevard in Wellington, Florida just past a hill. (T 9, 13). Both the Plaintiff and the Defendant described the drivers in the succession of vehicles as ‘slamming on their brakes’ as they approached the vehicles in front of them. (T 9, 55, 86, 112). The first car had stopped in the lane in question, disabled with a tire problem or something of that nature. (T 13-14, 53). The second vehicle was able to stop without hitting the disabled vehicle. (T 14-15).

The third, driven by a Mr. Kreitz, was stopped or stopping. (T 10, 14-15, 82). The fourth was driven by Defendant/Respondent Keri Ann Rideout, followed by Plaintiff/Petitioner, followed by a Mr. Nevin. (T 9, 82).

Defendant Keri Ann Rideout's car struck Mr. Kreitz' car from the rear, whether because she was pushed into it by Plaintiff's SUV striking her (T 90-91, 113) or because she ran into it (T 9) - a difference in the parties' versions which is not material to the issues in this appeal given the applicable law, as discussed below. Either way, the parties agree that Plaintiff/Petitioner ran into Defendant/Respondent Keri Ann's car from the rear, with the impact described by both as "severe" and "hard" - causing about $10,000 in damage to Keri Ann's car. (T 52, 91, 113). Mr. Nevin then ran into the Plaintiff's car from the rear. (T 9). Plaintiff's description of the event was:

> I had just gotten off of work and I was on my way home. And I remember I was driving down Forest Hill Boulevard westbound. I lived in Wellington at the time and was just about going over the hill there, passing the library and Polo grounds. I noticed the car in front of me, Ms. Rideout's car's, brake light turned on, so I turned my brake light on. It all happened so fast. So she just slammed into the car in front of her and I slammed into her, and the gentleman behind me slammed into me. It all happened really quick. There was no time for anything.

(T 8-9).

The accident occurred at around 3:45 p.m. in clear weather. (T 8, 15). The

area through which Forest Hill Boulevard travels in the vicinity of the accident is a combination of residential and commercial, but mainly commercial. (T 111). Plaintiff/Petitioner's and Defendant/Respondent's testimony was in agreement that the traffic was heavy to moderate. (T 9, 112). The Plaintiff/Petitioner said she was accustomed to that amount of traffic on Forest Hill Boulevard at that time of day, which was when she was on her way home from work. (T 9). The Plaintiff/Petitioner's own testimony was that she could see the cars in front of her before the accident, and that she could have avoided the accident if she left more space between her vehicle and the car in front of her that Keri Ann Rideout was driving. (T 57). Plaintiff/Petitioner testified that she saw Keri Ann's brake lights come on as they approached the top of the hill (or overpass, as the parties sometimes called it), and then Plaintiff/Petitioner slammed on her own brakes. (T 55).

On these facts, Plaintiff sued *inter alia* Defendants/Respondents Keri Ann and Linda Rideout. (R Vol 1, pp 1-2). The case came on for trial with just these parties. (T 1-131). At the close of the Plaintiff/Petitioner's evidence, the Defendants/Respondents moved for directed verdict on liability on the basis of the law established by the *Clampitt/Pierce*, *supra*, rule of decision. (R Vol 3, pp 386-

396; T 93-105). The trial court deferred ruling at that juncture. (T 105). The Defendants/Respondents renewed their motion at the close of all of the evidence, and the trial court then granted the motion and directed a verdict for the Defendants/Respondents on liability. (T 124-130).

A motion for new trial filed by the Plaintiff/Petitioner was denied (R Vol 3 pp 428-449, 456). Final judgment was entered for the Defendants/Respondents (R Vol 3, p 457), and Plaintiff/Petitioner filed a notice of appeal. (R 461-462). The Fourth District Court of Appeal affirmed the final judgment with the decision reported at *Cevallos v. Rideout*, 18 So. 3d 661 (Fla. 4th DCA 2009), applying the law established by this Court in *Clampitt v. D.J. Spencer Sales*, 786 So. 2d 570 (Fla. 2001) (approving *Pierce v. Progressive Am. Ins. Co*. 582 So.2d 712, 713-14 (Fla. 5th DCA 1991)(*en banc*)).

Plaintiff/Petitioner then sought discretionary review by this Court asserting express and direct conflict. This Court accepted the case for review on the merits by order dated April 20, 2010.

B. Response to certain factual recitations in Plaintiff/Petitioner's Corrected Initial Brief

Defendants/Respondents expressly acknowledge that all facts and inferences must be taken in favor of the Plaintiff/Petitioner as the non-movant for directed

verdict. Nonetheless, some of the Plaintiff/Petitioner's recitations are inaccurate or unsupported by any trial evidence. Defendants/Respondents respond to those recitations here.

Defendants/Respondents first note that the inaccurate and unsupported recitations are not as to ***material*** facts, but the Plaintiff/Petitioner attempts to make them appear material and suggestive of haste, inattention, and negligence on the part of Defendant/Respondent Keri Ann Rideout and of faultlessness on the part of Plaintiff/Petitioner. As indicated above, however, the only material record facts under the governing law were (a) that the Plaintiff/Petitioner rear-ended Defendant/Respondent who was in an accident in the roadway ahead of Plaintiff in the lane in which they had both been travelling, and (b) that the Plaintiff/Petitioner had no facts to overcome the presumption that her actions in so doing were the sole proximate cause of the injuries from the rear-end collision she caused. Response is made nonetheless to Plaintiff/Petitioner's additional 'facts' for the sake of accuracy.[2]

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[2] The inaccuracies were pointed out in Defendants/Respondents' Answer Brief filed in the Fourth District proceedings, but they are nonetheless repeated in Plaintiff/Petitioner's Corrected Initial Brief herein.

Plaintiff/Petitioner's Corrected Initial Brief states that Defendant/Respondent Kerri Ann Rideout's collision with the car in front of her caused Kerri Ann's car to "come to a sudden and unexpected stop directly in the path of Plaintiff's vehicle", and that "[a]s a result, Plaintiff Maria Ceballos, had no chance to stop her own car, but instead, ran into the back of [Defendant's vehicle] ." (Corrected Initial Brief, p 4). This statement contradicts Plaintiff/Petitioner's own trial testimony, which was that she could have avoided hitting Defendant/Respondent's vehicle if she left more space between her own vehicle and Defendant/Respondent's vehicle. (T 56).

Plaintiff/Petitioner's Corrected Initial Brief states: "Plaintiff Cevallos was following [Defendant/Respondent Kerri Ann Rideout] at a safe distance of about four car lengths." (Corrected Initial Brief, p 5). In the first instance, the reference to "safe distance" is not a statement of fact. It is also not supported by the record, including by any of Plaintiff/Petitioner's listed record cites. (R *passim*; T *passim*).

Plaintiff/Petitioner's Corrected Initial Brief states that "[Defendant/Respondent Keri Ann] had only fifteen minutes to make her doctor's appointment." (Corrected Initial Brief, p 6). The ***only*** testimony on this subject came from Keri Ann, who testified that she had plenty of time to make her doctor's appointment, which was close by, and that she was not late or rushed. (T 110-111).

Plaintiff/Petitioner had no evidence to the contrary. (T *passim*).

Plaintiff/Petitioner's Corrected Initial Brief states: "Plaintiff testified that she saw [Defendant/Respondent Keri Ann] talking on her cell phone immediately before the accident." (Plaintiff's Corrected Initial Brief, p 6). The Plaintiff/Petitioner's actual testimony, however, was that she did not really know if Defendant/Respondent was using her cell:

> Q. So, at that point in time you see her holding something up to her ear, but you don't know if it was a cell phone ?
>
> A. No, I don't know if exactly it was a cell phone. I'm believing it is.

(T 15). Defendant/Respondent's testimony was that her cell phone was on her car visor; that she was not on the phone; and that the first call she made was to her mother *after* the accident to let her mother know it had happened. (T 114).

Plaintiff/Petitioner's Corrected Initial Brief states that as a result of Defendant/Respondent's crash into the car ahead of her "Plaintiff had no opportunity to avoid the collision, but could only slam on her brakes and brace for the impact." (Corrected Initial Brief, p 7). The Corrected Initial Brief cites pages 8-10 and 55 of the trial transcript as the 'support' for that statement, but no such testimony appears on those pages - or anywhere. (T 8-10, 55; T *passim*).

STATEMENT OF THE ISSUES

Whether the decision of the Fourth District Court of Appeal should be approved as correctly following the law established by this Court in *Clampitt v. D.J. Spencer Sales*, 786 So. 2d 570 (Fla. 2001) (approving *Pierce v. Progressive Am. Ins. Co*. 582 So. 2d 712, 713-14 (Fla. 5th DCA 1991)(*en banc*)).

Whether the cited conflict cases are distinguishable such that the subject Fourth District decision should be approved or jurisdiction discharged as improvidently granted.

Whether the Fifth District panel's decision in *Charron v. Birge*, __ So. 3d __ , 2010 WL 1404060 (Fla. 5th DCA 2010)[3], issued after the Fourth District's decision herein, should be disapproved insofar as it attempts in *dicta* to limit this Court's plain holding in *Clampitt* and to disagree with the Fourth District for following that plain holding.

SUMMARY OF ARGUMENT

In *Clampitt v. D. J. Spencer Sales*, 786 So. 2d 570 (Fla. 2001), this Court reaffirmed the longstanding principle of Florida law that there is a rebuttable

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[3] As of the date of service of this Answer Brief, the decision has not become final.

presumption in rear-end collision cases that the rear driver's negligence was the sole proximate cause of the injuries from the collision. And, the *Clampitt* decision held, while various circumstances may rebut the presumption, it is ***not*** rebutted by a mere showing that there was a sudden stop by the driver in front of the rear driver due to an accident ahead in their lane of traffic. *Clampitt* made clear that sudden stops due to accidents ahead in a lane of traffic are an expected part of driving, for which every driver must be prepared:

> Unfortunately, accidents on the roadway ahead are a routine hazard faced by the driving public. ***Such accidents are encountered far too frequently and are to be reasonably expected. Each driver is charged under the law with remaining alert and following the vehicle in front of him or her at a safe distance.***

786 So. 2d at 575.

The *Clampitt* decision expressly approved *Pierce v. Progressive American Insurance Co*., 582 So. 2d 712 (Fla. 5th DCA 1991), which made it clear that the fact that a front vehicle may also have collided with a vehicle ahead of it does *not* change the principle that, as a matter of law, each rear driver's negligence in a chain of rear-end collisions, as occurred here, is deemed the sole proximate cause of that driver's rear-ending collision. As *Clampitt* summed up in approving *Pierce*: "The court in *Pierce* also rejected the notion that the rear driver can benefit from a

claim that the forward driver was negligent in rear-ending the vehicle in front of him or her." 786 So 2d at 574.

Plaintiff/Petitioner's case fell squarely within the *Clampitt* and *Pierce* circumstances under which her negligence in rear-ending a vehicle stopped suddenly in her lane by an accident in the roadway ahead is deemed the sole proximate cause of the Plaintiff/Petitioner's rear-ending collision. The Plaintiff/Petitioner had no additional facts or circumstances that took her colliding into the rear-end of Defendant/Respondent's vehicle out of the *Clampitt-Pierce* rule.

Plaintiff/Petitioner's arguments in these discretionary review proceedings virtually ignore this Court's controlling decision in *Clampitt*, opting instead: (a) to discuss broad tort concepts about forseeability and negligence generally being jury questions; (b) to suggest conflict with other - factually inapposite - cases involving different types of rear end collisions; and (c) to point to the recent (non-final) decision in *Charron v. Birge*, __ So. 3d __ , 2010 WL 1404060 (Fla. 5th DCA 2010), in which the Fifth District distinguished *Clampitt* and the Fourth District's decision herein, and essentially declined to read *Clampitt* as written. Defendants/Respondents respectfully submit that none of Plaintiff/Petitioner's

arguments show error in the Fourth District's ruling, and that neither do they point out any actual conflict requiring resolution by this Court.

Clampitt has provided a clear and simple rule of law that is easily followed and easily applied. Every driver is responsible for controlling the amount of space kept in the lane ahead so as not to rear end cars in front of the driver. An accident occurring in the lane ahead is to be expected. So, if all that a rear-ending driver can show is that the car ahead got into a chain collision due to an accident in the lane ahead, that showing will not rebut the presumption that the rear-ending driver's fault was the sole cause of the collision with the vehicle that was rear-ended. ***That*** set of lawsuits, at least, should have been eliminated by *Clampitt*.

Petitioner's lawsuit falls right within the *Clampitt* rule of law, but Petitioner chose to litigate anyway because she did not like the result it dictated for her. Such is not a reason for changing the *Clampitt* law or for reversing the Fourth District, which followed *Clampitt*. Neither does the Fifth District *Charron* panel's *dicta*-expressed opinion that *Clampitt* could not possibly mean what it so plainly says present any basis for changing *Clampitt* or the result reached here. The decision of the Fourth District should be approved or jurisdiction should be discharged.

ARGUMENT

A. The Fourth District's decision correctly applied the governing law set by this Court's *Clampitt* decision

1. The law set by *Clampitt*

Although Plaintiff/Petitioner has, for the most part, attempted to ignore it, the on-point and governing law is set by this Court's decision in *Clampitt v. D.J. Spencer Sales*, 786 So. 2d 570, 572-73 (Fla. 2001). That law is accordingly discussed first in this brief, followed by a section addressing the entirely distinguishable law cited by Plaintiff/Petitioner, and thereafter by a section addressing the Fifth's District panel's non-controlling views expressed in dicta in *Charron.*

In *Clampitt*, this Court discussed the long-established principle of Florida law that there is a rebuttable presumption that the negligence of the rear driver in a rear-end collision was the sole proximate cause of the accident. 786 So. 2d at 572-73. This presumption may be rebutted "[w]hen the defendant produces evidence which fairly and reasonably tends to show that the real fact is not as presumed," i.e., that the rear-end collision was not the result of the rear driver's negligence." *Gulle v. Boggs*, 174 So. 2d 26, 29 (Fla. 1965).

As noted in a decision of the Florida Third District Court of Appeal, the

Florida courts have recognized three specific fact patterns which may rebut the presumption:

> (1) affirmative testimony regarding a mechanical failure, *see, e.g., Gulle [v. Boggs]*, 174 So. 2d [26] at 29 [Fla. 1965](holding that affirmative testimony by the defendant that his brakes failed was sufficient to overcome the negligence presumption);
>
> (2) affirmative testimony of a sudden ***and unexpected*** stop or unexpected lane change by the car in front, *see, e.g., Conda v. Plain*, 222 So. 2d 417, 417-18 (Fla. 1969)(holding that testimony by the defendant that the plaintiff suddenly switched into the defendant's lane while the defendant was passing the plaintiff was sufficient to rebut the presumption); and
>
> (3) when a vehicle has been illegally and, therefore, unexpectedly stopped, *see, e.g., Ry. Express Agency, Inc. v. Garland*, 269 So. 2d 708, 710 (Fla. 1st DCA 1972)(presumption rebutted where defendant, who was driving a bus, improperly stopped on an expressway to pick up fallen debris), *cert. denied*, 275 So. 2d 14 (Fla. 1973); *Be''s Seltzer, Inc. v. Markey*, 254 So. 2d 377, 378 (Fla. 3d DCA 1971)(presumption rebutted where plaintiff presented evidence that defendant was improperly stopped on a bridge), *cert. denied*, 261 So. 2d 176 (Fla. 1972).

Department of Highway Safety and Motor Vehicles v. Saleme, 963 So. 2d 969, 972 (Fla. 3d DCA 2007).

As to the second - "sudden and unexpected stop" - category, into which the Plaintiff/Petitioner sought, and seeks, to fit the instant case, the *Clampitt* decision explained that a showing of "*sudden* stop" alone does *not* rebut the presumption:

> 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. 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.

786 So. 2d at 574, *quoting Pierce v. Progressive American Insurance Co.*, 582 So. 2d 712 (Fla. 5th DCA 1991).

In *Clampitt*, as here, the reason for the sudden stop of the preceding vehicle was that it collided with the vehicle in front of it due to an accident in the lane of traffic ahead. In *Clampitt*, the lead vehicle had slowed to a stop in order to make a left-hand turn, whereupon the second vehicle ran into it, and the third vehicle rear-ended the second. Distinguishing the Court's earlier decision in *Eppler v. Tarmac America, Inc.*, 752 So. 2d 592 (Fla. 2000), this Court in *Clampitt* ruled that *as a matter of law* the showing of a "sudden stop" which consists of a preceding vehicle colliding with a vehicle in the lane in front of it does ***not*** overcome the presumption that the negligence of the vehicle that rear-ends such a preceding vehicle is the sole proximate cause of the rear-end collision:

> The present case differs from *Eppler* wherein the forward driver allegedly made an abrupt and arbitrary stop in bumper-to-bumper accelerating traffic, i.e., a "gotcha" stop. Rather, this case is similar to *Pierce v. Progressive American Insurance Co.*, 582 So. 2d 712 (Fla. 5th DCA 1991), and other "sudden stop" cases wherein the forward

driver merely stopped abruptly.

786 So. 2d at 574.

The facts in *Pierce*, as in *Clampitt* and the instant case, involve what the *Pierce* decision referred to as a "chain collision":

> Pierce testified that he was traveling 30-35 miles per hour and began to brake when he saw the second car (Reaves) hit the first car (Boone) two or three car lengths ahead of him. Pierce applied his brakes before the car immediately ahead of him (Tiroff) braked. Tiroff then locked his brakes and slid to the left, hit the car in front of him, then was struck by Pierce. All three collisions were in the left lane.

582 So. 2d at 713. The *Pierce* Court analyzed these facts in light of the established Florida law as to the presumption of negligence on the part of the rear driver in a rear-ending collision, and how it may be overcome:

> 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. [cites omitted]. 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. [cites omitted]. The burden on the defendant is not to come up with just any explanation, but one which is "substantial and reasonable." [cite omitted].

582 So. 2d at 714. The *Pierce* decision held that, as a matter of law, pointing to a 'sudden stop' caused by a preceding vehicle rear-ending the car in front of it does

not overcome the presumption as to the rear vehicle: "*As a matter of law*, it is not a substantial and reasonable explanation by [the rear ending driver] to merely say that the vehicles ahead of him - whether Boone, Reaves, or Tiroff - stopped abruptly." *Id.*

Approving this rule from *Pierce*, this Court in *Clampitt* concluded:

> This is a classic "sudden stop" case. Clampitt's auto stopped abruptly on the highway as the result of a collision with Huguley's trailer, and Hetz's tractor-trailer rig was unable to stop in time. ***Unfortunately, accidents on the roadway ahead are a routine hazard faced by the driving public. Such accidents are encountered far too frequently and are to be reasonably expected. Each driver is charged under the law with remaining alert and following the vehicle in front of him or her at a safe distance.*** [fn omitted].
>
> ***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.*** This is why when a vehicle collides with an object ahead of it, including the rear of a leading vehicle, there is a presumption of negligence on the part of the overtaking or following vehicle. *Lynch v. Tennyson*, 443 So. 2d 1017, 1020-21 (Fla. 5th DCA 1983) (Cowart, J., dissenting).
>
> ***Each driver must be prepared to stop suddenly*** (particularly during school and business hours on a roadway that is bordered by multiple business and residential establishments and a school, as in the present case). ***It is logical to charge the rear driver with this responsibility because he or she is the person who is in control of the following distance.***

786 So. 2d at 575-576.

The *Clampitt* decision also cited with approval the holding in *Pierce* that the negligence of preceding drivers in themselves rear-ending cars ahead of them does ***not*** overcome the presumption that each rear-ending driver's negligence is deemed the ***sole proximate cause*** of that driver's rear end collision:

> The court in *Pierce* also rejected the notion that the rear driver can benefit from a claim that the forward driver was negligent in rear-ending the vehicle in front of him or her. [FN7]
>
> [FN7.] *See Pierce*, wherein the district court ruled as follows:
>
> The second argument [i.e., that the negligence of the first three drivers in rear-ending the vehicles in front of them inured to Pierce's benefit] is equally fallacious. The presumption of negligence arising from the collision between Boone and Reaves [i.e., the first and second drivers, respectively] inured only in favor of Boone, and against Reaves. ***Likewise, any presumption of negligence against Tiroff and in favor of Reaves [i.e., the third and second drivers, respectively] arising from a second collision could not benefit Pierce in regard to the third collision where he struck Tiroff.***
> ....
>
> 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. The burden to produce that evidence was upon Pierce. Even on this appeal, Pierce has not contended that

> there was any material evidence of negligence on the part of Tiroff or Reaves other than the fact each ran into a preceding vehicle.

Clampitt, supra, 786 So. 2d at 574, *quoting Pierce, supra*, 582 So. 2d at 714-715.

In both *Clampitt* and *Pierce*, application of the presumption that the rear-ending driver's negligence was the sole proximate cause of the rear-end collision resulted in full liability for the rear-end collision being left with the rear driver. The negligence of the preceding drivers in causing rear-end collisions of their own in the road ahead did not alter that conclusion because the *Clampitt* and *Pierce* cases focused not on the comparative negligence of the preceding and rear drivers, but rather on whose actions were deemed *the proximate cause* of the rear-end collision. As a matter of policy, this Court in *Clampitt* pronounced the failure to comply with the law's requirement that all drivers maintain an "imaginary clear stopping distance or assured stopping space or adequate zone within which the driven vehicle can come to a stop", 786 So. 2d at 575, to be *the sole proximate cause* of a rear-end collision in the case of chain collisions in a lane of traffic.

Defendants/Respondents expressly acknowledge here, as was also done in the Fourth District, the law as to when directed verdicts may be granted, as stated, for example in *Dep't of Children & Family Services v. Amora*, 944 So. 2d 431 (Fla.

4th DCA 2006):

> A motion for directed verdict should be granted only when the evidence, viewed in a light most favorable to the non-moving party, shows that a jury could not reasonably differ as to the existence of a material fact and that the movant is entitled to judgment as a matter of law.

944 So. 2d at 435. Here, however, there were no ***material*** facts in dispute.

Under the *best* version of the facts for the Plaintiff/Petitioner, she ran into the rear-end of a car in front of her in their lane of traffic because that car had been involved in an accident in the roadway ahead of her. This is ***exactly*** the "classic 'sudden stop' case" , 786 So. 2d at 575, addressed by *Clampitt* and *Pierce*, under which the Plaintiff/Petitioner's rear-ending of Defendant/Respondent's vehicle is deemed the sole proximate cause of the rear-end collision and of whatever injuries Plaintiff/Petitioner may have sustained in that collision. Plaintiff/Petitioner's own testimony was that she could have avoided the collision had she left more space between her vehicle and the vehicle of Defendants/Respondents. Whatever evidence Plaintiff/Petitioner may or may not have had of cell phone talking or rushing to an appointment would relate only to Defendant/Keri Ann's negligence as the sole proximate cause of Keri Ann rear-ending the vehicle *in front of Keri Ann*. Such evidence in no way altered Plaintiff/Petitioner's negligence as the sole

proximate cause of her own rear-ending of Keri Ann.

2. Response to Plaintiff/Petitioner's commentary on *Clampitt*

a. Sole proximate cause

When Plaintiff/Petitioner finally gets around to a substantive discussion of *Clampitt* at page 25 of the Corrected Answer Brief (and then only insofar as *Clampitt* is referenced in *Department of Highway Safety and Motor Vehicles v. Saleme*, 963 So. 2d 969, 972 (Fla. 3d DCA 2007)), Plaintiff/Petitioner states, inaccurately: "A careful reading of *Clampitt*, however, reveals that nowhere in the decision do the words 'sole proximate cause' appear." (Corrected Initial Brief, p 25). In citing Pierce with approval, the Clampitt decision states:

> Rather, this case is similar to *Pierce v. Progressive American Insurance Co*., 582 So.2d 712 (Fla. 5th DCA 1991), and other "sudden stop" cases wherein the forward driver merely stopped abruptly. The court in *Pierce* explained that a sudden stop standing alone is insufficient to overcome the presumption of negligence:
>
> > ***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 <u>the sole proximate cause</u> of a rear-end collision.*** 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.
>
> *Pierce*, 582 So. 2d at 714 (citations omitted).

Clampitt, 786 So. 2d at 574.

Further, *Clampitt* concluded with this reference: "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." *Clampitt*, 786 So. 2d at 575, n 8 (*quoting Lynch v. Tennyson*, 443 So.2d 1017, 1020-21 (Fla. 5th DCA 1983) (Cowart, J., dissenting)). The final sentence in the decision is this comment as to whose actions should be deemed the cause of rear-end collisions in sudden stop cases: "It is logical to charge the rear driver with this responsibility because he or she is the person who is in control of the following distance." *Clampitt*, 786 So. 2d at 575.

Plaintiff/Petitioner is just wrong in suggesting that *Clampitt* does not mention the rear driver's negligence as the sole proximate cause of the rear-end collision where all that is shown is a sudden stop by driver in the lane ahead. The Fourth District correctly applied the *Clampitt* reasoning and that of the Third District in *Saleme, supra*, which followed *Clampitt.*

B. Response to Plaintiff/Petitioner's arguments

1. Plaintiff/Petitioner's 'fact issue' argument ignores the controlling *Clampitt/Pierce* law

Plaintiff/Petitioner's first argument section bears the heading: "BECAUSE PLAINTIFF PRESENTED EVIDENCE OF DEFENDANT'S NEGLIGENCE, THE ISSUE OF NEGLIGENCE WAS A JURY ISSUE." (Corrected Initial Brief, p 10). Plaintiff/Petitioner then goes on to provide a discussion of general tort law principles as to negligence and causation, and the general treatment of negligence issues as fact issues. Defendants/Respondents do not disagree with any of the background tort law principles, which have been part of the jurisprudence of Florida for a very long time.

There are, however, certain tort issues that the Florida courts have resolved as a matter of law. Rear driver liability in rear-end collision cases that fall in the category of 'sudden stop without more' is just such an issue, as this Court established in *Clampitt* - the subject of the preceding section of this Answer Brief. The fact that Plaintiff/Petitioner has turned a blind eye to *Clampitt* in making the arguments in the first argument section of her brief does not eliminate it as the controlling law. Plaintiff/Petitioner argues that the issue of Defendant/Respondent's liability as a rear-ended 'sudden stop'driver presented a

fact issue. *Clampitt* held that it does not.

2. Plaintiff/Petitioner is incorrect that the rear-end collision presumption is logically inapplicable to a rear driver *plaintiff* and incorrect that the presumption is inconsistent with comparative fault law

Plaintiff next argues that the rear-end collision presumption was developed in the context of a *defendant* who has rear-ended the car in front of him/her, and that it should not apply in the context of a *plaintiff* who has rear-ended the car in front of him/her. Respectfully, this argument makes no sense. If anything, the presumption is an *a fortiori* in the case of a rear-ending plaintiff.

The presumption was first discussed and adopted in the case of *McNulty v. Cusack*, 104 So. 2d 785 (Fla. 2d DCA 1958), later endorsed by this Court in *Gulle v. Boggs*, 174 So. 2d 26 (Fla. 1965). As Plaintiff/Petitioner herself points out that, in creating the presumption, "[t]he *McNulty* court reasoned that the driver in front usually won't see the other car approaching and is often surprised by the impact. Thus, to require the driver of a car which has been rear-ended by another to explain why the collision occurred could create not only an unfair, but an impossible burden to overcome." (Corrected Initial Brief, pp 18-19). A rear-ending *plaintiff* ***does*** have the opportunity to see the cars ahead, and thus should all the more be required to come forward with the explanation as to why the accident should not be

considered solely attributable to the plaintiff's own running into a car in front of it.

Plaintiff goes on to argue further in this section that *McNulty* was decided before Florida adopted the doctrine of comparative negligence. Since comparative negligence principles now apply, the Plaintiff argues, the comparative liability of the rear driver and lead driver should always present a question of fact.

This argument, too, simply ignores this Court's 2001 *Clampitt* decision, which was issued long after comparative negligence was adopted in 1973.[4] Some negligence issues - whether as to negligence, comparative negligence, or proximate cause - are decided as a matter of law. Plaintiff argues that it is better policy to treat all such issues as fact issues, but such an approach is far too overbroad and ignores innumerable decisions to the contrary throughout Florida tort law. Some tort issues have been decided as a matter of law, usually determined by the courts for public policy reasons. When certain such issues have been decided and carved out for treatment as a matter of law, it is no argument for revisiting the decisions that all negligence and causation issues should really be determined by juries rather than by courts.

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[4] *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

The subject decision from the Fourth District contained a cogent discussion of application of the *Clampitt* 'sole proximate cause as a matter of law' holding applicable to rear drivers in sudden stop without more rear-end collision to rear-ending plaintiffs as well as rear-ending defendants:

> In Florida, there is a rebuttable presumption that the negligence of the rear driver in a rear-end collision was the sole proximate cause of the accident." *Dep't of High. Saf. & Motor Vehs. v. Saleme*, 963 So.2d 969, 972 (Fla. 3d DCA 2007) (emphasis added). *See also Eppler v. Tarmac Am., Inc.*, 752 So. 2d 592, 594 (Fla. 2000) (discussing *Jefferies v. Amery Leasing, Inc.*, 698 So. 2d 368, 370-71 (Fla. 5th DCA 1997) and *Gulle v. Boggs*, 174 So. 2d 26 (Fla. 1965)). A rear-driver defendant can overcome the presumption by establishing that the lead-driver plaintiff stopped abruptly and arbitrarily. Once the rear-driver defendant overcomes the presumption, the burden of proof on the proximate cause of the collision reverts back to the plaintiff, who can no longer rely on the presumption to establish the sole proximate cause of the accident. *Id.* at 594-95.
>
> Where the plaintiff is the rear driver, however, the rear-driver plaintiff, like the rear-driver defendant, must prove that the lead-driver stopped abruptly ***and arbitrarily*** to rebut the presumption that the plaintiff's own negligence was the sole proximate cause of the accident. Phrased another way, the evidence must establish that the rear-driver plaintiff cannot reasonably have been expected to anticipate the lead driver's sudden stop. *Pierce v. Progressive Am. Ins. Co.*, 582 So. 2d 712, 713-14 (Fla. 5th DCA 1991) (*en banc*). More importantly, a rear-driver plaintiff cannot rely on the mere fact that the lead-driver defendant "ran into a preceding vehicle" without "material evidence of negligence" on the part of the lead-driver defendant in stopping abruptly. *Id.* at 714-15.
>
> The plaintiff argues that the rebuttable presumption of rear-driver

> negligence does not apply to bar a claim by a rear-driver plaintiff because a lead-driver defendant could be comparatively negligent. In other words, a lead-driver defendant cannot use the presumption as a "shield" to require a rear-driver plaintiff to "establish the absence of negligence on her own part to pursue" her claim. We disagree.
>
> The distinction between a presumption of comparative negligence and a presumption of the sole cause of the accident is reasonably related to the purpose of the presumption. Not only does the "sole cause of the accident" presumption relieve the lead-driver plaintiff of the difficult task of adducing "proof of all four elements of negligence," it serves the additional public policy of ensuring that all drivers "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." *Clampitt v. D.J. Spencer Sales*, 786 So. 2d 570, 573, 575 (Fla. 2001) (quoting *Jefferies*, 698 So. 2d at 370-71) and *Lynch v. Tennyson*, 443 So. 2d 1017, 1020-21 (Fla. 5th DCA 1983) (Cowart, J., dissenting). It further avoids the burden of proof being shifted to the lead-driver defendant.

Cevallo, 18 So. 3d at 663-664.

Defendants/Respondents respectfully submit that the Court should reject Plaintiff/Petitioner's arguments that the Fourth District's decision applying *Clampitt* was wrongly decided because of her position as a rear-end driver *plaintiff* and/or because of the availability of comparative negligence principles.

3. Plaintiff/Petitioner is incorrect in arguing 'confusion' amongst the district courts

Although Plaintiff/Petitioner suggests otherwise, in fact the Florida decisions are not in conflict with each other or with the Fourth District's decision here. The

cases cited by Plaintiff/Petitioner are addressed in turn below, as they are all, in fact, in harmony with this Court's decisions and with the subject Fourth District decision. The *dicta* in the Fifth District panel's decision in *Charron* interjects the only arguable conflict, and it is addressed in a following section.

Jefferies v. Amery Leasing, Inc., 698 So. 2d 368 (Fla. 5th DCA 1997), cited repeatedly by Plaintiff/Petitioner, contains a long discourse by the Fifth District on how the negligence presumption should be applied *vis á vis* comparative negligence, which discourse turns out to be pure *dicta* because the case is decided based on the fact that there was no evidence in the record of negligence on the part of a lead driver that a rear driver sought to blame. *Jefferies* also predates *Clampitt* and does not address facts like those presented in *Clampitt* and in the instant case, as Plaintiff/Petitioner's brief admits. The *Clampitt* decision from this Court holds that the issue of sole proximate causation is to be decided as a matter of law in cases, like the instant case, that present *Clampitt* or *Pierce* facts. Insofar as the *dicta* in *Jefferies* may suggest otherwise, *Clampitt* is clearly controlling.

Cleaveland v. Florida Power and Light, Inc., 895 So. 2d 1143 (Fla. 4th DCA 2005) is not entirely clear in setting out the facts of the case, but suggests that the facts fall under *Eppler v. Tarmac America, Inc.*, *supra*, 752 So. 2d 592, 594 (Fla.

2000), rather than *Clampitt*, which distinguished *Eppler* as set out above. In *Eppler*, a lead driver and following driver began to move forward when a traffic light turned green for them, whereafter the lead driver suddenly ***and arbitrarily*** braked her car for no observable reason causing the rear driver to collide with the rear of her car. Such circumstances were held to overcome the presumption of rear driver responsibility for the collision: "Abrupt and ***arbitrary*** braking in bumper-to-bumper, accelerating traffic is an irresponsible and dangerous act that invites a collision." 752 So. 2d at 595. The Fourth District in *Cleaveland* seemed to conclude that the facts fell into the *Eppler* category - which is ***not*** the *Clampitt* category of facts presented in this case.[5]

Alford v. Cool Cargo Carriers, Inc., 936 So. 2d 646 (Fla. 5th DCA 2006) involved a sudden ***lane change*** by the lead vehicle into the path of the rear vehicle. Sudden lane changes are one of the recognized circumstances in which the presumption does not apply, so this case is not at odds with the *Clampitt* case law.

The Fourth District itself explained the distinctions between the instant case

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[5] If the *Cleaveland* facts (again not fully set out in the opinion) were the same as those in *Clampitt* (and thus the same as the facts here), then the *Clampitt* ruling presumably would have been followed by the Fourth District, just as it was in the instant case.

and *Pollock v. Goldberg*, 651 So.2d 721 (Fla. 4th DCA 1995):

> This case is distinguishable from our decision in *Pollock v. Goldberg*, 651 So. 2d 721 (Fla. 4th DCA 1995). There, we reversed a directed verdict against a rear-driver counter-plaintiff entered after a jury verdict. *Id.* at 722. We acknowledged that the rear driver's burden of proof was greater than merely establishing that the lead driver suddenly stopped to avoid the presumption of rear-driver negligence. *Id.* at 723-24. However, because there were "two competing affirmative claims, both governed by the doctrine of comparative negligence," we held that the trial court erred in directing a verdict for the lead driver. *Id*. at 723.

Yellow Cab Co. of St. Petersburg, Inc. v. Betsey, 696 So. 2d 769 (Fla. 2d DCA 1996) did not involve a 'sudden stop' of the *Clampitt-Pierce* ilk involved here, but rather the rear-ending of a vehicle that had already been in one accident and had pulled all or part of the way ***off the roadway*** to await assistance when hit by another vehicle. The facts as to the second accident were the subject of very conflicting testimony, which is not material here because the facts bear no similarity to the facts of this case. And, finally, *Johnson v. Deep South Crane Rentals*, 634 So. 2d 1113 (Fla. 1st DCA 1994) also did not involve a 'sudden stop' within the *Clampitt-Pierce* rules that apply here.

None of Plaintiff's cited authorities, in short, apply to dictate a different result than that correctly reached by the Fourth District in following the governing *Clampitt/Pierce* rule.

C. The Fifth District panel's comments in dicta in *Charron*

Plaintiff/Petitioner relies heavily on the recently issued panel decision in *Charron v. Birge*, __ So. 3d __ , 2010 WL 1404060 (Fla. 5th DCA 2010) to suggest confusion in the law and conflict. The portions of the *Charron* panel decision upon which Plaintiff/Petitioner relies are the following statements from footnote 6 of the decision, clearly identified as *dicta,* not least in the first sentence of the footnote:

> [FN6]. *Cevallos* is different from this case because the plaintiff in that case was the following driver in a rear-end collision. The *Cevallos* court found that "public policy" mandated a rule that the following driver be deemed the sole cause of the collision, notwithstanding that its proportional negligence might be minor. If the following driver cannot show the lead driver suddenly stopped at a location he could not anticipate, then the following driver will be deemed the sole cause of the accident, without regard to any negligence of the lead driver.
>
> The *Cevallos* court does not mention the *Cleaveland* decision from the same court, which appears to be contrary. We do not find in *Clampitt* that the presumption of the rear driver's negligence is a court-created rule in furtherance of some "public policy" against rear-end collisions. The *Clampitt* court did say that the following driver is "normally" the sole proximate cause of a rear-end collision, but that statement is *dicta*, likely from decisions that predated the adoption of comparative negligence. *Clampitt* was a suit by the lead driver and the question presented was whether evidence that the middle driver/plaintiff stopped suddenly and never applied her brakes before colliding with the vehicle in front of her was sufficient to overcome the presumption of negligence of the driver following her. The *Clampitt* court did not consider the issue of comparative negligence.

> Consider, for example, a lead driver is texting a cell phone message to his girlfriend with one hand, while tuning the car radio with the other, when he drops his phone into the cup of coffee between his legs and slams on the car's brakes in shock and pain, with the result that he is struck by the following driver, who was unprepared for the sudden stop. The notion that the lead driver is immune from any liability because the collision happened to occur at a time and place where the following driver should have anticipated his stop makes no sense. If this is a rule based on public policy, it is odd that even drunk drivers get a better break than do following drivers. *See* 768.36, Fla. Stat. (2009); *Pearce v. Deschesne*, 932 So.2d 640 (Fla. 4th DCA 2006).
>
> As a matter of public policy, we want all drivers to obey all traffic laws, not just the prohibition against following too closely. We want drivers not to go the wrong way down a one-way street; we want the speed limits and traffic signals obeyed; we want headlights on after dark. (Presumably, we also want drivers not to make sudden stops for no good reason in the middle of the roadway.) In all these other instances, rules of comparative negligence apply. We do not believe the *Clampitt* court intended to create a rule eliminating comparative negligence uniquely for negligent following drivers. Even if the *Cevallos* court is right, however, the presumption still would have no application to an injured third party.

2010 WL 1404060, *6, n 8.

This commentary indicates that the Fifth District panel does not believe that *Clampitt* means what it so plainly states. Insofar as these *dicta* remarks may create confusion (assuming the decision becomes final), they should be disapproved.

The *Clampitt* decision is clear. Further, it serves a good and legitimate purpose. Some issues are decided as a matter of law for public policy reasons, as

discussed above. The Fifth District panel's remarks express an inability to understand how this issue was singled out when there are so many traffic issues still deemed to present fact questions. But, the fact that only some areas of the law present settled questions of law is no grounds to disturb them. Clarity and bright line rules are beneficial to the public, bench, and bar wherever they arise. The fact that there are not *more* such rules is no argument for retreating from those which do exist.

* * *

The *Clampitt* reasoning is plain, and it applies to a clearly delineated set of 'sudden stop' circumstances. The Fourth District quite correctly followed the applicable law here, and its decision should accordingly be approved. Insofar as the panel *dicta* in *Charron* may have created uncertainty on this settled subject, it should be disapproved.

CONCLUSION

Based on the foregoing facts and authorities, Defendants/Respondents respectfully submit that, if the Court determines that conflict jurisdiction exists at all, the decision of the Fourth District Court of Appeal should be approved.

Respectfully submitted,

KIRWAN & SPELLACY, P.A.
750 S.E. 3rd Avenue, Third Floor
Fort Lauderdale, Florida 33316
Telephone (954) 463-3008
Facsimile (954) 463-3010
-and-
RUSSO APPELLATE FIRM, P.A.
6101 Southwest 76th Street
Miami, Florida 33143
Telephone (305) 666-4660
Facsimile (305) 666-4470

Counsel for Respondent

By:_____
ELIZABETH K. RUSSO
Florida Bar No. 260657

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Answer Brief of Respondents was sent by U.S. mail this 12th day of July, 2010 to: Allen R. Seaman, Esquire, Seaman & Coven, P.A., 803 Lake Avenue, Lake Worth, Florida 33460.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Answer Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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