THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

SUPREME COURT CASE NO.: SC09-2238

LOWER TRIBUNAL NOS.: 4D08-3042
50-2005-CA-010701XX

MARIA CEVALLOS,

Appellant,

v.

KERI ANN RIDEOUT and
LINDA RIDEOUT,

Appellees

_____/

APPELLANT'S AMENDED INITIAL BRIEF

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SUMMARY OF ARGUMENT

While the determination of a duty of care is a matter for the court, issues of negligence can be decided as a matter of law only when the facts are agreed upon and all inferences and conclusions that reasonable people can draw from those facts support but a single result. Otherwise, questions of negligence, causation and damages must be submitted to the jury for its determination.

Plaintiff presented competent and substantial evidence to prove that Defendant's negligence triggered the multi-car accident in which Plaintiff was injured. Neither the trial judge nor the District Court had the authority to independently consider and weigh the evidence. The trial judge thus erred when he directed a verdict on negligence in favor of the defense.

The Florida Supreme Court has twice held that the rebuttable presumption of negligence which applies in the case of a rear-end collision is irrelevant to questions involving the lead driver's negligence. The limited presumption of negligence created by a 1958 holding of the Second District is intended to relieve the burden on drivers who are involved in accidents whose car is hit from the rear, of having to explain what the rear driver did to cause the accident.

The District Court erred in holding that Plaintiff must overcome the presumption of negligence as a pre-requisite to allowing her claim of negligence against the Defendant-leading driver to be considered by a jury.

The District Court further erred in ruling that unless Plaintiff could overcome the presumption, she is deemed, as a matter of law, to have been the sole cause of the accident sued upon. The court's interpretation of the presumption violates the doctrine of comparative negligence.

Finally, the District Court impermissibly came to its own conclusions, after weighing evidence in the record, in order to rule that Plaintiff had failed to rebut the presumption of negligence. Because Plaintiff presented exculpatory evidence refuting the claim of comparative negligence, only a jury could decide if Plaintiff should be charged with a portion of blame.

Both the judiciary and the trial bar have struggled to come to an understanding of the standards which apply to cases involving rear-end collisions. Existing case law is both confusing and contradictory. Clear guidance is required from the Florida Supreme Court.

Prior decisions of the Florida Supreme Court have focused on the question of whether a defendant made just a sudden stop, or a sudden and unexpected stop. In practical application, however, such an approach has resulted in ad hoc rulings

by the lower courts which lack in consistency and clarity. This approach has also led to rulings in which some trial judges and appellate courts have encroached on the jury's prerogative to resolve disputed issues of fact. Though often not recognized as such, these rulings have the effect of denying parties the right to trial by jury.

A more consistent and rational approach was recommended by Justice Pariente in her dissenting opinion in the case of *Eppler v. Tarmac America*, 752 So.2d 592 (Fla. 2000).

Issues of negligence, even in rear-end collisions, should be decided based on long established tort law principles. Among these is the rule that a Defendant's actions (or a Plaintiff's actions where comparative negligence is claimed) are determined in accordance with a "reasonable care" standard.

Factual issues are usually for the jury to decide, based upon its consideration of all the relevant evidence presented.

Orders of summary judgment and directed verdicts are granted only sparingly. When ruling on such motions, the court is obligated to view the evidence in the light most favorable to the non-moving party. This same rule applies when a judge or appellate court is asked to determine if a driver of a car which rear ends another vehicle has overcome the presumption of negligence.

There is no reason that cases involving rear-end collisions are determined by a different set of principles then those which govern other types of accident claim.

The holding of the District Court should be quashed, and the case remanded to the trial court for a new trial on both negligence and damages.

STATEMENT OF FACTS AND THE CASE

Defendant, KELLY RIDEOUT, suddenly and without warning slammed her SUV into a line of cars that had come to a stop because of a broken down vehicle in the lane ahead of them. The resulting collision brought RIDEOUT'S vehicle to a sudden and unexpected stop directly in the path of Plaintiff's vehicle. As a result, Plaintiff, MARIA CEVALLOS, had no chance to stop her own car, but instead, ran into the back of RIDEOUT'S SUV (T. 8-9, 55).

On these basic facts, the trial court entered its order directing a verdict in Defendant's favor, finding that the law presumed that CEVALLOS was entirely at fault for the multi-vehicle accident and *also* that Defendant, RIDEOUT, was entirely free of blame. Judgment was therefore entered in Defendant's favor and Plaintiff appealed to the Fourth District.

In this brief, the letter "T" followed by a page number will be utilized to identify the page of the trial transcript upon which Appellant relies.

Plaintiff below will be referred to as Plaintiff, Appellant, or CEVALLOS. Defendant below will be referred to as Defendant, Appellee, or RIDEOUT.

The collision occurred on Thursday, January 27, 2005, at approximately 3:45 p.m. on Forest Hill Boulevard in the Village of Wellington. Traffic was moderate to heavy. Both Plaintiff and Defendant were westbound, and both were traveling in the inside lane of the three lanes available for westbound traffic.

Forest Hill Boulevard passes over a small hill located just east of the scene of the eventual collision. RIDEOUT was traveling behind a car driven by Joseph Kreitz. Plaintiff, CEVALLOS, was following RIDEOUT at a safe distance of about four car lengths (T. 8-10, 13-15, 55-57, 82-86, 109-113).[1]

RIDEOUT had just left work and was planning on stopping by her home and then proceeding to a doctor's appointment. She had only fifteen minutes to make it to her doctor's office when the collision occurred (T. 110, 120 [2]). Plaintiff

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1 The accident at issue involved four vehicles. The first was driven by Mr. Kreitz, who was at a complete stop prior to the collision. Rideout was the second car in line. She struck the Kreitz vehicle in the rear. Cevallos was the third car in line behind Rideout. Cevallos' car struck the rear of Rideout's SUV The Cevallos vehicle was, in turn, struck in the rear by a fourth vehicle driven by a Mr. Nevin. Neither Kreitz (the first car) nor the driver of the fourth car, Mr. Nevin, were parties to the suit. Rideout had brought a counterclaim for her own injuries. That claim was resolved prior to trial.

2 Defendant got off work at 3:30, her doctor's appointment was at 4:00, and the accident was at approximately 3:45, partially confirmed by the fact that Defendant's cell

testified that she saw RIDEOUT talking on her cell phone immediately before the accident (T 15-16).

Despite the requirement of Florida's traffic laws, Defendant did not slow her vehicle as she approached and passed over the crest of the hill (T. 87,118).

Defendant initially saw that the cars ahead of her had stopped. It is not known exactly how many vehicles had stopped, but there were at least several (T. 13-15, 82, 84). It is undisputed that the vehicle ahead of Defendant (Mr. Kreitz) was able to bring his own car to a safe, controlled stop, as did the cars ahead of him (T-14,15). RIDEOUT, however, failed to bring her own car to a stop and, instead, with little or no warning slammed into the rear of the Kreitz's vehicle (T-9,10).[3]

As Plaintiff, CEVALLOS, came over the same hill, having slowed to thirty-five miles per hour, ten miles per hour below the posted speed limit, she saw the RIDEOUT vehicle crash into the car ahead of it, thereby coming to an almost instantaneous stop. CEVALLOS testified that RIDEOUT'S SUV looked as if it

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phone bill shows a call at 3:44 p.m., which Defendant claims was a call to her mother immediately after the collision.

3 RIDEOUT denies running into the Kreitz vehicle, but instead, testified that she had come to a stop, or at least nearly to a full stop, when she was hit from behind by CEVALLOS and pushed into the vehicle ahead of her (T. 82).

had “hit into a wall.” As a result, Plaintiff had insufficient notice or opportunity to avoid the collision, but instead, could only slam on her brakes and brace for the impact (T. 8-10, 55).

While RIDEOUT claimed that she was first struck from behind and then pushed into the Kreitz vehicle, photographs showing damage to Defendant’s SUV revealed considerably more damage to the front than to its rear (T. 91).

CEVALLOS admitted that she was unable to stop in time to avoid hitting RIDEOUT’S SUV, but because Defendant came to such a sudden and unexpected stop, just past the crest of a hill, Plaintiff could not possibly have avoided her (T. 8-10, 55). Plaintiff’s counsel argued to the trial court that while a jury might find Plaintiff to share some of the blame for the accident, the evidence supported his contention that Defendant, RIDEOUT, was also negligent and a jury issue was therefore presented.

The trial judge nevertheless granted Defendant’s motion for a directed verdict. The trial court held that because of the legal presumption of negligence which attaches to a driver which strikes the rear of another vehicle, CEVALLOS

was, as a matter of law, solely and entirely to blame for the four-car pile-up which gave rise to this suit (T. 129-130.)[4]

The trial judge granted RIDEOUT'S motion for a directed verdict on issues of negligence and a Final judgment was therefore awarded in favor of the defense. Plaintiff filed her appeal to the Fourth District, arguing that the trial judge had erred in determining the issue of negligence as a matter of law. Appellant further maintained that even if one assumes that her comparative negligence could be determined by a directed verdict, because CEVALLOS presented competent evidence of MS. RIDEOUT'S negligence, a jury issue was created which required, at a minimum, that the question of Defendant's negligence be submitted to the jury.

The Fourth District held that under the facts of the case at hand, the presumption of negligence, first enunciated in the case of *McNulty v. Cusack*, 104 So.2d 785 (Fla. 2d DCA 1958) required that MS. CEVALLOS be presumed the *"sole cause"* of the accident, rather than just a *contributing cause*. The court's

4 "My ruling is I'm going to go ahead and direct a verdict on behalf of the defendant. I don't believe the plaintiffs have produced competent, sufficient evidence to overcome the presumption" (T. 128). "I'm directing a verdict on behalf of the defendant because of the presumption..." (T. 129).

opinion was based, in part, upon the belief that such a rule would more effectively promote public safety.[5] The trial court's order was therefore affirmed.

Plaintiff/Appellant filed his appeal to the Florida Supreme Court, and in her Jurisdictional Brief, argued that the Fourth District's opinion conflicted with prior cases of both the Supreme Court and a number of District Courts and that it violated the doctrine of comparative negligence which the Florida Supreme Court adopted in 1973.

On May 15, 2010, Petitioner/Appellant filed her notice of additional authority, to wit, the April 9, 2010, Fifth District opinion in *Crystal Charron v. Warren Birge,* 2010 Fla. App. LEXIS 4696.

By its order of April 20, 2010, this Court accepted jurisdiction and set forth its schedule for briefs to be filed.

The presumption of negligence imposed on a driver which rear ends another vehicle, first established in the case of *McNulty v. Cusack,* 104 So.2d 785 (Fla. 2d

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5 "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." *Cevallos v. Rideout,* supra, at page 664.

DCA, 1958) and later adopted by the Florida Supreme Court will be referred to from time to time in this brief as "The McNulty Presumption."

ISSUE ONE

BECAUSE PLAINTIFF PRESENTED COMPETENT EVIDENCE OF DEFENDANT'S NEGLIGENCE, THE ISSUE OF NEGLIGENCE WAS A JURY ISSUE

Appellant had urged the Fourth District to overturn the ruling of the trial court which directed a verdict in Defendant's favor, finding that, as a matter of law, Plaintiff was the sole cause of the accident sued upon. Appellant argued that the trial judge erred in weighing the evidence and determining the issue of negligence as a matter of law.

Plaintiff presented evidence during her trial to prove MS. RIDEOUT's negligence, which included proof of Defendant's failure to slow her vehicle as she passed over a hill, that she was talking on a cell phone while driving, and that she was probably in a rush to make it to her doctor's appointment, all of which resulted in Defendant failing to notice that traffic in front of her had come to a stop. As a consequence, and with little or no warning, MS. RIDEOUT slammed her SUV into the rear of the car ahead of her. Defendant's negligence thus triggered a four-car, chain reaction collision.

While determining the existence of a 'legal duty' is for the court, questions of negligence, proximate cause and damages are usually matters for the jury. Both the trial judge and the District Court invaded the province of the jury by holding, as a matter of law, that Plaintiff was the sole cause of the accident sued upon.

Basic tort law holds that a legal duty will arise "whenever a human endeavor creates a generalized and foreseeable risk of harming others," *McCain v. Fla. Power Corp.*, 593 So.2d 500 (Fla. 1992) and *Whitt v. Silverman*, 788 So.2d 210 (Fla. 2001).

A legal duty can be derived from (1) legislative enactments; (2) judicial interpretations of such enactments; (3) other judicial precedent; and (4) the general facts of the case. Neither a trial judge nor an appellate court can find a lack of duty if "a foreseeable zone of risk more likely than not was created by the defendant," *Goldberg v. Florida Power & Light*, 899 So.2d 1105 (Fla. 2005).

The State Uniform Traffic Control laws, Chapter 316, *Florida Statutes*, contain several provisions applicable to the facts of this case. At Section 316.1925, drivers are required to operate their vehicles in a "careful and prudent manner... so as not to endanger the life, limb, or property of any person." Section 316.155 requires anyone stopping or suddenly decreasing the speed of their vehicle

to give "an appropriate signal... to the driver of any vehicle immediately to the rear." The Second District interpreted this to mean that one's brakes must be applied in time to give sufficient warning to the driver of the following vehicle to apply her own brakes and come to a stop, *Haislet v. Crowley*, 170 So.2d 88 (Fla. 2nd DCA, 1964).

Finally, Florida Statute § 316.183 requires that drivers maintain a speed which is "reasonable and prudent under the conditions," and specifically mandates that all drivers reduce their speed while approaching the crest of a hill.

For a 'duty' to arise, it is not necessary that a particular statute apply. More often than not, a duty of "reasonable care" arises merely from the facts and circumstances of the case.[6] In this instance, MS. RIDEOUT had a specific duty to obey the traffic control laws, and a more general duty to drive in an careful and prudent manner so as to avoid creating a situation which placed other drivers in the vicinity of her vehicle at greater risk of becoming involved in a wreck. Such duties are applicable to all who operate automobiles, and there is no basis for excusing the actions of someone who just happens to be in the front of a line of cars.

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6 "The statute books and case law, in other words, are not required to catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care," *McCain v. Fla. Power Corp.*, 593 So.2d 500, 503 (Fla. 1992).

The testimony established that Defendant was talking on her cell phone, failed to slow as the approached and passed over the crest of a hill, and hit her brakes only seconds before slamming into a line of cars. RIDEOUT's conduct set into motion a chain of events which led to the four-car pile-up in which Plaintiff was injured. "One who is negligent is not absolved of liability when her conduct 'sets in motion' a chain of events resulting in injury to the Plaintiff," *Gibson v. Avis-Rent-A-Car Systems, Inc*., 386 So.2d 520, 522 (Fla. 1980).

MS. CEVALLOS testified that the collision was caused by MS. RIDEOUT first slamming her SUV into a line of vehicles and coming to an instantaneous stop. Credible evidence was thus presented from which a jury could have found MS. RIDEOUT to have been partially or entirely to blame for the ensuing four-car accident. It is axiomatic that neither a trial judge nor an appellate court may independently weigh disputed evidence to come to its own conclusion on issues of negligence. Questions of negligence are ordinarily left to juries to decide, except in very rare instances where the facts are both undisputed and susceptible to but a single inference which unequivocally either supports or refutes claims of negligence, *Nelson v. Ziegler*, 89 So.2d 780 (Fla. 1956), *Conda v. Plain*, 222 So.2d

417 (Fla. 1969), and *Tynan v. Seaboard Coast Line Railroad*, 254 So.2d 209 (Fla. 1971), *Helman v. Seaboard C. L. R. Co.*, 349 So.2d 1187 (Fla. 1977).

> "A party moving for a directed verdict admits not only the facts stated in the evidence presented, but he also admits every conclusion favorable to the adverse party that a jury might freely and reasonably infer from the evidence. It is ordinarily the function of the jury to weigh and evaluate the evidence. This is particularly so in negligence cases where reasonable men often draw varied conclusions from the same evidence. In a case of this nature, unless the evidence as a whole with all reasonable deductions to be drawn therefrom, points to but one possible conclusion, the trial judge is not warranted in withdrawing the case from the jury and substituting his own evaluation of the weight of the evidence," *Nelson v. Ziegler*, supra, at page 782.

The Fourth District erroneously held that under the presumption of negligence chargeable to a driver which rear ends another vehicle, MS. CEVALLOS was required to prove that she was not comparatively negligent as a condition precedent to allowing a jury to consider evidence of RIDEOUT's negligence.

The District Court further erred by proceeding to conduct its own evaluation of the evidence, from which it concluded that MS. CEVALLOS must have been negligent based solely on the fact that she collided with the rear of Defendant's car. Such a conclusion assumes there was but one possible cause of the accident. The

evidence supports other, equally plausible explanations by which the jury could have found Defendant to have been solely or at least partly to blame.

CEVALLOS testified that she was driving at approximately 35 miles per hour as she came over the crest of the hill, which was ten miles per hour below the posted speed limit. She felt there was an appropriate space between her vehicle and MS. RIDEOUT's SUV which CEVALLOS estimated to be "about four car lengths." Plaintiff explained that her inability to avoid hitting the rear of Defendant's vehicle was due to the fact that RIDEOUT's SUV came to a sudden stop, with little warning, as if it had "run into a wall."

Thus, an alternative view of the evidence, which the District Court implicitly rejected, would support the conclusion that MS. CEVALLOS was driving at a proper speed and maintaining a safe following distance from the vehicle ahead of her, and but for the negligence of MS. RIDEOUT, the accident would never have occurred.

Where the parties give opposing testimony with each claiming a different version of events, and reasonable people can come to differing conclusions regarding the apportionment of blame, it is the jury's task, rather than the court, to

weigh and evaluate the evidence, and assign fault taking into account all of the facts and circumstances of the case, *Goldberg v. Florida Power & Light*, supra.

The actions of both the trial judge and the District Court denied Plaintiff her right to jury trial and must therefore be reversed, Fla. Const. Art. I, § 22 (2010) .

ISSUE TWO

THE DISTRICT COURT'S INTERPRETATION OF THE PRESUMPTION APPLICABLE TO REAR END AUTO ACCIDENT CASES VIOLATES THE DOCTRINE OF COMPARATIVE NEGLIGENCE

Presumption of Negligence

The burden of proving that a defendant acted "negligently" is usually on the Plaintiff who, in order to avoid a directed verdict, must establish a prima facie case, *St. Germain v. Carpenter*, 84 So.2d 556 (Fla. 1956). In cases where a defendant rear ends another vehicle, the courts have carved out a limited *evidentiary* exception, which eliminates the requirement that the lead driver present factual proof to explain what the following driver did to cause the collision, *McNulty v. Cusack*, 104 So.2d 785 (Fla. 2d DCA 1958) and *Bellere v. Madsen*, 114 So.2d 619 (Fla. 1959).

This presumption of negligence has never been absolute and the fact that a rear-end accident occurs has never been held to relieve the lead driver from her duty to operate her own vehicle in a cautious and lawful manner. Instead, the courts have uniformly held that when the following driver presents evidence to rebut the presumption, the question of negligence then becomes a question of fact for the jury to resolve:

> "Rebuttable presumption of negligence does not preclude the jury finding the lead driver to have been negligent... the rule will, at most, establish as a matter of law that the driver of the rear car is liable for some portion of the overall damages. There is no logic in blindly applying the rear-end collision rule to determine the rear driver automatically to be the sole source of negligence," *Chadbourne v. Van Dyke*, 590 So.2d 1023 (Fla. 1st DCA, 1991).

See also, *McNulty v. Cusack*, supra; *Bellere v. Madsen*, supra; *Alford v. Cool Cargo Carriers*, 936 So.2d 646 (Fla. 5th DCA, 2006); *Jefferies v. Amery Leasing*, 698 So.2d 368 (Fla. 5th DCA, 1997); *Yellow Cab v. Betsey*, 696 So.2d 769 (Fla. 2nd DCA, 1996); *Clampitt v. D.J. Spencer Sales*, 786 So.2d 570, 573 (Fla. 2001); *Johnson v. Deep South Crane Rentals*, 634 So.2d 1113 (Fla. 1st DCA, 1994); and *Cleveland v. Florida Power & Light*, 895 So.2d 1143 (Fla. 4th DCA, 2005).

Nevertheless, the Fourth District, in the case at hand, ruled that CEVALLOS could not only be presumed negligent by virtue of having rear ended RIDEOUT's vehicle, but that unless she could prove that she was entirely free of fault, her claim against Defendant would be barred as a matter of law. The District Court's ruling violates the doctrine of comparative negligence and must therefore be quashed.

Florida courts have held that where a defendant runs into the rear of a car which is stopped either for a traffic signal, or at an intersection, a presumption will arise in which the driver of the rear-ending vehicle will be presumed to have been negligent, unless a reasonable explanation is provided, which shows that the presumption is misplaced, *McNulty v. Cusack*, 104 So.2d 785 (Fla. 2d DCA 1958) and *Bellere v. Madsen*, 114 So.2d 619, 621 (Fla. 1959).

In *McNulty v. Cusack*, supra, the Plaintiff, Annie Cusack, was stopped for a traffic light at the intersection of Datura and Florida Avenue when suddenly, and without warning, she was struck from behind by a car driven by Jerome McNulty. Ms. Cusack was looking straight ahead at the traffic signal at the moment of impact and therefore could not say *why* Mr. McNulty had struck her car. Defendant did not offer any testimony or rebuttal. The trial court directed a verdict

finding McNulty negligent, and following a verdict in favor of Ms. Cusack, the defendant appealed.

On appeal, Defendant argued that Plaintiff was obligated to offer direct factual proof of his negligence. The appellate court disagreed, and held that since McNulty had slammed his vehicle into the rear of the Plaintiff's car while it was at a complete stop at a traffic light, a rebuttable presumption of negligence would arise, thereby shifting the burden to the Defendant to explain why he should not be held responsible for the accident.

The *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. The presumption which the court created was intended to ameliorate this problem.[7]

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7 The same result, however, could have been reached had the court found that evidence of Defendant having driven into the rear of a car waiting at a traffic light is sufficient to establish a prima facie case, since a jury is allowed to draw reasonable inferences from the evidence and running into the back of a stationary vehicle, without further explanation, certainly implies negligence. This alternative approach would have avoided a lot of judicial time and effort in making sense out of the "presumption" adapted by the Second District as litigants sought to apply it to a variety of situations, many of which were more complex, and less clear than where someone runs into the back of a stationary vehicle. The court in *McNulty*, however, considered and rejected this option, though

Presumption of Negligence and Comparative Fault

At the time of the *McNulty* decision, Florida had not yet adopted the rule of comparative negligence. Thus, the *McNulty* case contains no discussion of the possibility of the lead driver being partly to blame for the accident.

More importantly with respect to the case at hand, since the adoption of comparative negligence in 1973, the Florida Supreme Court has never held that the following driver must first establish that her own actions did not contribute to the accident in order to pursue a claim of negligence against the lead driver. Further, neither the holding nor logic of the *McNulty* decision support such a result.

The holding of the Fourth District herein is contrary to the rule of comparative negligence as adopted by the Florida Supreme Court in *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973**)**:

> "The rule of contributory negligence is a harsh one which either places the burden of a loss for which two are responsible upon only one party or relegates to Lady Luck the determination of the damages for which each of two negligent parties will be liable. When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party," id. at page 437.

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without explaining why. Perhaps the unstated reason was to make it less likely for the lead driver to lose on an unjust finding of "contributory negligence."

Therefore, even if Plaintiff was partly to blame for the accident, the lead driver, MS. RIDEOUT, would not be absolved of responsibility for her own negligence since the rule of comparative negligence requires that each party be held responsible for their proportional share of the blame.

The Fourth District claims that its ruling is supported by the public policy goal of encouraging drivers to maintain a safe distance from the vehicle in front of them. However, while the Fourth District's opinion *might* encourage drivers to maintain proper following distances, it does so at a cost of excusing the lead driver's actions, merely because she was lucky enough to be driving the first car in line.

Safe driving is promoted by the doctrine of comparative negligence which assigns fault to each driver based on his or her own degree of fault. Such an approach encourages prudent conduct by *all* drivers, and is therefore not only a better way to promote safe driving, but leads to a more fair and just result.

> "Tort liability in Florida is premised on pure comparative negligence, which means that a jury should apportion fault between a plaintiff, defendant, and any third parties alleged to have been at fault, and render an award based on a defendant's percentage of fault in causing an injury. Granting absolute immunity to some who may in fact be partially responsible for contributing to the cause of an accident would obviously undermine this policy of shared responsibility," *Williams v. Davis*, 974 So.2d 1052, 1061 (Fla. 2007).

Appellant's position follows the reasoning adopted by the Fifth District, *Jefferies v. Amery Leasing, Inc*., 698 So.2d 368 (Fla. 5th DCA 1997), and *Charron v. Birge*, 35 FLW D805 (Fla 5th DCA, 2010).

The *Jefferies* decision, supra, held that while the law might impose a rebuttable presumption of negligence against a driver that 'rear ends' another, the presumption has no bearing on the question of whether or not the lead driver can also be found negligent.

In any negligence case, the plaintiff must show that the defendant breached a duty, and as a proximate result of that breach, injury or damages were suffered. Where proof of negligence is presented to a jury, neither *McNulty* nor its progeny allow the lead driver to escape responsibility:

> "Today, when a rear driver sues a lead driver for damages from a rear-end collision, and the lead driver answers with an affirmative defense of comparative negligence, the rule will, at most, establish as a matter of law that the driver of the rear car is liable for some portion of the overall damages. There is no logic in blindly applying the rear-end collision rule to determine the rear driver automatically to be the sole source of negligence in all rear-end collisions. If it is sufficiently demonstrated that the lead driver was negligent as well, the jury should pass upon the question of shared liability and apportionment of damages." *Jefferies v. Amery Leasing,* supra, at page *371*.

Charron v. Birge, supra, also involves a question of liability arising out of a rear-end collision. Therein the lead driver, Birge, was traveling on Highway 17-92 in Sanford, Florida. A second driver, Cristie, was driving a pick-up truck on Seminole Boulevard, and had come to a proper stop at the point where Seminole Boulevard merged with highway 17-92. When Birge saw Cristie's truck approaching, he slowed his vehicle nearly to a complete stop and gave a signal for Cristie to proceed, even though Birge had the right-of-way and Cristie had a stop sign.

Plaintiff, Charron, was a passenger on a motorcycle driven by Smith. The motorcycle was also on 17-92, though some distance behind Birge. Smith testified that as he rounded a curve in the road, he glanced to his right to make sure no vehicles were approaching from Seminole Boulevard. When he looked up, he saw Birge's vehicle unexpectedly sitting at a complete stop. Smith struck the rear of Biege's car which resulted in serious injuries to his passenger.

Charron brought suit against both Smith and Birge alleging that the negligence of each had caused her to suffer injuries. Birge moved for entry of summary judgment which the trial judge granted, holding that because Smith was

unable to fully rebut the presumption of negligence, he was deemed to be the *sole* cause of the accident. An appeal to the Fifth District followed.

The appellate court reversed, holding that "in a case such as this where the only issue is the lead driver's negligence, the presumption of the following driver's negligence is not relevant," *Charron v. Birge*, id .

The Fifth District in *Charron*, refused to follow the Fourth District's decision in *Cevallos*, of which it was critical. In the Fifth District's view, the *McNulty* presumption was intended to "fill an evidentiary void for the lead driver; not to insulate a negligent lead driver for his negligence. See also, *Clampitt v. D.J. Spencer Sales, et al.*, 786 So.2d at 572-73 (Fla. 2001).

The Fifth District was also skeptical of the Fourth District's claim that its decision in *Cevallos* promotes public safety, saying that while ruling in *Cevallos* might punish some forms of negligence, it would excuse other, more egregious driving habits:

> "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," *Charron,* id. at footnote 6.

A Logical Solution to the Conflict and Confusion

It is clear to this writer that disagreement exists between the District Courts with regard to the meaning and application of the *McNulty* presumption. The First and Fifth Districts have adopted one view, while the Third (possibly) and Fourth District apply a different logic.

The Third District's decision in *Department of Highway Safety and Motor Vehicles v. Saleme*, 963 So.2d 969 (Fla. 3rd DCA, 2007) is typical of the confusion that exists.

In *Seleme*, a state trooper pulled onto a highway to give chase to a pair of motorcycles clocked at over 100 mph. Plaintiff, Seleme, also on a motorcycle, was racing to catch up with the two bikers the trooper was chasing.

Investigators later determined that Seleme traveled 292 feet from the moment he saw the trooper's car to the point at which he first hit his brakes. He then left 156 feet of skid before striking the rear of the patrol car. Surprisingly, Saleme sued, claiming the trooper was at fault for the accident.

According to the appellate opinion, Plaintiff offered no evidence to show that the trooper had come to an abrupt stop, made a sudden lane change, or was doing anything in violation of the state traffic laws.

Nevertheless, a jury returned a verdict finding the Trooper 15% at fault, and assigning 85% responsibility to Plaintiff. Defendant appealed, claiming the trial judge erred in its refusal to grant his motion for directed verdict, and subsequent motion JNOV. The appellate court agreed and the judgment was reversed.

The District Court began its analysis stating that, "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," *Department of Motor Vehicles v. Saleme,* id. at page 972. In support of this statement, the court cited *Clampitt v. D.J. Spencer Sales*, supra. A careful reading of *Clampitt,* however, reveals that nowhere in the decision do the words "sole proximate cause" appear. In fact, *Clampitt* held that, of necessity, the presumption applied to cases where the lead driver sues the following driver, and thus has no bearing on the lead driver's conduct, *Clampitt v. D.J. Spencer Sales*, supra at pages 572 and 573. That's the first problem with the decision.

Second, it is not at all clear that the District Court's ruling was based on the Plaintiff's failure to rebut the presumption of negligence, as opposed to a simple lack of credible proof. While the District Court began its analysis with a discussion of the *McNulty* presumption, it later states that its ruling is based on Plaintiff's failure to offer credible evidence of the trooper's alleged negligence:

> "Saleme's theory of the case was that Trooper Lozano suddenly swerved into Saleme's lane of travel. Despite the dissent's assertion to the contrary, there was, however, no evidence presented to support this theory," *Department of Motor Vehicles v. Saleme*, id. at page 972.

An equally confusing and contradictory group of cases can be found out of the Fourth District. To begin with, the District Court's ruling in *Cevallos* directly contradicts two prior decisions of the same court, *Cleveland v. Florida Power & Light*, 895 So.2d 1143 (Fla. 4th DCA, 2005) and *Pollock v. Goldberg*, 651 So.2d 721 (Fla. 4th DCA 1995).

The panel in *Cevallos* sought to distinguish the facts in the case at issue from those in *Pollock v. Goldberg*, supra. *Pollock* was a case arising out of a rear-end collision in which each driver had brought suit against the other. Goldberg, the lead driver, was struck in the rear by Pollock's vehicle. A jury returned a verdict

on both the initial claim and counterclaim, assigning 35% of the blame to Goldberg and 65% to Pollock.

Goldberg, however, was awarded only $58,000, which, after reduction for his comparative negligence, resulted in a verdict of only $37,700. Pollock, on the other hand, was awarded $196,200 for his damages, which after reduction for comparative negligence, resulted in a verdict to him of $68,600. Once the two judgments were set off against each other, Goldberg would owe Pollock $30,900.

Goldberg moved to set aside the verdict, claiming that because Pollock failed to overcome the presumption of negligence, his counterclaim should be barred. The trial judge agreed and the verdict in favor of Pollock was set aside.

Because the jury assigned 65% of the blame to Pollock, Goldberg argued that Pollock had obviously failed to rebut the presumption of negligence. The trial judge agreed.

When *Godlberg* reached the appellate court, however, the Fourth District rejected his argument. Citing *Chadbourne v. Van Dyke*, supra, the District Court held that, "in order to direct a verdict here, it was necessary for the trial court to conclude not only that appellant was negligent but that appellee was totally free of negligence," *Pollock v. Goldberg*, supra at page 723.

Thus, the Fourth District in *Pollock v. Goldberg* held that the lead driver could not use the *McNulty* presumption to shield himself from liability for his own negligence. The Fourth District in *Cevallos* reached an opposite result.[8]

The panel in *Cevallos*, sought to distinguish the case at hand from the decision in *Pollock v. Goldberg*, supra, based solely on the fact that the *Pollock* case involved both a claim and a counterclaim. As the foregoing analysis shows, however, the court is relying on a factual distinction which makes no real difference.

The Fourth District in *Cevallos* also makes no mention of another contrary decision, *Cleveland v. Florida Power & Light*, 895 So.2d 1143 (Fla. 4th DCA, 2005). *Cleveland* was a case in which Plaintiff was following behind four FP&L trucks. The first three trucks came to a stop. The fourth failed to stop in time, and as a result, ran into the back of the third. Plaintiff, who was on a motorcycle, ran into the rear of the fourth truck and was injured. Relying on the McNulty

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8 "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," *Cevallos v. Rideout, supra at page 664.*

presumption, the trial judge granted FP&L's motion for summary judgment. On appeal, the Fourth District reversed, stating: "We conclude that, here, where there is evidence of the lead driver's negligence, the rear-end collision rule does not bar Appellant's claim," *Cleveland v. FP&L*, id. at page 1145.

Despite the fact that the Florida Supreme Court has, on at least two occasions, held that the *McNulty* presumption has no application to questions concerning the lead driver's negligence, the lower courts continue to mis-apply the rule. Such mistakes could be avoided were each courts to bear in mind the limited purpose which the *McNulty* presumption is intended to serve. The rule is intended to assist the driver of the lead vehicle in proving negligence against the driver who rear ends his car. Without the presumption, it might be impossible for a Plaintiff, lead driver, to offer proof to show what the driver of the car which hit him from behind did to cause the accident:

> "The usefulness of the rule is obvious. A plaintiff ordinarily bears the burden of proof of all four elements of negligence--duty of care, breach of that duty, causation and damages. Yet, obtaining proof of two of those elements, breach and causation, is difficult when a plaintiff driver who has been rear-ended knows that the defendant driver rear-ended him but usually does not know why. Beginning with *McNulty*, therefore, the law presumed that the driver of the rear vehicle was negligent unless that driver provided a substantial and reasonable explanation as to why he was not negligent, in which case

> the presumption would vanish and the case could go to the jury on its merits," *Clampitt v. D.J. Spencer Sales*, supra, at page 573.

It is understandable that the driver of a car which is hit from behind might not be able to explain exactly what happened and why. Where the issue is the negligence of the lead driver, however, this potential problem would no longer exist. Clearly the driver of the lead vehicle should have no problem explaining her own actions to rebut, if possible, the Plaintiff's allegations of negligence.

Sudden and Unexpected Stops

Appellee has argued that her vehicle came to a sudden, but not an unexpected stop. Thus, Appellee reasons that CEVALLOS should be deemed, as a matter of law, to have been the sole cause of the accident.

While there is no logic at all to imposing 100% of the blame on Plaintiff, Appellant concedes that case law does lend support to Defendant's claim that CEVALLOS be deemed to share at least partial blame, assuming that it can truly be said that RIDEOUT's vehicle came to a sudden but expected stop.

Justice Pariente, in her dissenting opinion in *Eppler v. Tarmac America*, supra, correctly describes the current state of the law as follows:

> "While a sudden stop alone does not defeat a directed verdict on the issue of the rear driver's negligence, a sudden stop that occurs because

> the forward driver failed to exercise reasonable care (i.e. stopped for no apparent reason) could also be the basis for a claim of comparative negligence where the forward driver is the plaintiff. Indeed, after this Court first adopted the presumption of negligence in rear-end collisions, the principle of comparative negligence replaced the all-or-nothing contributory negligence doctrine. Comparative negligence allows a jury to apportion liability between a negligent plaintiff and a negligent defendant. After the advent of comparative negligence, an unrebutted presumption of negligence no longer means that the negligence of the rear driver must be the "sole proximate cause" of a rear collision, *Eppler v. Tarmac America* at page 597, 598. See also, *Jefferies v. Amery Leasing*, supra at page 370.

The trial court was addressing two separate questions. The first was the question of Defendant's negligence. The McNulty presumption has no bearing on the issue of RIDEOUT's alleged negligence, since the court has consistently held that the presumption does not apply to the issue of a leading driver's fault, *Eppler v. Tarmac America*, supra at page 594, *Clampitt v. D.J. Spencer Sales, supra at pages 572, 573.*

The second was the question of Plaintiff's comparative negligence. Here, the *McNulty* presumption applies, but does not impose 100% fault. Because Plaintiff offered proof by which a jury could find MS. RIDEOUT to have also been negligent, apportioning liability between the two parties is for the jury to decide.

With regard to Plaintiff's alleged comparative negligence, under the current state of the law, if it is determined that RIDEOUT came to a sudden *and*

unexpected stop, CEVALLOS could be held free of any blame. Thus, the question is whether or not MS. CEVALLOS should have reasonably foreseen that MS. RIDEOUT would crash her vehicle into another car, and as a result, come to a sudden stop.

Admittedly, some courts have answered the factual question of whether a defendant's vehicle came to a sudden and unexpected stop, rather than having a jury decide the issue. Moreover, Appellant's counsel agrees that in those few cases where the facts are undisputed and the situation is so clear that no reasonable person could reach but a single conclusion, a court would be justified in ruling as a matter of law, that a stop was both sudden and unexpected.

The problem is, case law as it now exists, is highly inconsistent, establishes no discernable rule to govern the decisions of trial judges, and appears to engage in an ad hoc approach, *Charron v. Birge*, supra. Justice Pariente reached a similar conclusion:

> "The issue of whether the defendant's explanation is sufficient to rebut the presumption of negligence should be evaluated under the standard governing directed verdicts. **In other words, once the rear driver provides an explanation for the collision, a directed verdict should only be granted if the party opposing the directed verdict could not prevail under any reasonable view of the evidence**. On a motion for directed verdict, the non-moving party is entitled to all

> reasonable inferences from the facts that would support his or her claim.
>
> **This is particularly true in negligence actions. Negligence is the failure to use reasonable care under the circumstances. Thus, to defeat a directed verdict on negligence, the rear driver 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 1060-61; accord § 90.302(1), Fla. Stat. (1999) (requiring only "credible evidence" to rebut an evidentiary presumption). Once the presumption of negligence is rebutted, the presumption vanishes and the case is sent to the jury on the basis of all the evidence submitted, together with justifiable inferences--not presumptions--to be drawn therefrom," *Eppler v. Tarmac America*, supra, (Pariente dissenting), at page 599, emphasis added.

Appellant agrees with this interpretation of the law, and encourages a majority of the court to adopt Justice Pariente's statement as a governing rule of law in cases which involve rear-end collisions.

The current law, where a sudden stop imposes liability on the following driver, but a sudden and unexpected stop confers blanket immunity, leads to arbitrary and unjust outcomes.

Long held principles of tort law hold that factual issues, such as questions of foreseeability, are rarely decided by the court, but are instead within the province of juries to resolve. Complex factual issues are rarely relegated to formulaic solutions, but are submitted to juries to consider in light of all the evidence.

Negligence in most accident cases is governed by the standard of "reasonable care." Why rear-end collisions, unlike every other imaginable kind of accident, must be governed by the narrow question of whether another driver's actions are "expected" or "unexpected" defies reason.

Whether a defendant bringing her vehicle to a stop can be said to have been expected or unexpected can certainly be a factor for the jury to consider in its determination of whether the driver acted "reasonably". There is no logic to restricting jurors to this single factor, since in all other accident cases, juror's are told they are to weight all of the evidence, giving each part the weight they think it deserves.

The foregoing approach is consistent with tort law principles and assures that juries will resolve questions of fact based on the unique circumstances of each individual case, and not based on an artificial construct which may or may not lead to a just result.

CONCLUSION

The trial court erred when it granted Defendant's Motion for directed verdict, since the evidence supported Plaintiff's contention that Defendant, KERI

ANN RIDEOUT, was negligent. Instead of paying attention to her driving, Defendant was talking on her cell telephone, possibly in a rush to make a doctor's appointment, and violated the traffic laws by failing to slow as she passed over a hill. As a result, she failed to see that traffic had come to a stop and therefore failed to brake until it was too late. With little or no warning, MS. RIDEOUT slammed her SUV into the rear of the car ahead of her. Defendant's negligence thus triggered a four car, chain reaction collision.

The jury should have been allowed to consider the issues of negligence and to apportion fault as it deemed was justified by the evidence. The trial court erred in holding as a matter of law, that Plaintiff was the sole cause of the accident.

The District Court further erred in holding that case law pertaining to the presumption of negligence, governed Plaintiff's right to assert a claim against MS. RIDEOUT. The presumption of negligence was created to assist only in proving negligence by the driver of a car that rear ends another vehicle. It has no application or relevance to questions concerning negligence by the driver of the lead vehicle, which in this case was the Defendant, KERI RIDEOUT.

The District Court's reasoning conflicts with the doctrine of comparative negligence. Comparative negligence offers a fair and just method for assigning blame while promoting the societal interest of discouraging dangerous behavior.

The holding of the trial judge and the District Court must be quashed, and the case remanded for a new trial on issues of liability and damages.

Respectfully submitted,

SEAMAN & COVEN, P.A.

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 15th day of September , 2010, to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellant's Initial Brief is formatted in Times Now Roman 14-point font and that a copy of her Brief is contained on a floppy disc which accompanies the original Brief for filing with the Florida Supreme Court.

An electronic copy of this Brief will also be filed with the court, utilizing the MSWord word processing program, contemporaneously with the filing of a hard copy of this Brief.

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