THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

SUPREME COURT CASE NO: SC09-2238

LOWER TRIBUNAL NOS.: 4D08-3042
502005CA010701XX

MARIA CEVALLOS,

Appellant/Petitioner,

v.

KERI ANN RIDEOUT and
LINDA RIDEOUT,

Appellees/Respondents.

PETITIONER'S REPLY BRIEF

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

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

Respondent makes several arguments in her Answer Brief. First, she encourages the Court to relinquish jurisdiction despite obvious disagreement among the District Courts. Second, she argues for an interpretation of the Florida Supreme Court's decision in *Clampitt v. D.J. Spencer Sales*, 786 So.2d 570 (Fla. 2001) which is contrary to the doctrine of comparative negligence. Third, Respondent treats the separate issues of Plaintiff and Defendant's negligence as but a single question, the answer to which she argues is dependent on Plaintiff's ability to overcome the *McNulty* rule of presumptive negligence.[1] In all of these respects, Respondent is wrong.

[1] *McNulty v. Cusack*, 104 So.2d 785 (Fla. 2nd DCA, 1958).

Because of the obvious existence of conflict, especially in light of the Fifth District's recent decision in *Charron v. Birge*, 37 So.3d 292 (Fla. 5th DCA, 2010), Petitioner will address only the assertion that the *Clampitt* decision, supra, mandates an affirmance, and the proper application of the *McNulty* Rule.

The *Clampitt* case did not abrogate the rule of comparative negligence in cases arising out of rear-end automobile accidents. In fact, the court's opinion specifically states that the *McNulty* presumption has no bearing on the question of the lead driver's negligence.[2] Rideout's interpretation of the *Clampitt* decision is, therefore, flawed. Thus, her claim that the *Clampitt* case requires the lower court's ruling be affirmed is equally wrong.

The Fourth District, in the case at hand, held that a lead-driver defendant can use the *McNulty* presumption as a 'shield' requiring the rear driver to prove the absence of negligence on her own part as a prerequisite to pursuing a claim of negligence.[3] Appellee is mistaken in claiming that the District Court's ruling is supported by *Clampitt*, supra. In fact, the opinion in *Clampitt* specifically states

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2 *Clampitt v. D.J. Spencer Sales*, supra, at pages 572 and 573.

3 *Cevallos v. Rideout*, 18 So.3d 661, 664 (Fla. 4th DCA, 2009).

that the *McNulty* presumption has no bearing on the question of the lead driver's comparative fault:

> "The rebuttable presumption of negligence that attaches to the rear driver in a rear-end collision in Florida arises out of necessity in cases where the lead driver sues the rear driver. The presumption bears only upon the causal negligence of the rear driver…" *Clampitt*, supra, at pages 572 and 573.[4]

A more careful reading of *Clampitt* reveals that the Supreme Court held only that the driver of a car which rear ends another must offer evidence to show why she was not negligent in order to avoid being presumed to have been at least partly to blame. At best, the *McNulty* presumption aids in establishing the negligence of the rear driver. Neither *McNulty* nor *Clampitt*, supra, held that presumed negligence by the rear-ending driver precludes claims against the lead driver where

4 See also, *Charron v. Birge*, 37 So. 3d 292, 297 (Fla. 5th DCA, 2010) –" In *Clampitt*, the Florida Supreme Court said: "The rebuttable presumption of negligence that attaches to the rear driver in a rear-end collision in Florida cases arises out of necessity in cases where the lead driver sues the rear driver. The presumption bears only upon the causal negligence of the rear driver..." 786 So.2d at 572-73. (Emphasis added.) The presumption exists to fill an evidentiary void for the lead driver; it does not exist to insulate a negligent lead driver from liability for his negligence. That is why the test is framed in terms of the rear driver's conduct, i.e., whether the rear driver should have anticipated the lead driver might stop at the location, not whether it was reasonable for the lead driver to do so."

there is evidence proving that the lead driver's conduct fell below a "reasonable standard of care".

That is not to say, however, that the conduct of one driver cannot explain the actions of the other. Evidence of the lead driver's misconduct *may* be sufficient to overcome the presumption that the rear-ending driver was negligent. Evidence of the lead driver's negligence will overcome the presumption of the rear driver's negligence, but only where it helps prove that the rear driver may not have been at fault.

In *Clampitt*, the Supreme Court held that in order to overcome the presumption of negligence, it was not enough for the defendant truck driver to show that Mrs. Clampitt failed to slow her vehicle in a proper manner. This was because Mrs. Clampitt's conduct did not explain why the driver of a seventy-six thousand pound semi-tractor trailer, traveling on a straight and level highway, could not bring his own vehicle to a stop, when he should have seen the brake lights and blinkers of the cars ahead of him in plenty of time to do so. Because evidence of Mrs. Clampitt's conduct did not explain or excuse the defendant/rear driver's actions, the Supreme Court held that the District Court erred in ruling that Hetz had overcome the presumption.

In the present case, if one accepts Appellee's argument that the evidence presented did not show that the accident could have occurred in the absence of any negligence by Cevallos, the Fourth District still erred in holding that Plaintiff's comparative negligence bars her claim against Ms. Rideout. The District Court's ruling violates the doctrine of comparative negligence.

Appellee claims that the Fourth District's opinion is supported by the Supreme Court's decision in *Clampitt,* supra. The Clampitt case did not hold, however, that a presumptively negligent, rear-ending driver is subjected to the old rule of contributory negligence, or that the doctrine of comparative fault does not apply to rear-end accidents. Appellee ignores the plain wording of the *Clampitt* decision wherein the court specifically stated that the *McNulty* presumption has no bearing on the question of the lead driver's negligence. While the presumption may be utilized as a "sword," potentially imposing liability on Cevallos, it may not be used as a "shield" preventing Rideout from being held responsible for her own misconduct.

Appellee's error arises, in part, from her failure to recognize the limited scope of the Supreme Court's decision in *Clampitt.* *Clampitt* involved a three-car collision. The lead vehicle, driven by Charles Hughley, was a pick-up truck which was towing a small trailer. The Plaintiff therein, Colletta Clampitt, was following

behind Mr. Hughley in her car. Carl Hetz was following Mrs. Clampitt and was driving a tractor trailer owned by his employer, D.J. Spencer Sales.

As Hughley approached his driveway, he slowed his vehicle and activated his blinker. Hughley's pick-up truck had completed its turn, and the trailer he was towing was almost completely off the highway when it was struck by Mrs. Clampitt's vehicle. Mrs. Clampitt's car thereupon came to a complete stop in the roadway.

Mr. Hetz, according to his own testimony, never saw Hughley's brake lights or turn signal and was seemingly oblivious to the fact that Hughley was slowing to make his turn. As a result, Hetz slammed his semi into the rear of Mrs. Clampitt's automobile causing her to suffer serious injury.

Before the case proceeded to trial, Mrs. Clampitt filed her motion for summary judgment claiming that because there was no record of evidence which would serve to excuse Hetz's failure to notice the traffic ahead of him slow and come to a stop (Hetz was driving a semi-tractor trailer and, therefore, had a "bird's-eye view" of the traffic ahead of him), he should be found to have been negligent as a matter of law. The trial judge agreed and granted Clampitt's motion.

The District Court reversed, and in its written opinion, held that evidence that Mrs. Clampitt struck Hughley's trailer and thereupon came to a dead stop in

the highway "constitutes sufficient evidence to overcome the presumption of negligence which attaches to the driver of the rear vehicle involved in a collision," *D.J. Spencer Sales v. Clampitt*, 704 So.2d 601, 604 (Fla. 1st DCA, 1997). The case was therefore remanded to consider both the question of Hetz's negligence and the alleged comparative negligence of Mrs. Clampitt.

Had the District Court, in *Clampitt*, restricted its ruling to the question of comparative negligence, the Supreme Court may have never reviewed the decision. However, the District Court went further, holding that a sudden stop, standing alone, was sufficient to overcome the *McNulty* presumption and, therefore, the question of Hetz's negligence became a jury issue. This holding triggered conflict jurisdiction and allowed an appeal to the Florida Supreme Court:

> "We have for review *D.J. Spencer Sales v. Clampitt*, 704 So.2d 601 (Fla. 1st DCA 1997), based on conflict with *Pierce v. Progressive American Insurance Co.*, 582 So.2d 712 (Fla. 5th DCA 1991). We have jurisdiction. See art. V, § 3(b)(3), Fla. Const. We quash *D.J. Spencer Sales*," *Clampitt v D.J. Spencer Sales*, 786 So.2d 570 (Fla. 2001).

The Supreme's Court's decision in *Clampitt* was thereafter limited to the issue on which jurisdiction was granted, to wit, the question of whether or not evidence of Mrs. Clampitt's negligence was sufficient to demonstrate that the semi driver, Hetz, was not negligent. The Supreme Court's decision never directly answered the more limited question of whether the trial judge should have allowed

argument on the issue of comparative negligence, and though it is not entirely clear, the court may have refused to address the issue as being outside the basis for its grant of discretionary review:

> "The district court reversed on the summary judgment issue, ruling that the evidence in favor of Spencer Sales was sufficient to overcome the presumption of negligence. This Court granted review based on conflict with *Pierce v. Progressive American Insurance Co.*, 582 So.2d 712 (Fla. 5th DCA 1991), wherein the District Court held that an abrupt stop, by itself, is insufficient to overcome the presumption of negligence that attaches to a rear driver [4]", *Clampitt v. D.J. Spencer Sales,* supra, at page 572.
>
> "[4] Clampitt raises an additional issue that is outside the scope of the inter-district conflict and was not the basis for this Court's granting of discretionary review," *Clampitt v. D.J. Spencer Sales,* supra, footnote 4 at page 572.

Appellee's reliance on the *Clampitt* decision is therefore misplaced. While the facts in *Clampitt* might be similar to those in the case at hand, the *Clampitt* opinion did not abrogate the doctrine of comparative negligence with respect to cases involving rear-end collisions. Even a driver presumed to have been negligent under *McNulty* is still entitled to have the jury consider evidence by which the driver of the lead vehicle could be determined to have been comparatively negligent.

CONCLUSION

The presumption of negligence established by the *McNulty* decision bears only on the question of the rear driver's negligence. It has no application to the question of the lead driver's fault.

Where a rear driver offers competent evidence from which a jury could find the lead driver to have been negligent, the question of the lead driver's negligence becomes a jury issue.

The issue of the rear-ending driver's negligence is not relevant to the question of the lead driver's negligence. While a jury may be required to consider the conduct of both drivers, the question of each driver's negligence poses separate and distinct issues. Thus, even if the trial judge was correct in directing a verdict on the question of Cevallos' negligence, the question of Rideout's negligence was an issue for the jury to resolve.

The Fourth District erred in holding that the *McNulty* presumption can be used not only as a sword, but as a shield to protect the driver of the lead vehicle from being held responsible for her own negligence. The holding of the Fourth District must be reversed and a new trial ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 4th day of October, 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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