THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

SUPREME COURT CASE NO.: SC10-1755
LOWER TRIBUNAL NOS.: 5D08-4504
08-CA974

WARREN A. BIRGE,

Petitioner,

v.

CRYSTAL D. CHARRON,

Respondent.

______________________________/

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

In this brief, Plaintiff below will be referred to as Plaintiff, Respondent, or CHARRON. Defendant below will be referred to as Defendant, Petitioner, or BIRGE. Citations to the Three (3) Volume Record on Appeal will be made by the letter "R" and the appropriate page number.

STATEMENT OF THE CASE AND FACTS

This Court has accepted jurisdiction to review Charron v. Birge, 37 So.3d 292 (Fla. 5th DCA 2010) on the basis of conflict with Cevallos v. Rideout, 18 So.3d 661 (Fla. 4th DCA 2009).

In the context of a motor vehicle rear-end collision, a presumption exists that the rear driver was a negligent cause of the collision. This presumption, hereafter referred to as "The McNulty Presumption,"[1] can be rebutted if the rear driver produces sufficient evidence tending to show that the fact presumed, i.e., that the rear driver was negligent, is incorrect. Gulle v. Boggs, 174 So.2d 26, 29 (Fla.1965). The presumption was not legislatively enacted, but was created by the courts out of "necessity"[2] in the 1950's, when Florida still operated under the harsh doctrine of contributory negligence.

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[1] McNulty v. Cusack, 104 So. 2d 785 (Fla. 2d DCA, 1958).
[2] Clampitt, 786 So.2d at 572.

This State's courts are currently conflicted regarding whether the rear driver is presumed to be the *sole* cause, or merely a *contributing* cause, of the collision. If the presumption is that the rear driver is the *sole* cause, and the presumption is not rebutted, then the rear driver cannot continue a negligence claim, no matter how much evidence of negligence may implicate the lead driver as contributing to the collision. This is the holding of the Fourth District in Cevallos v. Rideout, 18 So.3d 661 (Fla. 4th DCA 2009). Contrast the Fifth District's holding in Charron v. Birge, 37 So.3d 292 (Fla. 5th DCA 2010) where the presumption is instead that the rear driver is only a *contributing* cause, and the rear driver is not precluded from maintaining a claim against the lead driver if evidence suggests the lead driver was himself negligent, *even if* the McNulty Presumption is unrebutted.

The case at hand entered the appellate phase upon the trial court's grant of summary judgment in the Defendant's favor. Summary judgment should be cautiously granted in negligence suits, only when there is no genuine issue of material fact and where, after the court has drawn every possible inference in favor of the non-moving party, the facts are so crystallized that nothing remains but questions of law. Moore v. Morris, 475 So.2d 666, 668 (Fla. 1985); Nelson v. Ziegler, 89 So.2d 780, 782 (Fla. 1956) (Fact questions are left to juries except in rare instances where the facts are undisputed and susceptible to but a single inference which unequivocally either supports or refutes claims of negligence).

Given this standard, the facts below are presented as they were available to be examined upon summary judgment review—in the light most favorable to the non-moving Plaintiff.

The Defendant operated the lead car involved in a two-vehicle, rear-end automobile collision. (R.75-76). Defendant stopped abruptly in the middle of a busy thoroughfare under the unfounded belief that non-party, Justin Christie ["Christie"], who was approaching a merger juncture from a side street, would violate the right-of-way, despite there being no indication that Christie was in any way operating his vehicle improperly. (R.75-77, 83). Although Defendant was traveling in a thoroughfare, US 17 and 92, and on a road not controlled by any traffic control device such as a stop light or yield sign, Defendant erroneously concluded that he did not have the right-of-way and therefore abruptly stopped in the middle of the roadway. Christie found the Defendant's stop highly unusual and completely unnecessary. (R.76-77).

Non-party, William A. Smith ["Smith"] operated a motorcycle which followed behind Defendant at a reasonable distance of approximately one and a half car lengths. (R.75, 78). The Plaintiff, Charron, was a passenger on Smith's motorcycle. (R.75). When Defendant made his sudden, abrupt and unexpected stop, Smith was unable to avoid collision. (R.75). Smith lost control of his motorcycle which flipped and landed on top of the Plaintiff who sustained

catastrophic injuries. Charron thereafter brought a negligence suit against the Defendant. (R.74-75).

At a hearing of November 17, 2008 the trial court granted summary judgment in Defendant's favor, reasoning that the Plaintiff had not presented the necessary evidence to rebut the presumption of evidence on negligence on the following driver.[3] (R.78). Accordingly, the Defendant received a final summary judgment in his favor. Reversing this decision, the Court of Appeals held that the McNulty Presumption is a burden which belongs only to the rear *driver*, and does not apply to *passengers*. (R.81). Further, the lower appellate court held the question of whether the McNulty Presumption had been rebutted was not the end of the relevant inquiry. Equally important was that the court examined whether any record evidence suggested the lead driver's own negligence caused or contributed to the collision. Finding that such evidence existed in the record, the Fifth District Court of Appeal held that summary judgment in Defendant's favor was improper. (R.83, 85).

Essentially, the Court of Appeal held that even if the McNulty Presumption was unrebutted, the "presumption bears only upon the causal negligence of the rear

[3] The Trial Judge was The Honorable James E.C. Perry. See Appellant's Suggestion of Disqualification dated June 7, 2011.

driver,"[4] and not the negligence of the lead driver. Therefore, the Plaintiff should not have been precluded from continuing a negligence claim. (R.85).

The Fifth District below certified conflict, "to the extent that portions of the opinion of the Fourth District Court of Appeal in Cevallos v. Rideout, 18 So.3d 661 (Fla. 4th DCA 2009), are expressly contrary to this Court's opinion." (R.117). The Florida Supreme Court initially stayed the case at hand, pending disposition of Cevallos, upon which review jurisdiction had been exercised. However, after entertaining briefs and oral arguments in Cevallos, but before publishing a final opinion, this Court lifted the stay on March 17, 2011 and instructed these parties to address conflict between Charron v. Birge, 37 So.3d 292 (Fla. 5th DCA 2010), Cevallos v. Rideout, 18 So.3d 661 (Fla. 4th DCA 2009) and Clampitt v. D.J. Spencer Sales, 786 So.2d 570 (Fla. 2001). (R.127-28).

SUMMARY OF THE ARGUMENT

Two considerations urge this Court to affirm the opinion in Charron v. Birge, 37 So.3d 292 (Fla. 5th DCA 2010) while embracing that holding's interpretation of Clampitt v. D.J. Spencer Sales, 786 So.2d 570 (Fla. 2001). The same considerations suggest that this Court invalidate the rationale found in Cevallos v. Rideout, 18 So.3d 661 (Fla. 4th DCA 2009):

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[4] Charron, 37 So.3d at 297 quoting Clampitt, 786 So.2d at 572-73

(1) The trial court erred in imputing the McNulty Presumption to the Plaintiff, who was an innocent passenger in the collision. It is clear from well-established precedent that the presumption bears only upon the negligence of the rear driver and not passengers. Further, the evidence in the case at hand at no time suggested the existence of any of the exceptions to the rule which would allow the presumption to impute to the Plaintiff/passenger, such as a joint enterprise or agency relationship between the Plaintiff and Smith.

(2) Given that the evidence suggested the likelihood that the lead driver was at least negligent and was a cause of the collision, the following driver may not have been negligent, and the Plaintiff should have survived summary judgment review. Stated differently, the Defendant's abrupt and unwarranted stopping could well be viewed by reasonable people as clear negligence, thus rebutting the presumption.

To bar following drivers from maintaining negligence suits, even when there is evidence suggesting the lead drivers own culpability caused the collision, would create a holdover of contributory negligence. It appears that the Florida Supreme Court has not held that the following driver must first establish that his or her own actions did not contribute to the accident in order to pursue a claim of negligence against the lead driver. It cannot be said that Clampitt, or any other opinion from this Court since Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), intended to carve

out an exception to comparative negligence principles uniquely in the context of rear-end collisions.

The public policy considerations raised by Cevallos and raised by Appellee's Merit Brief in this case, are unpersuasive as a basis for reversing Charron. Such public policy goals apply equally to a number of additional contexts where Florida courts have elected to apply comparative negligence, rather than contributory negligence, principles.

Given that the Charron v. Birge, 37 So.3d 292 (Fla. 5th DCA 2010) opinion is in harmony with the doctrine of comparative negligence, while the Cevallos v. Rideout, 18 So.3d 661 (Fla. 4th DCA 2009) opinion ignores it, the logic underpinning the former should be upheld while the reasoning of the latter should be abandoned. Under any view of the available facts here, the trial court's dismissal of the Plaintiff's case was error and denied the Plaintiff her right to a jury trial, Fla. Const. Art. I, § 22 (2011). Reversal of the trial court's decision by the Fifth District Court of Appeal was proper and should be affirmed.

ARGUMENT ONE

THE MCNULTY PRESUMPTION OF NEGLIGENCE WHICH ATTACHES TO A FOLLOWING DRIVER IN A REAR-END COLLISION DOES NOT APPLY TO PASSENGERS

Here, Plaintiff was a passenger on a motorcycle operated by Smith. The presumption that a rear driver in a rear-end collision is negligent does not impute

to passengers. As the Court of Appeal stated below: "The presumption clearly does not apply where a passenger of the following vehicle sues the lead driver for his negligence." (R.81). In Footnote 5, the appellate court continued:

> Even under contributory negligence, a passenger in the rear vehicle was entitled to pursue all potential tortfeasors, including the forward drivers, in a rear-end collision. The presumption of negligence of the rear driver that is available to the lead driver does not affect the passenger's right to recover. See Davis v. Sobik's Sandwich Shops, Inc., 351 So.2d 17 (Fla. 1977). (R.81).

After distinguishing the facts, and disagreeing with the rationale, of Cevallos, the Fifth District stated in Footnote 6: "Even if the Cevallos court is right ... the presumption still would have no application to an injured third party." (R.82).

While conflict exists regarding whether Clampitt v. D.J. Spencer Sales, 786 So.2d 570 (Fla. 2001) intended to allow a remnant of contributory negligence to linger in Florida's tort law, there is no conflict regarding whether the McNulty Presumption is imputed to passengers who exercise no control over the rear vehicle. Florida precedent clearly demonstrates that it does not.

As early as 1912 this Court held that the negligence of a chauffeur driving a vehicle was not imputable to his passenger, absent a showing that the passenger had authority or control over the machine or driver. Porter v. Jacksonville Elec. Co., 60 So. 188 (Fla. 1912). Over the next century, this general principle was affirmed time and again. See Miami Coca Cola Bottling Co. v. Mahlo, 45 So.2d

119, 121 (Fla. 1950); Bessett v. Hackett, 66 So.2d 694, 698 (Fla. 1953) ("The rule is that the negligence of the driver of an automobile is not in general imputable to a passenger who has no authority or control over the car or the driver."); Georgia S. & F. Ry. Co. v. Shiver, 172 So.2d 639 (Fla. 1st DCA 1965) (quoting Bessett); Conner v. Southland Corp., 240 So.2d 822 (Fla. 4th DCA 1970); Walton v. Robert E. Haas Const. Corp., 259 So.2d 731 (Fla. 3d DCA 1972); James A. Cummings Inc. v. Larson, 588 So.2d 1066 (Fla. 4th DCA 1991).

Since the presumption did not impute to the Plaintiff, the record must be searched for an exception to the normal rule so as to permit a passenger to be held accountable for the negligence of the driver. The evidence in this case never suggested that the Plaintiff exercised control over Smith's motorcycle. Further, the Plaintiff and Smith were not on a joint enterprise and there existed no agency relationship between them. Conner, 240 So.2d 822 (detailing the elements of a "joint enterprise" in the context of automobile liability); Bessett, 66 So.2d at 698 citing Ford Motor Lines v. Hill, 106 Fla. 33 (Fla. 1931) ("In the absence of agency or joint enterprise, contributory negligence on the part of the driver will not ordinarily be imputed to a guest or invitee if the latter relies on the skill and judgment of the driver and does not attempt to impose his will on the driver to see that the machine is properly driven.").

Given Florida's firmly established precedent on this matter, rebutting the McNulty Presumption was a burden the law never intended for this Plaintiff to bear, since she "was an innocent passenger, free of any contributory negligence." Davis, 351 So.2d at 18. Therefore, the trial court's grant of summary judgment in Defendant's favor was error, and this Court should affirm the Fifth District Court of Appeal's holding to that effect.

ARGUMENT TWO

EVEN IF THE PRESUMPTION COULD BE IMPUTED TO PLAINTIFF, AND WAS UNREBUTTED, BECAUSE EVIDENCE SUGGESTED NEGLIGENCE ON THE PART OF THE LEAD DRIVER, COMPARATIVE NEGLIGENCE PRINCIPLES PRECLUDES SUMMARY JUDGMENT

Given that the McNulty Presumption carries a burden the law never intended a passenger to bear, the Charron opinion clearly did not turn upon whether that presumption had been rebutted. However, even if it had been proper to impute the presumption to the Plaintiff/passenger, there indeed was sufficient record evidence suggesting the lead driver Defendant's own negligence was a proximate cause of the accident. Therefore, the Plaintiff's suit should have been allowed to continue under comparative negligence principles.

The rear-end collision presumption rule was recognized by Florida appellate courts in 1958 and approved by this Court shortly thereafter in 1959.[5] The rule was created to fill the evidentiary void created by a lead-driver's inability to explain the reason for the rear driver's collision with his or her vehicle. That is, while a plaintiff ordinarily bears the burden of proving the four elements of negligence, obtaining proof of a breach and causation in a rear-end collision is difficult because while a lead driver plaintiff may know he or she has been rear-ended, they usually do not know why they were rear-ended.[6]

Florida law has recognized three specific factual situations in which the rear driver may rebut the McNulty Presumption: (1) evidence of a mechanical failure,[7] (2) evidence suggesting the lead vehicle was illegally, and therefore, unexpectedly stopped,[8] or (3) evidence suggesting the lead driver made a sudden and unexpected stop or lane change.[9] Dep't of Highway Safety & Motor Vehicles v. Saleme, 963 So.2d 969, 972 (Fla. 3d DCA 2007). It is the third situation which applies to the

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[5] McNulty v. Cusack, 104 So. 2d 785 (Fla. 2d DCA, 1958); Bellere v. Madsen, 114 So.2d 619 (Fla. 1959)

[6] Eppler v. Tarmac Am., Inc., 752 So.2d 592, 594 (Fla. 2000).

[7] Gulle v. Boggs, 174 So.2d 26, 29 (Fla.1965) (testimony that defendant's brakes failed was sufficient to overcome the negligence presumption).

[8] 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)

[9] Clampitt v. D.J. Spencer Sales, 786 So.2d 570, 574 (Fla. 2001) quoting Pierce v. Progressive American Insurance Co., 582 So.2d 712, 714 (Fla. 5th DCA 1991) ("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.")

case at hand. Examining the evidence available to the trial court, the appellate court stated:

> Under one view of the evidence, Birge was negligent because, even though he had the right-of-way on a major thoroughfare, he suddenly stopped his car, erroneously believing Christie had the right-of-way, to the point that he even waved Christie on. There is no suggestion that Christie was not operating his vehicle correctly. Birge stopped because Christie reached the intersection as Birge reached the point of merger and Birge was not sure what was happening. But, if Birge wanted to stop until he was sure it was safe to proceed, or if he wanted to let Christie have the right-of-way, he had to do so in a way that would not place others in a zone of risk of harm. There is a difference between stopping for a reason and unnecessarily stopping for a reason. (R.83).

As to whether Defendant's sudden stop should have been anticipated, the Fifth District stated:

> Based upon the evidence, it would seem that the question whether Birge's alleged sudden stop occurred at a time and place where a following driver should reasonably have anticipated a sudden stop is a question of fact.
>
> ...
>
> The evidence could support a verdict for negligence on the part of Birge because there is evidence that he suddenly stopped in the middle of 17-92, that he did so unnecessarily, under the mistaken belief that Christie might have the right to proceed, and that he did so under circumstances where there was following traffic endangered by the unnecessary stop. Entry of summary final judgment in his favor was error. (R.84-85).

While it was beyond question that Defendant's stop was "sudden," the appellate court elected to not affirmatively state that the stop was "unexpected," as

doing so would be putting the judiciary in the shoes of the fact-finder. Nelson v. Ziegler, 89 So.2d 780, 782 (Fla. 1956), states:

> 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.

The McNulty Presumption arose during a period of Florida's history when the state had not yet adopted comparative negligence. Eventually recognizing the unjust results that the doctrine of contributory negligence could create, this Court stated in Hoffman v. Jones, 280 So.2d 431, 437 (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.

Recently, this Court again affirmed its adherence to comparative negligence principles in Williams v. Davis, 974 So.2d 1052, 1061 (Fla. 2007):

> [T]ort 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.

Although Florida now operates under the comparative negligence doctrine, to answer the question of whether the McNulty Presumption has been rebutted

does not also answer the unrelated question of whether evidence suggests the lead driver was also negligent. Servello & Sons, Inc. v. Sims, 922 So.2d 234 (Fla. 5th DCA 2005); Jefferies v. Amery Leasing, Inc., 698 So.2d 368 (Fla. 5th DCA 1997); Cleaveland v. Florida Power & Light, Inc., 895 So.2d 1143, 1145 (Fla. 4th DCA 2005); Johnson v. Deep South Crane Rentals, Inc.,634 So.2d 1113, 1114 (Fla. 1st DCA 1994). Given that reasonable minds could differ as to whether at least some of the evidence in this case suggested that the Defendant's stop was "unexpected," the above quoted precedent establishes that the Plaintiff should have survived summary judgment review.

Many situations could arise where a rear driver is unable to rebut the McNulty Presumption but is still able to produce evidence suggesting the lead driver's negligence as a cause of the collision. In Footnote 6 of the Charron opinion the Fifth District provides this illustrative example:

> 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. (R.81).

This argument is consistent with Justice Pariente's dissenting opinion from Eppler v. Tarmac America, 752 So.2d 592, 597-98 (Fla. 2000), which is the most

rational approach to the presumption to be offered after the adoption of comparative negligence:

> 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.

To bar following drivers from maintaining negligence suits because they are unable to rebut the presumption, even when there is evidence suggesting the lead drivers own culpability for the collision, would create a situation incompatible with comparative negligence principles. Chadbourne v. Van Dyke, 590 So.2d 1023 (Fla. 1st DCA, 1991) ("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."); Gibson v. Avis-Rent-A-Car Systems, Inc., 386 So.2d 520, 522 (Fla. 1980) ("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."). It cannot be the case that Clampitt, or any other opinion from this Court since Hoffman v. Jones, 280 So.2d

431 (Fla. 1973), intended to carve out an exception to comparative negligence principles exclusively to the unremarkable context of rear-end collisions.

Here, the facts detailed above in the *Statement of the Case and Facts* could easily support a finding by the fact finder that the Defendant was himself negligent. In addition, 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." Florida Statute § 316.183 requires that drivers maintain a speed which is "reasonable and prudent under the conditions." Given these standards, a jury could have decided that Defendant's own conduct was a negligent contributing cause to the collision, regardless of whether the passenger-Plaintiff was able to overcome the presumption that Smith, the rear driver, was also negligent.

The Fourth District Court of Appeal in Cevallos claims that its holding 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 apparent misconduct. There are a number of motor vehicle contexts where such public policy goals could also apply, yet the courts continue to apply comparative, rather than contributory negligence

principles: drivers who drive the wrong way down one-way streets; who violate the speed limit and traffic signals; who fail to have headlights on after dark. As the Charron court stated:

> 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.
> …
> 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). (R.82).

Petitioner's Merits Brief suggests that if the appellate court's opinion is allowed to stand it will cause confusion in the current state of the law. To the contrary, upholding the Charron opinion presents an opportunity to provide clear guidance on the ambiguity regarding the presumption. It is clear that Defendant and the lower courts are at odds on these matters. In fact, the Cevallos opinion seems to be itself in direct conflict with two prior decisions from the same Fourth District, Cleaveland v. Florida Power & Light, 895 So.2d 1143, 1145 (Fla. 4th DCA, 2005) ("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.") and Pollock v. Goldberg, 651 So.2d 721 (Fla. 4th DCA 1995) ("in order to direct a verdict here, it was necessary for the trial court to conclude not only that [the rear driver] was negligent but that [the lead driver] was totally free of negligence.").

While the Cevallos court sought to distinguish Pollock on the basis that it involved both a claim and a counterclaim, this factual distinction was immaterial to the legal analysis applied. And the Cevallos panel omits any mention of its prior decision in Cleaveland.

The Florida Supreme Court should provide clear guidance now, so that litigants and lower courts can begin to reconcile the confusing legal landscape. The first step toward clarity is to affirm the holding and rationale of Charron v. Birge, 37 So.3d 292 (Fla. 5th DCA 2010), which is in harmony with comparative negligence principles.

CONCLUSION

The ruling and rationale of Charron v. Birge, 37 So.3d 292 (Fla. 5th DCA 2010) should be upheld. The trial court erred in imputing the McNulty Presumption to the Plaintiff, an innocent passenger. The trial court further erred in granting summary judgment in Defendant's favor. The Plaintiff should have been allowed to continue her claim under comparative negligence principles.

The McNulty Presumption was an evidentiary rule, seemingly born of "necessity" over a half century ago when this state's law operated under an entirely different negligence standard and when applied to a plaintiff who was the lead driver. The presumption has no bearing on whether there is separate evidence suggesting the lead driver's own negligence in causing the collision.

Appellant urges this Court to: (1) affirm the decision of Charron v. Birge, 37 So.3d 292 (Fla. 5th DCA 2010), and (2) Accordingly, hold that the case be remanded to the appropriate court for continuation of the lawsuit as ordered by the Fifth District Court of Appeal.

Respectfully submitted,

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FBN: 0059452

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondent's Answer Brief is formatted in Times Now Roman 14-point font and that an electronic copy of this Brief will be filed with the court, utilizing the MSWord word processing program, contemporaneously with the filing of a hard copy of this Brief.

/ s /

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