IN THE SUPREME COURT
STATE OF FLORIDA

WARREN A. BIRGE,

Petitioner,

vs. CASE NO.: SC10-1755

CRYSTAL D. CHARRON,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL
CASE NO. 5D08-4504

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

This Court has accepted jurisdiction to review this case on the basis of conflict with Clampitt v. D.J. Spencer Sales, 786 So. 2d 570 (Fla. 2001), and Cevallos v. Rideout, 18 So. 3d 661 (Fla. 4th DCA 2009). The Court directed the parties to address this conflict in their briefs. At issue is the proper application of the rebuttable presumption that negligence on the part of a rearending driver is the sole proximate cause of the collision in a case where the defendant was the leading driver and the plaintiff was a passenger on the rear vehicle.

In Clampitt this Court reiterated the dual purposes underlying the presumption. The presumption fills an evidentiary void which arises in cases where a driver has been rear-ended but does not know why. 786 So. 2d at 572-573. Additionally, the presumption furthers public policy because the law requires all drivers with remaining alert and following the vehicle in front of him or her at a safe distance. Id. at 575. Because failure to maintain an adequate zone within which to stop is normally the sole proximate cause of injuries and damages resulting from a rear-end collision, there is a presumption of negligence on the part of the overtaking or following vehicle whose driver is in control of the following distance. Id. at 575-576.

Applying Clampitt, the Fourth District in Cevallos held that the rebuttable presumption applied to bar a claim by a rear-driver plaintiff against a lead-driver

defendant. The Fourth District rejected the plaintiff's argument that a lead-driver defendant could not 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. 18 So. 2d at 664. In addition to the policy reasons outlined in Clampitt, the Cevallos court noted that the "sole cause of the accident" presumption avoids the burden of proof being shifted to the lead-driver defendant. Id. at 664.

In the instant case the Fifth District held the presumption does not apply when the plaintiff is a passenger of the following vehicle and sues the lead driver for negligence.[1] (A.1-12) The Fifth District determined that in such a case the issue is not whether any presumption of the following driver's negligence is rebutted but whether there is evidence that the leading driver was negligent and whether that negligence was a cause of the accident. (A.12) Characterizing as dicta this Court's statement in Clampitt that the following driver's presumed negligence is normally the sole proximate cause of a rear-end collision (A.9 n.6), the Fifth District further held that summary judgment against the plaintiff was improper whether or not the presumption of negligence on the part of the following driver was rebutted. (A.8)

[1]The case is reported as Charron v. Birge, 37 So. 3d 292 (Fla. 5th DCA 2010). A copy of the opinion is included in the Appendix, which is referenced as (A.__)

STATEMENT OF THE FACTS

The Fifth District's opinion reflects that Petitioner, Warren Birge, was the operator of a motor vehicle which was struck from the rear by a motorcycle operated by William Smith. (A.1-2) Respondent, Crystal Charron, was a passenger on the rear-ending motorcycle and sued Birge for negligence. (A.1-2) The accident occurred on U.S. Highway 17-92, at the juncture where it merges with Seminole Boulevard at Lake Monroe in Sanford, Florida. (A.1-2)

Seminole Boulevard runs east and west parallel to the south shore of Lake Monroe. (A.14; R2.303, R3.438) The Birge vehicle and the motorcycle were both traveling in the single northbound lane of 17-92. (R2.273, 303) The north and southbound lanes of 17-92 are divided by a grassy median in this area. (R2.303) The northbound lane curves to the west and merges with Seminole Boulevard at the lake.[2] (A.14; R3.438)

The car was traveling a "[p]retty good ways" in front of Smith as he rounded a curve. (A.2) Smith testified he looked down a crossover side road to make sure no one was coming. (A.2) When he looked up, he saw that the car in front of him was "stopped" or "just about stopped." (A.2) Smith was unable to stop, and the bike flipped. (A.2)

[2]A diagram of the area is included in the Appendix. (A.14)

Birge testified that he slowed as he approached the merger point because he saw a black pickup approaching on Seminole Boulevard. (A.2) There is a yield sign on Seminole Boulevard, but it looked to Birge as though the two vehicles were bound for a collision because the two roads merged into a single lane. (A.2) Being cautious and knowing this was "a very hairy intersection," Birge stepped on the brake to slow down. (A.2-3) As he slowed, the pickup also slowed and eventually stopped at the sign. (A.2) Before he slowed down, Birge looked in the rear and side view mirrors and there was nothing in sight. (A.3)

When Birge was sure the pickup was stopped and was not proceeding, he stepped on the gas again and pulled ahead. (A.3) Just as he passed the truck and the yield sign, Birge heard a thump. (A.3) He pulled ahead two or three car lengths until he could see in the rearview the motorcycle and two people on the ground. (A.3) When he stopped the car, it was in the common lane just past the intersection of Seminole Boulevard. (R3.378)

Justin Christie, the operator of the pickup, testified that his vehicle had a manual transmission and was in third gear as he approached the yield sign. (R3.414-415) When he came to the yield sign, he looked over and saw the car coming, so he slowed down. (A.3) The other car also slowed down and then came to a complete stop. (A.3) That was when he heard the motorcycle hit and saw two people fly over. (A.3-4)

According to Christie, the accident happened more or less in front of the yield sign, where the two roads merged. (R3.417-18, 425) He did not know if the motor bike hit the car. (R3.419) He just heard a big braking noise, and it was at the back of the car. (R3.419)

Christie estimated the speed of the car at about 40 before it started to slow down. (R3.423) The car was not speeding but going at the regular speed that a car would be going on that road. (R3.423) The car slowed down right at the intersection where the two roads merged. (R3.423)

Christie could not estimate the speed of the motorcycle. (R3.424) He thinks the sound he heard was the wheels that were locked up. (R3.424) After he heard the braking, he heard a thump so he assumed the motorcycle hit the car. (R3.424) He did not see anything that would have obstructed the motorcycle operator's view of the car in front of him. (R3.427) He estimated that the motorcycle was one and a half car lengths behind the car before it hit. (R3.429, 430)

Christie's deposition was taken on June 19, 2008. (R3.408) On September 30, 2008, Christie was notified by the court reporter that the transcript was available for him to read and sign. (R3.437) No errata sheet was ever filed.

On November 5, 2008, Appellant filed an affidavit of Mr. Christie in opposition to the motion for summary judgment. (R1.57-58) In the affidavit, he stated that he saw the car proceeding on French Avenue at a speed of

approximately 30 to 35 miles per hour. (R1.58) He stated that the motorcycle was proceeding "at a reasonable distance behind the subject automobile at or about the same speed the automobile operator had been traveling before he slammed on his brakes." (R1.58) Although Christie repeatedly testified at his deposition that the Birge vehicle "slowed down" before it came to a complete stop (R3.414, 415, 416, 417, 423), he stated in his affidavit that the operator of the automobile "abruptly slammed on his brakes and brought his vehicle to an abrupt stop." (R1.58) Christie further averred that the motorcycle operator suddenly attempted to veer and slow the motorcycle, but the motorcycle flipped and threw both the operator and the passenger off and onto the roadway. (R1.58) The Fifth District quoted these facts from Christie's affidavit in its opinion. (A.4-5)

Charron claims to have memory loss as a result of the accident. (R2.183) She does not remember seeing any vehicle on Seminole Boulevard. (R2.189) She did not see when the car in front stopped or why it stopped. (R2.192) She did not see if the car moved to the right or the left or was in the same lane when it tried to stop. (R2.190)

Charron remembered Mr. Smith downshifting, and that was all. (R2.190) She testified that Mr. Smith downshifted as soon as the car in front stopped. (R2.205) They were maybe three car lengths from the car when Smith

downshifted. (R2.205-06) Appellant did not remember anything after the downshifting. (R2.217)

Mr. Smith also has memory problems, although he does not know if they are from the accident. (R2.285) He did not remember anyone coming down Seminole Boulevard. (R2.242) He did not look down Seminole Boulevard to see if a car was coming. (R2.246-47) He agreed that traffic does come from that direction, but he never looked at Seminole Boulevard to see if there was any traffic. (R2.275, 307)

He remembered looking to his right to make sure no one was coming up a cross street that intersects 17-92. (R2.242-44) Smith looked down the cross street and saw no one coming. (R2.243) The car ahead of him was still moving. (R2.306) Smith testified the cross street was 500 to 700 feet from where the accident happened. (R2.242)

After Smith had fully passed the side street, he looked up and saw the brake lights on the car in front of him. (R2.243, 269, 306) He downshifted and tried to stop and then tried to go to the left. (R2.247) When he hit the brakes, the motorcycle started sliding sideways. (R2.247-48)

Smith estimated that the car was three to four car lengths ahead of him when he tried to downshift and stop. (R2.248) He could have been traveling 30 miles an hour before he started braking. (R2.253) He had fully passed the side street before he hit his brakes. (R2.269) He did not know where he was on the roadway when he

first tried to stop, nor did he know how far away the car was when he started to go toward the left. (R2.248, 305, 307) He drives on the right side of the lane and went to the left to get to the grassy median. (R2.248-51) He never made it off the roadway. (R2.250)

Smith did not specifically remember hitting the car. (R2.251, 252) He remembered being flipped. (R2.252) He did not know whether the bike flipped before or after it hit the car. (R2.252) When he downshifted and tried to stop and went to the left, he tried to lay the bike down going toward his left. (R2.252) As he was laying the bike down, he yelled to Charron to jump. (R2.253) She did not jump but grabbed onto him. (R2.253)

Smith ended up in the middle of the roadway, six or eight feet from the car. (R2.253, 308) The motorcycle was on top of Charron. (R2.309) The back side of the bike fender was under the car. (R2.261) All the damage to the bike was on its left side. (R2.262) The car was still within the two lines of the northbound lane. (R2. 268, 273)

Birge moved for summary judgment, asserting that a presumption of negligence attached to Smith as the following driver, that Charron failed to

overcome the presumption, and that Birge was not liable for the accident as a matter of law. (A.4) The trial court[3] granted Birge's motion, stating:

> In the Clampitt [v. D.J. Spencer Sales, 786 So. 2d 570 (Fla. 2001)] case the court says it appears – explains that the sudden stop standing alone is insufficient to overcome the presumption of negligence. It is not merely an abrupt stop, but if they perceive the vehicle if it is in its proper place on the highway that rebuts or dissipates the presumption that the negligence that the rear driver was the sole cause of the collision. It is a sudden stop by the preceding driver at the time and place where it could not reasonably be expected by the following driver that creates the factual issue. These cases seem to be clear. And in the Hunter [v. Ward, 812 So. 2d 601 (Fla. 1st DCA 2002)] case each driver is charged under the laws to remain alert in following the vehicle in front of him or her at a safe distance.
>
> Anyway, I find that there's no substantial – in looking at it in the light best suited for the plaintiff I'm going to grant the motion for summary judgment.

(A.5-6) Charron's motion for rehearing was denied by the trial court. (A.6)

The Fifth District's Opinion

Construing this Court's decision in Clampitt as applying only to cases "where the lead driver sues the rear driver," the Fifth District concluded that the presumption of negligence on the part of the following driver does not apply where a passenger of the following vehicle sues the lead driver. (A.8) The court characterized the issue in this case "properly framed" as being "not whether any

[3]The trial court judge was The Honorable James E.C. Perry. (A.1)

presumption of Smith's negligence was rebutted, but whether there is record evidence that Birge was negligent as the forward driver and solely caused, or caused in connection with Smith, the injuries to Charron." (A.8, 12) The court concluded that summary judgment against Charron was improper "whether or not the presumption of Smith's negligence as the following driver was rebutted." (A.8)

The court acknowledged that its conclusion was contrary to that of the Fourth District in Cevallos v. Rideout, 18 So. 3d 661 (Fla. 4th DCA 2009), and rejected the Cevallos court's finding that public policy mandated a rule that the following driver be deemed the sole cause of a rear-end collision. (A.9 n.6) The court reasoned that Cevallos was "different from this case because the plaintiff in that case was the following *driver* in a rear-end collision." (A.9 n.6) (emphasis in original). Even if the Cevallos court was right, however, the Fifth District held the presumption of negligence would have no application to an injured third party. (A.9 n.6)

The Fifth District characterized as dicta this Court's statement in Clampitt that the following driver is "normally" the sole proximate cause of a rear-end collision. (A.9 n.6) The court held that, to the extent Birge suddenly stopped, the issue on his motion for summary judgment was not whether Smith should have anticipated the stop but whether the stop was negligent. (A.9-10) The court concluded it was error to enter summary judgment under the facts of this case on

the issue of whether the rear driver should have anticipated the lead driver's stop at the location where the accident happened. (A.10)

The Fifth District granted Petitioner's motion for certification "to the extent that portions of the opinion of the Fourth District Court of Appeal in Cevallos . . . are expressly contrary" to the decision in the instant case. (A.13) This Court has exercised its jurisdiction to review Cevallos, and that case is currently pending. *See* Case No. SC09-2238. This Court has accepted jurisdiction in the instant case on the basis of conflict with Cevallos and Clampitt and has directed the parties to address that conflict in their briefs.

SUMMARY OF THE ARGUMENT

The Fifth District certified conflict with the Fourth District's decision in Cevallos v. Rideout, 18 So. 3d 661 (Fla. 4th DCA 2009). The Fifth District's decision expressly and directly conflicts with Cevallos and also conflicts with this Court's decision in Clampitt v. D.J. Spencer Sales, 786 So. 2d 570 (Fla. 2001). This Court should exercise its jurisdiction to resolve these conflicts.....

The Fifth District's decision departs from the longstanding principle of Florida law that a rebuttable presumption of negligence applies to a rear-ending driver. Although the presumption developed in cases where the plaintiff was the leading driver, the purposes of the presumption are served by applying it to the rear-ending driver whether the plaintiff is the leading driver, the rear-ending driver,

or a passenger in either vehicle. Application of the presumption should not depend on the rear-ending driver's status in litigation.

The Fifth District ignored the policy reasons underlying the presumption and disregarded this Court's precedent. Its decision is likely to cause confusion for litigants and the trial courts. This Court should exercise its jurisdiction to review this case and reaffirm the viability of the presumption.

Because the Fifth District applied erroneous legal principles in this case and there was no evidence fairly and reasonably tending to show that Mr. Smith was not negligent, the Fifth District's decision should be quashed.

ARGUMENT

I. The Fifth District's Decision Conflicts with this Court's decision in Clampitt v. D.J. Spencer Sales, 786 So. 2d 570 (Fla. 2001).

The Fifth District's decision in the instant case expressly and directly conflicts with this Court's decision in Clampitt v. D.J. Spencer Sales, 786 So. 2d 570 (Fla. 2001). There is express conflict because the Fifth District's decision contains a discussion of the legal principles applied by the court. See Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981). There is direct conflict because the Fifth District announced a rule of law which conflicts with this Court's announcement in Clampitt. See Aguilera v. Inservices, Inc., 905 So. 2d 84, 86 (Fla. 2005).

Clampitt came to this Court based on conflict between the First District's decision in D.J. Spencer Sales v. Clampitt, 704 So. 2d 601 (Fla. 1st DCA 1997), and the Fifth District's *en banc* decision in Pierce v. Progressive American Insurance Co., 582 So. 2d 712 (Fla. 5th DCA 1991). In Pierce a majority of all the judges of the Fifth District affirmed a summary judgment holding that two leading drivers in a chain collision were not liable, as a matter of law, to the rear-driver plaintiff because the plaintiff failed to produce evidence to rebut the presumption of the plaintiff's negligence in regard to the third collision. Id. at 714. In Spencer Sales the First District held the trial court erred in granting a partial summary judgment on liability, holding that the rear driver failed to rebut the presumption that he was the sole cause of the accident. 704 So. 2d 602.

The First District's description of the facts in Spencer Sales was scant. The court noted that three vehicles were involved in the accident at issue. The first vehicle was a pickup truck and trailer driven by a party who was dismissed from the action prior to trial. Id. The middle vehicle was an automobile driven by Clampitt. Id. The third vehicle was a tractor-trailer rig driven by Carl Hetz and owned by Spencer Sales and Reliable Peat Company JV. Id. The First District described the accident as follows:

> Hetz, the driver of the rear vehicle, testified that [Clampitt] "dead-stopped" in front of him in an area with a posted speed limit of 55 miles per hour. He also

> testified that after leaving the Bronston city limits, he remained two truck lengths behind appellee's car. Appellant Hetz then stated that when he saw [Clampitt] stop on the highway, he hit his brakes and put down 110 feet of skid marks. He further testified that [Clampitt's] brake lights did not come on prior to the collision. [Hetz's] testimony was corroborated, in part, by [Clampitt's] memorandum of law in support of her motion for partial summary judgment on liability. The memorandum states that [Clampitt's] car collided with the vehicle ahead and then stopped in the roadway. At the same instant or immediately thereafter [Hetz's] vehicle collided with the rear of [Clampitt's] car.' Appellant Hetz stated that the lead driver's brake lights and turn indicators were checked at the accident site, and were found to be operational. Unfortunately, [Clampitt] has no memory of the moments immediately before and after the accident.

Id. at 603.

Clampitt argued in her motion for partial summary judgment that there was no evidence to rebut the presumption of negligence of Hetz as the driver of the rear vehicle. Id. at 602. She further argued that her abrupt stop in front of the vehicle driven by Hetz did not rebut or dissipate the presumption that the negligence of the rear driver was the sole proximate cause of the rear-end collision. Id. at 602-603. The trial court accepted Clampitt's argument that since her car was in its proper place on the highway, the presumption of negligence was not rebutted merely because her vehicle stopped suddenly. Id. at 603.

In reaching its conclusion the First District referred to Pierce, in which the Fifth District held:

> As a matter of law, it is not a substantial and reasonable explanation by Pierce to merely say that the vehicles ahead of him . . . stopped abruptly. Such stops had to be reasonably anticipated at the time and place where they occurred according to Pierce's own testimony: in a crowded lane of traffic approaching a busy intersection controlled by a traffic signal which was in view of all four drivers at the time of the collisions.

Id. at 603-604, quoting Pierce, 582 So. 2d at 714. The First District contrasted the situation in Pierce with that in Spencer Sales, noting the collision in the latter case occurred on a two-lane highway with a posted speed of 55 miles per hour and no traffic signals. 704 So. 2d at 604. The area was described as a country road with a junior college, apartments, and a few businesses located along that stretch of highway. Id. Consequently, drivers on the highway reasonably could be expected to anticipate the possible deceleration and turn of lead vehicles into the various establishments. Id.

The First District concluded that Hetz's affirmative testimony concerning Clampitt's "dead-stop" in front of him and her seeming failure to use her brakes prior to impact with the lead vehicle constituted sufficient evidence to overcome the presumption of negligence which attaches to the driver of the rear vehicle involved in a collision. Id. at 604. Since the lead driver testified that he used his

turn indicators to signal his turn into his business, a jury could reasonably infer that Clampitt was negligent in failing to decelerate gradually as the lead driver slowed and turned in front of her vehicle. Id. For these reasons the First District held the trial court erred in granting Clampitt's motion for partial summary judgment. Id.

This Court set forth additional facts in its opinion. This Court noted that the lead vehicle was driven by Charles Huguley. 786 So. 2d at 571. Huguley's trailer was struck from behind by Clampitt as Huguley was turning off Alternate U.S. 27 into the driveway of his business. Id. Hetz testified he was traveling 45 to 50 miles per hour following Clampitt's auto by approximately 120 feet. Id. at 572. He did not know that Huguley was turning until he saw Clampitt's auto strike Huguley's trailer and push the pickup truck and trailer off the road. Id. At that point he saw Clampitt's auto come to a "dead-stop" on the highway. Id. He slammed on his brakes and left 100 feet of skid marks but struck Clampitt's auto. Id. He did not see Huguley's turn signal or brake lights illuminate at any time prior to the accident, nor did he see Clampitt's brake lights illuminate at any time. Id.

This Court found Clampitt to be similar to Pierce and other "sudden stop" cases wherein the forward driver merely stopped abruptly. Id. at 574. The Court agreed with the reasoning in Pierce that a sudden stop standing alone is insufficient to overcome the presumption of negligence on the part of the rear driver:

> It is not merely an "abrupt stop" by a preceding vehicle (if it is in its proper place on the highway) that rebuts or dissipates the *presumption that the negligence of the rear driver was the sole proximate cause of a rear-end collision*. It is a sudden stop by the preceding driver at a time and place where it could not reasonably be expected by the following driver that creates the factual issue.

786 So. 2d at 574, quoting Pierce, 582 So. 2d at 714. This Court concluded that the presumption was not overcome in Clampitt.

This Court held the First District erred in reasoning that a jury could infer that Clampitt negligently failed to decelerate gradually as Huguley's vehicle pulled off the highway. 786 So. 2d at 574. Clampitt was not a case in which the forward driver allegedly made an abrupt and arbitrary stop in bumper-to-bumper accelerating traffic but was similar to Pierce and other "sudden stop" cases wherein the forward driver merely stopped abruptly. Id. The accident occurred at midmorning on a clear day on a level stretch of a two-lane roadway just outside the Bronson city limits. Id. at 575. In the area of the accident the roadway was bordered by a farm supply store and other commercial establishments, several apartment complexes and a residential development, and the campus of Central Florida Junior College, all of which had entrances and exits on the roadway. Id. Hetz testified that, in spite of his vantage point in the cab from where he had a clear view of both vehicles in front of him, (1) he did not see Huguley activate his turn signal; (2) he did not see Huguley illuminate his brake lights; (3) he did not

see Huguley slow down; (4) he did not see Huguley turn into his driveway; and (5) he did not see Clampitt slow down or activate her brake lights. Id. At best, according to Hetz, Clampitt made a sudden stop on the roadway ahead and Hetz did not see her until the last minute. Id. Interpreting the alleged facts in the light most favorable to Spencer Sales, this Court concluded that Hetz appeared to have been "asleep at the wheel" of a seventy-six thousand pound vehicle traveling at 50 miles an hour. Id.

This Court determined that Clampitt was a classic "sudden stop" case. Clampitt's auto stopped abruptly on the highway as the result of a collision with Huguley's trailer, and Hetz's tractor-trailer rig was unable to stop in time. Id. The Court noted that accidents on the roadway ahead are a routine hazard faced by the driving public and that such accidents are to be reasonably expected. Id.

The Clampitt Court noted that the rebuttable presumption of negligence on the part of the rear-ending driver serves an evidentiary purpose and also furthers public policy. The evidentiary purpose was stated as follows:

> 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 [v. Cusack, 104 So. 2d 785 (Fla. 2d DCA 1958)], 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.

786 So. 2d at 573, quoting Jefferies v. Amery Leasing, Inc., 698 So. 2d 368, 370-371 (Fla. 5th DCA 1997). The Clampitt Court also explained the public policy underlying the rule:

> In effect the law requires all drivers to push ahead of themselves an imaginary clear stopping distance or assured stopping space or adequate zone within which the driven vehicle can come to a stop. Failure to maintain such a zone is normally the *sole proximate cause* of injuries and damages resulting from the collision of a vehicle with an object ahead. This is why when a vehicle collides with an object ahead of it, including the rear of a leading vehicle, there is a presumption of negligence on the part of the *overtaking or following vehicle*. Lynch v. Tennyson, 443 So. 2d 1017, 1020-21 (Fla. 5th DCA 1983) (Cowart, J., dissenting). *Each driver must be prepared to stop suddenly* (particularly during school and business hours on a roadway that is bordered by multiple business and residential establishments and a school, as in the present case). *It is logical to charge the rear driver with this responsibility because he or she is the person who is in control of the following distance*.

786 So. 2d at 575-76 (emphasis supplied). The Court quashed the First District's decision, thereby affirming the summary judgment on liability entered by the trial court in favor of Clampitt. Id.

This Court thus made clear in Clampitt clear that the following driver's failure to maintain an adequate zone within which to stop "is normally the ***sole proximate cause*** of injuries and damages resulting from the collision of a vehicle with an object ahead." 786 So. 2d at 575. The Court emphasized that a "sudden stop" by the lead vehicle is insufficient standing alone to overcome the presumption that negligence of the rear driver was the sole proximate cause of a rear-end collision; it is a sudden stop by the preceding driver at a time and place where it could not reasonably be expected by the following driver that creates a factual issue. *Id.* at 574. The rebuttable presumption imposes the burden on the rear-driver to come forward with evidence that "fairly and reasonably tends to show" that the presumption of negligence is misplaced. 786 So. 2d at 573.

The Clampitt Court analyzed the facts and concluded that Spencer Sales failed to present evidence that "fairly and reasonably" tended to show that its driver Hetz was not negligent in colliding with Clampitt's vehicle. Id. at 575. The Spencer Sales vehicle was the third in a chain collision. Hetz did not see the first vehicle activate its turn signal, did not see the first vehicle illuminate its brake lights, did not see the first vehicle slow down, did not see the first vehicle turn into a driveway, did not see the second vehicle slow down, and did not see the second vehicle activate its brake lights. Id. According to Hetz, the Clampitt vehicle made a

sudden stop on the roadway ahead and he did not see it until the last minute. Id. These facts are almost identical to the facts in the instant case.

In the instant case Mr. Smith, the rear driver, looked away from the road in front of him but never looked at Seminole Boulevard, did not see the Christie vehicle approaching the merger point with U.S. 17-92, did not see the Birge vehicle illuminate its brake lights, did not see the Birge vehicle slow down, did not see the Birge vehicle stop, and was unable to stop in time to avoid the accident. All of this evidence tended to show that Mr. Smith was negligent. There was no evidence that tended to show that Smith was *not* negligent, which was required by Clampitt in order to rebut the presumption that Smith's negligence as the rear-ending driver was the sole proximate cause of this accident.

The Fifth District in the instant case construed Clampitt as applying only to cases "where the lead driver sues the rear driver" and held the presumption did not apply apply where a passenger of the following vehicle sues the lead driver for his negligence. (A.7-8) While it is true that this Court in Clampitt recognized that the presumption of negligence that attaches to the rear driver in a rear-end collision arose in the context of cases where the lead driver sues the rear driver, 786 So. 2d at 572-573, the Court did not limit its discussion or its conclusion to such cases. To the contrary, the Court's discussion of the reason for the presumption made clear that "there is a presumption of negligence on the part of the ***overtaking or***

following vehicle." Id. at 576. This Court concluded it is logical to charge the rear driver with the responsibility of being prepared to stop suddenly because he or she is the person who is in control of the following distance. Id. at 576. The Fifth District's finding that the presumption does not apply when the plaintiff is a passenger in the rear-ending vehicle and sues the leading driver flies in the face of this Court's pronouncements in Clampitt.

Moreover, the Clampitt Court approved the Fifth District's decision in Pierce, where the presumption was applied to bar the claim of the rear-driver plaintiff. See Id. at 570 (Pariente, J., concurring). This Court's approval of Pierce implicitly if not explicitly acknowledged that the presumption applies to the rear driver regardless of that driver's status in litigation. If the presumption "arises out of necessity in cases where the lead driver sues the rear driver," it is no less necessary in cases such as this where the lead driver is the defendant. If a lead-driver/plaintiff has need of the presumption in order to fill an evidentiary void, that evidentiary void is even more significant when the lead-driver is the defendant. There is absolutely no policy reason why a lead-driver plaintiff should have the benefit of the presumption but a lead-driver defendant should not.

Just as a lead-driver plaintiff has need of the presumption in order to satisfy the burden of proof on his or her claim, so a lead-driver defendant has need of the presumption in order to defend against a claim by a passenger in the rear-ending

vehicle. This conclusion is buttressed by Section 768.81(3), Florida Statutes (2006), which states that a party is liable only on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability. The statute permits a defendant to plead the fault of a nonparty but places the burden on the defendant to prove that fault of a nonparty caused any or all of the plaintiff's damages. Mr. Birge affirmatively pled that Plaintiff Charron's damages were caused by the negligence of Mr. Smith (R1.7). Mr. Birge was thus placed in the same evidentiary posture as if he were a lead-driver plaintiff, and he should have the benefit of the presumption.

In reaching its decision in this case, the Fifth District relied heavily on its opinion in Jefferies v. Amery Leasing, Inc., 698 So. 2d 368 (Fla. 5th DCA 1997). The Fifth District quoted the following from its opinion in Jefferies:

> 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 neglient as well, the jury should pass upon the question of shared liability and apportionment of damages.

(A.7, quoting from Jefferies, 698 So. 2d at 371). This Court was obviously aware of Jefferies when it decided Clampitt, because it also quoted from that opinion at 786 So. 2d at 573. The Clampitt Court notably omitted the passage from Jefferies quoted immediately above.

The Clampitt Court implicitly rejected the Fifth District's reasoning that there is "no ***logic***" in applying the rear-end collision rule "to determine the rear driver automatically to be the sole source of negligence in all rear-end collisions." The Court stated it is "***logical*** to charge the rear driver with this responsibility [to follow the vehicle in front of him or her at a safe distance] because he or she is the person who is in control of the following distance." 786 So. 2d at 576 (emphasis supplied). Moreover, the Clampitt Court made clear that the following driver's failure to maintain an adequate zone within which to stop "is normally the ***sole proximate cause*** of injuries and damages resulting from the collision of a vehicle with an object ahead." Id. at 575.

The Fifth District's decision expressly and directly conflicts with Clampitt. The Fifth District misconstrued language in Clampitt in concluding that the presumption only applies in cases where the lead driver sues the rear driver and did not apply at all in the instant case in which the plaintiff was a passenger on the rear vehicle. Although the Clampitt Court concluded it was "logical" to hold the following driver's presumed negligence to be the sole proximate cause of injuries and damages in a rear-end collision because he or she is in control of the following distance, the Fifth District saw "no logic" in this rule. Clampitt held that the rebuttable presumption imposes the burden on the rear driver to come forward with evidence that "fairly and reasonably" tends to show that the presumption of

negligence is misplaced, but the Fifth District eliminated that burden and shifted the focus to conduct of the leading driver when the leading driver is the defendant.

Petitioner respectfully submits that this Court should exercise its jurisdiction in the instant case to resolve the conflicts and clarify the proper application of the presumption.....

II. The Fifth District's Decision Conflicts with the Fourth District's Decision in Cevallos v. Rideout, 18 So. 3d 661 (Fla. 4th DCA 2009).

The Fifth District acknowledged that its decision expressly conflicts with portions of the Fourth District's decision in Cevallos v. Rideout, 18 So. 3d 661 (Fla. 4th DCA 2009). (A.13) In Cevallos the rear-driver plaintiff argued that the rebuttable presumption of her negligence did not apply to bar her claim because a lead-driver defendant could be comparatively negligent. Id. at 664. The plaintiff argued the lead-driver defendant could not 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. Id. The Fourth District disagreed. Id.

In Cevallos the Fourth District followed Clampitt in holding that the rebuttable presumption of negligence applied to bar the claim of a rear-driver plaintiff against a lead-driver defendant. Id. at 664. The court applied the Clampitt rule that there is a rebuttable presumption that the negligence of the rear driver in a rear-end collision was the ***sole proximate cause*** of the accident. Id. at 663. The

court concluded that the distinction between a presumption of comparative negligence and a presumption of the sole cause of the accident was reasonably related to the purpose of the presumption. Id.

Citing Clampitt, the Cevallos court observed that the "sole cause of the accident" presumption not only relieves the lead-driver of the difficult task of adducing "proof of all four elements of negligence" but also 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." 18 So. 3d at 664. The presumption "further *avoids the burden of proof being shifted to the lead-driver defendant*." Id. (emphasis supplied). Because the plaintiff in Cevallos failed to adduce evidence from which it could be reasonably inferred that the lead-driver defendant's sudden stop was one which could not reasonably be anticipated, the Fourth District held the trial court correctly directed a verdict for the defendant. Id.

The Cevallos court also relied on the Fifth District's *en banc* decision in Pierce v. Progressive American Insurance Co., 582 So. 2d 712 (Fla. 5th DCA 1991), in concluding that "a rear-driver plaintiff, like the rear-driver defendant, must prove that the lead-driver stopped **abruptly and arbitrarily** to rebut the presumption that the plaintiff's own negligence was the **sole proximate cause** of the accident." 18 So. 3d at 663 (emphasis by court). In Pierce the plaintiff was the

last driver in a chain collision involving four vehicles. 582 So. 2d at 713. The Fifth District discussed the rebuttable presumption as follows:

> When a leading vehicle is located within its proper place on the highway, proof of a rear-end collision raises a presumption of negligence on the part of the overtaking vehicle. [Citations omitted.] This presumption provides a prima facie case which shifts to the defendant the burden to come forward with evidence to contradict or rebut the presumed negligence. If the defendant produces evidence that fairly and reasonably shows that he was not negligent, the effect of the presumption disappears and negligence then becomes a jury question. [Citations omitted.] The burden on the defendant is not to come up with just any explanation, but one which is "substantial and reasonable." [Citation omitted.]

Id. at 714. Pierce was approved by this Court in Clampitt. See 786 So. 2d at 570 (Pariente, J., concurring).

The Fifth District concluded in Pierce that, as a matter of law, it was not a substantial and reasonable explanation by Pierce, the plaintiff, to merely say that the vehicles ahead of him stopped abruptly. Such stops had to be reasonably anticipated at the time and place where they occurred: in a crowded lane of traffic approaching a busy intersection controlled by a traffic signal which was in view of all four drivers. Id. Other than the fact that the preceding drivers each collided with a car in front of them, there was no evidence whatsoever of any negligence on their part to rebut the presumption of Pierce's own negligence in regard to the third collision. Id. *The burden to produce that evidence was upon Pierce, who was the*

plaintiff, and he failed to meet that burden. Id. (emphasis supplied). Following Pierce, the Cevallos court also applied the rebuttable presumption to bar the claim of the following-driver plaintiff against the lead driver in a rear end collision.

Contrary to Cevallos and its *en banc* holding in Pierce, the Fifth District in the instant case held the presumption does not even apply when the leading driver is the defendant. The Fifth District recognized that its decision expressly conflicts with Cevallos. (A.13) Even in the absence of the Fifth District's certification of conflict, its decision in the instant case expressly and directly conflicts with the Fourth District's decision in Cevallos.

Although the plaintiff in Cevallos was the driver of the following vehicle and Charron was a passenger on the following vehicle, the analysis in both cases should be the same. The defendants in both cases were leading drivers. The policy reasons underlying the presumption of negligence on the part of the following drivers are the same.

As the Fifth District noted in Jefferies, obtaining evidence of breach and causation is difficult for a driver who has been rear-ended but does not know why because his or her attention has been focused on the road ahead. This evidentiary void is the same, whether the leading driver is the plaintiff or the defendant. In order to fill this void, this Court has recognized the presumption that the rear driver is presumed to be negligent. A party seeking to rebut the presumption must

produce evidence that fairly and reasonably tends to show that the rear driver was not negligent.

When she filed this lawsuit, Charron recognized that she had this burden. She alleged in her complaint that Mr. Birge "suddenly stopped at a time and place where it could not reasonably be expected." (R1.1-4) The Fifth District's decision relieved Charron of her burden of proof on this issue by eliminating the presumption of negligence on the part of Mr. Smith. The Fourth District reached a different result in Cevallos.

Petitioner respectfully submits that this Court should exercise its jurisdiction in the instant case to resolve its conflicts with Cevallos.

III. The Fifth District Erred in Reversing the Summary Judgment in Favor of Petitioner.

Standard of Review

The standard of review of a ruling on a motion for summary judgment is de novo. Fayad v. Clarendon Nat'l Ins. Co., 899 So. 2d 1082, 1085 (Fla. 2005). See also Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000) (stating that a grant of summary judgment is reviewable de novo, and that summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law).

Argument

The Fifth District reversed the summary judgment entered by the trial court in favor of Mr. Birge. As discussed above, the Fifth District applied erroneous legal principles in doing so. The trial court properly ruled that Mr. Birge was entitled to summary judgment because the presumed negligence of Mr. Smith was the sole proximate cause of this accident and Charron's injuries, and there was no evidence fairly and reasonably tending to show that Smith was not negligent.

The Fifth District quoted at length from the affidavit of Justin Christie, which stated that "for no apparent reason and to my complete surprise," the operator of the automobile "abruptly slammed on his brakes" and brought the vehicle "to an abrupt stop." (A.5) The affidavit further stated that the motorcycle was traveling "at a reasonable distance behind the subject automobile" before the driver "slammed on his brakes." (A.5) The affidavit is not sufficient to create a genuine issue of material fact which would preclude summary judgment.

Florida Rule of Civil Procedure 1.510(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials *as would be admissible in evidence* on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(Emphasis supplied.) The statements of Justin Christie quoted above were not admissible in evidence. To the contrary, they were inadmissible lay opinions.

Section 90.701, Florida Statutes, permits a lay witness to testify in the form of an opinion if the following requirements are met:

> (1)The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
>
> (2)The opinions and inferences do not require a special knowledge, skill, experience, or training.

Here, Christie had readily communicated at his deposition what he had perceived without testifying in terms of inferences or opinions. He testified that the motorcycle was traveling about one and a half car lengths behind the automobile. (III.429-30) He repeatedly testified that the Birge automobile slowed down before it came to a stop. (III.414, 416) He had ample time to review the transcript but never submitted an errata sheet.

Clearly, Christie's statements in the affidavit that the motorcycle was traveling a "reasonable distance" behind the automobile, that the automobile "slammed on" its brakes and came to an "abrupt stop" were unnecessary to communicate what he had perceived. Therefore, under Section 90.701(1), his opinions were not admissible and did not create a disputed issue of material fact

which would preclude entry of summary judgment in favor of Appellee. See Castro v. Brazeau, 873 So. 2d 516, 517-18 (Fla. 4th DCA 2004) (holding that eyewitnesses' testimony, which was not admissible under Section 90.701(2), did not create a disputed issue of material fact as to the non-negligence of the defendant). Furthermore, Christie's affidavit at best only tended to show that the Birge vehicle suddenly stopped. A "sudden stop" standing alone is insufficient to overcome the presumption of negligence. Clampitt, 786 So. 2d at 574.

The Fifth District also relied on subjective testimony of Justin Christie and William Smith to the effect that Mr. Birge had no reason to slow down or stop as he approached the intersection with Seminole Boulevard. (A.4) That testimony was immaterial to the issue of whether Mr. Birge as the lead driver made a sudden stop "at a time and place where it could not reasonably be expected." Moran v. Florida Security Electronics, Inc., 861 So. 2d 57, 58-59 (Fla. 3d DCA 2003) (holding that a reasonable person standard applied to the sudden stop exception to the rebuttable presumption). See also Clampitt, 786 So. 2d at 576 (Pariente, J., concurring) (noting "the reason for the forward driver's stop is not the issue, as this factor relates to the issue of comparative fault. . . . Rather, the only issue involved in determining whether the rear driver has overcome the presumption of negligence is whether the stop occurred at a time and place that the rear driver reasonably could have expected").

The accident in Moran occurred at a place where there were businesses on both sides of the road. Vehicle 1 stopped in order to make a left turn into a business. Vehicle 2 (the plaintiff) stopped safely behind vehicle 1. Vehicle 3 (the defendant) ran into Vehicle 2. The driver of Vehicle 3 testified that he personally did not expect anyone to make a left turn at that point. The Moran court held that this self-serving and subject testimony was immaterial. Under these facts, the "unexpected stop" exception did not apply because "it could certainly be reasonably expected that a driver may make a left turn into one of the businesses located on that side of the street." Id. at 58-59.

The Fifth District's opinion in the instant case shows that the court focused on the subjective testimony of Justin Christie and Mr. Smith as opposed to the objective facts and the reasonable person standard. The court noted that Christie "indicated that he didn't see a reason for the driver to have stopped the car." (A.4) Additionally, "when Smith was asked whether he was concerned[4] about the traffic approaching at the intersection with W. Seminole Boulevard that caused Birge to stop, Smith responded: 'There would be no reason to. They have a yield sign. There's no reason to slow down there. . . .'" (A.4) This testimony is

[4]Use of the word "concerned" reflects a misunderstanding of Mr. Smith's actual testimony. Mr. Smith was not asked whether he was concerned about the traffic approaching the intersection but whether he *ever looked* at Seminole

indistinguishable from that of the driver in Moran, which was held to be insufficient to rebut the presumption of negligence on the part of the rear driver.[5]

In Tacher v. Asmus, 743 So. 2d 157, 158 (Fla. 3d DCA 1999), the Third District squarely held that a sudden stop by a preceding driver or drivers approaching or going through a busy intersection should be reasonably expected and is thus not sufficient to overcome the presumption of negligence on the part of a following driver. The court reasoned that it is not at all unusual for vehicles proceeding through busy intersections to have to suddenly brake for pedestrians, emergency vehicles or other drivers running a red traffic light from a cross-street. Although there is no indication in Tacher that any of these situations actually occurred, the court affirmed a directed verdict on liability in favor of the plaintiff against Tacher, who was the last driver in a three-car rear-end collision.

In the recently decided case of Sorel v. Koonce, 53 So. 3d 1225 (Fla. 1st DCA 2011), the First District followed Tacher in holding that the trial court erred in failing to direct a verdict against the rear driver in a rear-end collision. The plaintiff was a passenger in the second vehicle in line at a traffic light, and the defendants' vehicle was third in line. When the green arrow appeared, all three

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Boulevard to see whether or not any traffic was approaching the intersection; he testified he did not, because there was no reason to. (R2.246-247)

vehicles began to move forward. As they began moving forward, the third driver (Koonce) looked down at the clock on his radio. When he looked back up, he saw that the plaintiff's car had either stopped or was in the process of stopping. He slammed on his brakes but was unable to avoid colliding with the plaintiff's car. It was undisputed that the plaintiff's husband had tried to stop their car because another vehicle had run the red light.

In discussing whether the presumption of negligence on the part of Koonce was rebutted, the First District noted that the stop or deceleration of the plaintiff's vehicle was neither arbitrary nor irresponsible. Id. at 1228. Rather, it was an appropriate response to activity on the road, which Koonce should have reasonably expected. Id. As noted in Tacher, it is not unusual for cars to stop abruptly at an intersection for a variety of reasons. Id. Although there was no evidence in Sorel that the intersection was particularly busy, there was specific evidence that another vehicle ran the red light. Id. Based on these facts, the First District concluded that the trial court should have directed a verdict for the plaintiff on the issue of negligence in accordance with Tacher and Clampitt, where this Court recognized that the law requires all drivers to remain alert and to maintain a safe following distance when driving behind another vehicle. Id. Furthermore, there was no

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[5]It is odd to say the least that Mr. Smith felt no need to look for traffic on Seminole Boulevard, yet slowed to look for traffic as he approached the cross

evidence that fairly and reasonably showed that the presumption of negligence was misplaced in Sorel. Id. at 1229.

The instant case is similar to Tacher and Sorel. The undisputed evidence in this case showed that this accident occurred as the Birge and Christie vehicles were both approaching the intersection where Seminole Boulevard merged with U.S. 17-92. The undisputed evidence showed that Mr. Smith never saw the Christie vehicle before the accident, because he did not even look toward Seminole Boulevard. The undisputed evidence showed that Mr. Smith took his eyes away from the road in front of him to look at a side street and that Mr. Birge had slowed or stopped when Mr. Smith looked back ahead. The undisputed evidence showed that Mr. Smith was so close to the Birge vehicle that he was unable to stop his motorcycle safely after he returned his attention to the road in front of him.

The undisputed facts also show that Mr. Birge slowed or stopped his vehicle as he approached the merger with Seminole Boulevard because the Christie vehicle was approaching the merger point *at the same time*. Although there is no evidence as to the speed of the Christie vehicle, it was obviously not de minimis because it was in third gear. As in Sorel, Mr. Birge's reaction was the appropriate response to activity on the road.

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street *before* the intersection with Seminole Boulevard. (R2.247)

Because the vehicles were approaching the merger point at the same time, it is absurd to suggest that Mr. Smith should not have reasonably expected Mr. Birge to slow or stop as he approached the intersection simply because the yield sign applied to Seminole Boulevard and not to U.S. 17-92. It is a common occurrence for two or more vehicles to reach an intersection controlled by a stop or yield sign at the same time and for the vehicle with the right-of-way to slow or stop until it becomes clear that the other vehicle is going to comply with the traffic sign. As this Court is well aware, and as recognized by the courts in Tacher and Sorel, it is not at all unusual for vehicles proceeding through intersections to have to suddenly brake. Accidents commonly occur when a vehicle fails to yield and proceeds into an intersection and into the path of an oncoming vehicle with the right-of-way. For this reason, Mr. Birge's stop at an intersection with approaching traffic was *not* arbitrary but was at a place where it could – and should – have been reasonably anticipated. In this respect, the instant case is indistinguishable from Tacher and Sorel.

Because the admissible evidence showed there was no genuine issue as to any material fact and that Mr. Birge was entitled to a judgment as a matter of law, the trial court properly granted Mr. Birge's motion for summary judgment. Pursuant to Clampitt and Cevallos, Mr. Smith's presumed negligence was the sole proximate cause of injury and damages to Charron. Although Charron recognized

it was her burden to do so (R1.1-4), she produced no evidence fairly and reasonably tending to show that Mr. Smith was not negligent. The Fifth District erred in ruling otherwise.

Petitioner respectfully submits that the Fifth District's decision should be quashed with instructions to reinstate the judgment of the trial court.

CONCLUSION

The Court should exercise its jurisdiction to review the Fifth District's decision in this case to clarify not only whether or not the presumption of negligence applies when the defendant was the leading driver but also whether the presumption applies whether the plaintiff was the driver or a passenger in the rear-ending vehicle.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of Petitioner's Jurisdictional Brief and Appendix were mailed this 7th day of June, 2011, to **Charles R. Stack, Esquire**, High Stack Gordon, 525 Strawbridge Avenue, Melbourne, FL 32901, Attorney for Respondent; and **Nicholas P. Evangelo, Esquire**, 234 North Westmonte Drive, Suite 3000, Altamonte Springs, FL 32714, Co-Counsel for Petitioner.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was typed in 14 point Times New Roman, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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