IN THE SUPREME COURT
STATE OF FLORIDA

WARREN A. BIRGE

Petitioner,

v.
CRYSTAL D. CHARRON,

Respondent.
_____/

CASE NO. SC10-1755
Lower Tribunal No(s).: 5D08-4504, 08-CA-974

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

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

In this brief parties will be referred to by their original status at the lower court level: Respondent, Mrs. Crystal D. Charron, as "Plaintiff." Petitioner, Mr. Warren A. Birge, as "Defendant." It is hoped that this terminology will facilitate a clearer understanding of the case facts. Citations to the Appendix will be made by the letter "A" and the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Defendant operated the lead vehicle involved in a two vehicle, rear-end automobile collision. (A2-3). Defendant stopped suddenly and abruptly in the middle of a busy thoroughfare under the unfounded belief that non-party, Justin Christie ["Christie"], who was approaching a merger juncture, would violate the right-of-way, despite there being no indication that Christie was operating his vehicle improperly. (A2-4, 10). Plaintiff was a passenger of the following vehicle, operated by non-party, William A. Smith ["Smith"]. Plaintiff sustained catastrophic injuries in the collision and brought suit against the Defendant under a theory of negligence. (A1-2).

The trial court granted summary judgment in Defendant's favor, reasoning that the presumption of negligence which attaches to the following driver in a rear-end collision was not sufficiently rebutted to the court's satisfaction by passenger-Plaintiff, and therefore she was barred from maintaining suit. (A4-6). The Fifth

District Court of Appeal reversed, holding that the following driver presumption of negligence does not impute to a passenger-plaintiff, (A8-9) and further, that even if the presumption did apply, sufficient evidence suggesting comparative negligence on the part of the Defendant existed in the record such that the presumption was rebutted. (A9-10). Defendant filed a Motion for Certification of Conflict which was granted by the Fifth District, "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." After Petitioner's Jurisdictional Brief was filed, this Court stayed the matter pending disposition of Cevallos. While this Court has entertained briefs and oral arguments in that case, no final opinion has been published to date. This Court lifted its stay in the present case on March 17, 2011.

SUMMARY OF THE ARGUMENT

The Fifth District certified conflict with another District Court of Appeal. This Court has jurisdiction to review pursuant to Florida Constitution, Article V, Section 3(b)(3) and Section 3(b)(4). However, such jurisdiction is discretionary rather than mandatory. The following consideration urges this Court to decline jurisdiction:

The certified conflict between the Districts pertains solely to interpretations of the "rear-end collision rule," a rule which states that in rear-end automobile collision cases there exists a presumption that the following driver was negligent. The interpretations given to this rule are discussed below. Regardless of which interpretation this Court confirms as being correct, the outcome of the instant case should not change. The circuit court will still have erred in granting summary judgment, given the unique facts present here. Since resolving the legal conflict existing among the jurisdictions should not affect the ultimate outcome of the instant case, this Court should decline jurisdiction. Instead, this Court should finalize and publish its opinion in Cevallos, which will resolve the conflict and will render moot the question of whether the Fifth District gave the proper interpretation to the rear-end collision rule. Godwin v. State, 593 So.2d 211,212 (Fla. 1992) ("An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect.").

ARGUMENT

THE PRESUMPTION OF NEGLIGENCE WHICH ATTACHES TO A FOLLOWING DRIVER INVOLVED IN A REAR-END COLLISION DOES NOT APPLY TO PASSENGERS SUCH AS PLAINTIFF, AND EVEN IF IT DID, SUFFICIENT EVIDENCE EXISTED TO REBUT THE PRESUMPTION

A. Overview

The Districts conflict in their differing interpretations of the "rear-end collision rule." In Cevallos, the Fourth District stated that a following driver involved in a rear-end collision is presumed to be the *sole* cause of the collision, and if the following driver cannot rebut the presumption then they are barred from pursuing a claim against the lead driver, regardless of whether evidence demonstrates the lead driver's negligence. In the case at bar, the Fifth District interpreted the rule to mean that the following driver's presumption of negligence is merely one of *comparative* fault, and even if the following driver cannot rebut the presumption, if record evidence demonstrates positive negligence on the part of the lead driver, then the following driver will be permitted to maintain a claim against the lead driver.

In the case at bar, a substantial portion of Petitioner's Jurisdictional Brief argues that the Fifth District's opinion conflicts with Cevallos. However, Defendant fails entirely to discuss how resolution of that conflict will impact the ultimate outcome of this case. Given our unique facts, as recognized by the Fifth District, resolution of the certified conflict should seemingly not challenge the propriety of the decision by the appellate court to reverse and remand.

B. The Presumption of Negligence Did Not Apply

Here, Plaintiff was a passenger riding on a motorcycle operated by Smith. (A2). The presumption that a rear-end collision following driver is negligent, does *not* apply to passengers of the following driver. As the appellate court below stated: "The presumption clearly does not apply where a passenger of the following vehicle sues the lead driver for his negligence." (A8). In a footnote, the Fifth District 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). (A8).

Distinguishing Cevallos, the Fifth District stated:

> Cevallos is different from this case because the plaintiff in that case was the following *driver* in a rear-end collision. The Cevallos court found that "public policy" mandated a rule that the following driver be deemed the sole cause of the collision, notwithstanding that its proportional negligence might be minor. If the following driver cannot show the lead driver suddenly stopped at a location he could not anticipate, then the following driver will be deemed the sole cause of the accident, without regard to any negligence of the lead driver. ... Even if the Cevallos court is right ... *the presumption still would have no application to an injured third party*. (A9) (second emphasis added).

While conflict exists regarding whether precedent, particularly Clampitt v. D.J. Spencer Sales, 786 So.2d 570 (Fla. 2001), has carved out an exception to

comparative negligence principles in the context of a rear-end collision, no conflict exists over the question of whether that presumption imputes to innocent passengers who exercise no control over the following vehicle. The case law affirmatively states that the presumption does *not* apply to passengers. See Davis v. Sobik's Sandwich Shops, Inc., 351 So.2d 17 (Fla. 1977). It is even arguable that had this Plaintiff requested summary judgment herself, she may have been entitled to it. While admittedly, Salman v. Cooper, 633 So.2d 570, 573 (Fla. 4th DCA 1994), an opinion authored by this Court's learned Justice Pariente four years before joining the Supreme Court, is not factually similar to the case at bar, nevertheless the following language is persuasive when dealing with an injured passenger:

> [T]he plaintiff was an innocent passenger undisputedly free of any negligence. All of the parties responsible for this accident were joined in the lawsuit. ... There was no evidence that the accident, which caused the plaintiff's injury, was unavoidable or that the accident occurred as a result of intervening causes or reasons other than the negligence of one or more of the defendants. Under these circumstances, a directed verdict in favor of the plaintiff and against multiple defendants would have been permissible.

Regardless of such hypotheticals, given the Plaintiff's status as a passenger, the burden of rebutting the presumption was not one that Florida law required this Plaintiff to bare. As the case at bar did not necessarily turn upon the question of whether the presumption had been rebutted, one view of this matter is that the

remainder of the Fifth District's opinion was not necessary to find that the trial court's grant of summary judgment in Defendant's favor was error.

C. Record Evidence Rebutted the Presumption

Even if the presumption of negligence had applied to this Plaintiff, the Fifth District held that ample record evidence suggested that the Defendant was negligence in stopping in the time, place, and manner in which he did, such that the motion for summary judgment should have been denied. Applying a *de novo* examination to the evidence available to the trial court, the Fifth District stated:

> Under one view of the evidence, [Defendant] 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. [Defendant] stopped because Christie reached the intersection as [Defendant] reached the point of merger and [Defendant] was not sure what was happening. (A10).

The court continued, "There is a difference between stopping for a reason and unnecessarily stopping for a reason." (A10). As to whether Defendant's sudden stop should have been anticipated, the court stated:

> Based upon the evidence, it would seem that the question whether [Defendant'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 [Defendant] 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 unncessary stop. Entry of summary final judgment in his favor was error. (A11-12) (emphasis added).

Thus, even if the presumption of negligence did apply to this Plaintiff, which this brief strongly argues against, the presumption was adequately rebutted such that the grant of summary judgment in Defendant's favor was error.

CONCLUSION

The conflict between the Districts regards the interpretation of the "rear-end collision rule", and the final outcome of the instant case does not turn on that rule, given the unique facts present here. No matter which District's interpretation this Court affirms, the circuit court will still have erred in granting summary judgment, given that: (1) the Plaintiff was a passenger to whom the presumption did not apply, and (2) even if it did apply, the Plaintiff offered record evidence sufficient to rebut the presumption and thereby preclude summary judgment.

Respondent requests that this Court: (1) Decline to exercise its review jurisdiction over Charron v. Birge, 37 So.3d 292 (Fla. 5th DCA 2010), and (2) Accordingly, hold that the case be remanded to the circuit court for continuation of the lawsuit as ordered by the Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was furnished to Elizabeth C. Wheeler, Esquire, Elizabeth C. Wheeler, P.A., P.O. Box 2266, Orlando, Florida 32802-2266, by United States Mail, on this _____ of April, 2011.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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