IN THE SUPREME COURT
STATE OF FLORIDA

WARREN A. BIRGE,

Petitioner,

vs. CASE NO. SC10-__________

CRYSTAL D. CHARRON,

Respondent.
____________________________________/

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

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

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 motorcycle and sued Petitioner for negligence. (A.1-2) The trial court entered summary judgment for Petitioner, and Respondent appealed. (A.1) The Fifth District reversed, holding that the presumption of negligence that attaches to the following driver in a rear-end collision did not apply where the plaintiff was a passenger of the following vehicle. (A.8)

The accident occurred on U.S. Highway 17-92, at or near the juncture where it merges with Seminole Boulevard at Lake Monroe in Sanford, Florida. (A.1-2) Both the motorcycle and the car were traveling on 17-92. (A.2) The car was traveling a "[p]retty good ways" in front of Smith as he rounded a curve. (A.2) He looked down a crossover side road to make sure no one was coming and then looked up to find the car in front of him "stopped" or "just about stopped." (A.2) Smith was unable to stop, and the bike flipped. (A.2)

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 they were bound for

a collision because the two roads merged into a single lane. (A.2) Being cautious, 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.3) 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 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)

Justin Christie, the operator of the pickup, testified that when he came to the yield sign, he saw the car coming and slowed down. (A.3) According to Christie, the car slowed down and completely stopped. (A.3) That was when he heard the motorcycle hit. (A.4) Christie estimated that the motorcycle was approximately one and a half car lengths behind the car prior to the accident. (A.4)

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[1] 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

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

> 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 <u>Hunter</u> [<u>v. Ward</u>, 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) On a motion for rehearing Charron argued she should be allowed to present her case to a jury unless it could be said without reasonable men differing that she was the sole proximate cause of the accident or that the following driver was somehow the sole proximate cause of the accident. (A.6)

In its analysis the Fifth District referred to its prior decision in <u>Jefferies v. Amery Leasing, Inc.</u>, 698 So. 2d 368, 370-71 (Fla. 5th DCA 1997), in which it stated that the rear-end collision rule was developed when Florida was still a contributory negligence state and Florida subsequently departed from the contributory negligence doctrine. (A.7) The court concluded in <u>Jefferies</u> that there was "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"

and that "the fact that a rear driver is presumed negligent . . . should not operate to bar him from recovering proportional damages by establishing that the lead driver, too, was negligent." (A.7) The court applied this analysis in this case.

Construing this Court's decision in Clampitt as applying only to cases "where the lead driver sues the rear driver," the Fifth District held 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.7-8) The court characterized the issue in this case "properly framed" as being "not whether any 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.12) The court held 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 the Fourth District's 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.8-9 and 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 not apply 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.

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), as

well as the Third District's decision in Tacher v. Asmus, 743 So. 2d 157 (Fla. 3d DCA 1999). This Court should exercise its jurisdiction to resolve these conflicts.

ARGUMENT

This Court has jurisdiction under Article V, § 3(b)(4) of the Florida Constitution to review any decision of a district court of appeal "that is certified by it to be in direct conflict with a decision of another district court of appeal." This Court also has jurisdiction under Article V, § 3(b)(3) of the Florida Constitution to review any decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court or appeal or of the supreme court on the same question of law." Both of these provisions confer discretionary jurisdiction on this Court to review the Fifth District's decision in the instant case.

Direct conflict occurs when a court announces a rule of law which conflicts with a previous announcement or when a court misapplies a rule of law. *E.g.*, Aguilera v. Inservices, Inc., 905 So. 2d 84, 86 (Fla. 2005); Mancini v. State, 312 So. 2d 732 (Fla. 1975). The requirement for express conflict is satisfied if the opinion sought to be reviewed contains a discussion of the legal principles applied by the court. Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981). It is not necessary that a district court explicitly identify conflicting decisions. *Id.*

I. 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) This Court accepted jurisdiction to review Cevallos. *See* Case No. SC09-2238. Because Cevallos is currently pending in this Court, this Court should exercise its jurisdiction to also review the instant case.

In Cevallos the Fourth District held that the rebuttable presumption of negligence barred the claim of a rear-driver plaintiff against a lead-driver defendant. *Id.* at 664. The Cevallos court restated the 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. 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 could not reasonably be anticipated, the Fourth District affirmed a directed a verdict for the defendant. *Id.*

The Cevallos court applied the rebuttable presumption to bar the claim of a following driver against the lead driver in a rear end collision. The Fifth District held the presumption does not apply when the lead driver is the defendant. The Fifth District recognized that its decision expressly conflicts with Cevallos. (A.13) Its decision in this case expressly and directly conflicts with the Fourth District's decision in Cevallos.

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

This Court in Clampitt 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." 786 So. 2d at 575. This Court reiterated that the rebuttable presumption imposes the burden on the rear-driver defendant 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 Court emphasized that a "sudden stop" by the lead vehicle by itself will not 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 lead driver at a time and place not reasonably expected by the following driver that creates a factual issue. *Id.* at 574.

This Court did not suggest in Clampitt that the presumption of negligence on the following driver only applies in cases where the leading driver is the plaintiff. To the contrary, this Court stated in Clampitt:

> 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.*

Id. at 575 (emphasis supplied). This Court found it was 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 elimination of the presumption of negligence in cases where the leading driver is the defendant expressly and directly conflicts with the clear mandate of Clampitt.

III. The Fifth District's Decision Conflicts with Tacher v. Ausmus, 743 So. 2d 157 (Fla. 3d DCA 1999).

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 Fifth District acknowledged that this accident occurred as the Birge and Christie vehicles were approaching the merger point of two roads *at the same time*, but the court concluded the presumption of negligence on the part of the vehicle following Birge did not even apply. The Fifth District's decision thus expressly and directly conflicts with Tacher.

CONCLUSION

The Fifth District certified conflict with Cevallos. This Court has already accepted jurisdiction to review Cevallos. While the decision in Cevallos is consistent with both Clampitt and Tacher, the decision in the instant case conflicts with all three of these decisions. As it did in Cevallos, 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 13th day of September, 2010, to **Charles R. Stack,** High Stack Gordon, 525 Strawbridge Avenue, Melbourne, FL 32901, Attorney for Respondent; and **Nicholas P. Evangelo,** 234 North Westmonte Drive, Suite 3000, Altamonte Springs, FL 32714, Co-Counsel for Petitioner.

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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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