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 REPLY BRIEF

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PRELIMINARY STATEMENT

The record in the trial court shall be referenced by volume and page number as (R_.__). The record in the Fifth District Court of Appeal shall be referenced by page number as (5D.__). The Answer Brief will be referenced as (AB.__). The Initial Brief will be referenced as (IB.__).

ARGUMENT

This Court accepted jurisdiction in this case on the basis of conflict with both *Cevallos v. Rideout*, 18 So. 3d 661 (Fla. 4th DCA 2009), **and** *Clampitt v. D.J. Spencer Sales*, 786 So. 2d 570 (Fla. 2001). In the order accepting jurisdiction the Court explicitly directed the parties to address in their briefs the conflict with *both* of these cases. Respondent's Answer Brief discussed only the conflict between *Cevallos* and the Fifth District's decision in the instant case. Respondent made a few cursory references to *Clampitt*, but those references failed to even acknowledge the conflict. Those conflicts are addressed below.

I. THE PRESUMPTION OF NEGLIGENCE WHICH ATTACHES TO A FOLLOWING DRIVER IN A REAR-END COLLISION APPLIES WHEN A PASSENGER SUES THE LEADING DRIVER AND THAT DRIVER AFFIRMATIVELY PLEADS THE FAULT OF THE FOLLOWING DRIVER AS THE CAUSE OF THE PASSENGER'S DAMAGES.

Respondent recognized that this Court in *Clampitt* stated that the presumption of negligence on the part of the rear driver arose "out of necessity." (AB.1 n.2) The plaintiff in *Clampitt* was the lead driver, and this Court discussed the "necessity" for the presumption in that context:

> 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*, 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 573-574 (emphasis supplied). Respondent acknowledged that the "necessity" was 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." (AB.11) That evidentiary void is not present in other accident scenarios.

Despite her recognition of the "necessity . . . to fill the evidentiary void" on the part of the lead driver, Respondent argues that the presumption should not apply in this case because she was a passenger on the rear vehicle. (AB.7-10) Respondent's suggestion that the presumption was "imputed" to her by the trial court mischaracterizes both the issues raised on Petitioner's motion for summary judgment and the trial court's ruling. Petitioner moved for summary judgment on grounds that the undisputed facts showed that Respondent's driver was presumed to be negligent; that there was no evidence to rebut the presumption; and that Petitioner was not responsible for the accident as a matter of law. (R1.38-41)

In her first argument, Respondent attempts to support the Fifth District's conclusion that "the presumption of negligence of the rear driver that is available

to the lead driver does not affect the passenger's right to recover." (AB.8) The Fifth District cited *Davis v. Sobik's Sandwich Shops, Inc.*, 351 So. 2d 17 (Fla. 1977), as support, but *Davis* was decided nine years before the Florida Legislature enacted Section 768.81, Florida Statutes. *See* Ch. 86-160, §§ 60, 65, Laws of Fla.

The first version of Section 768.81 partially abrogated the doctrine of joint and several liability. § 768.81, Fla. Stat. (1986) The statute was subsequently amended several times, and when this accident occurred on February 25, 2007, Section 768.81(3) provided as follows:

> (3) APPORTIONMENT OF DAMAGES. – In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

See Ch. 2006-6, § 1, Laws of Fla. This provision took effect on April 26, 2006, and applied to causes of action that accrued on or after that date. *Id.* § 2.

Subsection 768.81(3)(a) required a defendant seeking to allocate any or all fault to a nonparty to plead the fault of that nonparty in the initial responsive pleading. In his answer to the complaint, Petitioner asserted that any losses and damages sustained by Respondent were not the direct and proximate result of any actions of Petitioner but instead were the natural consequences of the acts of Mr. Smith. (R1.7) Respondent filed nothing in avoidance of this affirmative defense. The negligence of Mr. Smith has thus always been an issue in this case, and

properly so under Section 768.81(3). *See Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993) (holding that the applicable version of Section 768.81(3) required the plaintiff's noneconomic damages to be reduced by the percentage that her husband's negligence contributed to the motor vehicle accident).

The cases cited by Respondent at pages 8 and 9 of her Brief do not apply to the instant case. Petitioner did not plead nor did the trial court rule that Mr. Smith's negligence should be "imputed" to Respondent. Moreover, all of those cases pre-dated enactment of Section 768.81.[1] Respondent has offered no reason why the presumption of negligence on the part of a following driver was not applicable to Petitioner's affirmative defense based on Section 768.81.

Petitioner had the burden of proof on his affirmative defense. As to that issue, Petitioner was in the same evidentiary posture as a lead-driver plaintiff. The "necessity" for the presumption was thus the same as that recognized by this Court in *Clampitt*. The presumption filled an evidentiary void because Petitioner knew something happened behind him but did not know what or why. (R3.376)

The Fifth District's conclusion that the presumption does not apply where a passenger of the following vehicle sues the lead driver for his negligence conflicts

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The most recent of those cases, *James A. Cummings Inc. v. Larson*, 588 So. 2d 1066 (Fla. 4th DCA 1991), was decided five years after Section 768.81 was enacted by Chapter 86-160. Although the date of the accident is not mentioned in *Larson*, the opinion shows that Section 768.81 was not an issue in that case.

with *Clampitt* as well as *Cevallos*. *Clampitt* both explained the reasons for the presumption and applied it in that case. *Cevallos* followed *Clampitt* in applying the presumption to a rear-driver plaintiff.

II. THE FIFTH DISTRICT'S DECISION CONFLICTS WITH *CLAMPITT'S* CLEAR DIRECTIVE, FOLLOWED BY *CEVALLOS*, THAT NEGLIGENCE OF THE FOLLOWING DRIVER IS NORMALLY THE SOLE PROXIMATE CAUSE OF A REAR-END COLLISION.

The *Clampitt* Court reviewed the evolution of the rebuttable presumption and the burden that is placed on the rear driver:

> 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.

Clampitt, 786 So. 2d at 573 (emphasis supplied). The Court reiterated that the burden is on the rear driver to come forward with evidence that "fairly and reasonably tends to show" that the presumption of negligence is misplaced. *Id.* The Fifth District completely ignored this burden, which was rightfully Respondent's under the circumstances of this case.

As discussed in Petitioner's Initial Brief, there was no evidence tending to show that Mr. Smith was *not* negligent. (IB.20) Mr. Smith took his attention away

from the road in front of him to look down a cross street. (R2.243) He knew that traffic came from Seminole Boulevard but did not look at Seminole Boulevard to see if a car was coming. (R2.244-45, 246-47, 275, 307) He did not see the Christie vehicle approaching the merger point with U.S. 17-92. (R2.242) He did not see Petitioner's vehicle illuminate its brake lights, did not see Petitioner's vehicle slow down, and did not see Petitioner's vehicle stop. (R2.243, 269, 306)

Smith testified that after he had fully passed the side street, he looked up and saw the car in front of him was "just about stopped, and far enough away. It was a good ways in front (sic) me." (R2.243) He was driving on the right side of the lane of travel, near the curb. (R2.249-50) He started downshifting and trying to stop when he was three to four car lengths behind Respondent's vehicle and traveling 30 miles an hour. (R2.247-48, 253) After he downshifted and tried to stop, he tried to go to the left to get away. (R2.247)

When he hit the brakes, the motorcycle started sliding sideways. (R2.247-48) He tried to lay the motorcycle down going toward his left. (R2.247, 252) The bike flipped and landed on top of Respondent. (R2.252, 309) Smith ended up in the middle of the roadway, six or eight feet from the car. (R2.253, 308) The car was still within the two lines of the northbound lane. (R2.268, 273)

It was undisputed that the accident happened more or less in front of the yield sign, where Seminole Boulevard and U.S. 17-92 merge. (R3.382, 417-18,

425) Respondent's vehicle did not stop so abruptly as to leave skid marks. (R3.351, 387) Respondent was actually proceeding forward and was passing the yield sign when he heard a thump on the left behind him. (R3.376)

Mr. Smith's actions are remarkably similar to those of the rear driver in *Clampitt*, which this Court deemed insufficient to rebut the presumption of negligence on the part of the following driver. The only difference between this case and *Clampitt* is that the following driver in *Clampitt* appeared to have been "'asleep at the wheel' of a seventy-six thousand pound vehicle traveling at fifty miles an hour." 786 So. 2d at 575. In the instant case, Mr. Smith was oblivious to his surroundings while traveling at thirty miles an hour on a motorcycle with no protection between him and his passenger and the roadway.

As in *Clampitt* and *Cevallos*, the facts in this case, when viewed in the light most favorable to Respondent, show nothing more than an "abrupt stop" on the part of Petitioner. It was Respondent's burden to show something more than an "abrupt stop" by Petitioner's vehicle in order to rebut the presumption that negligence of Mr. Smith was the sole proximate cause of this accident:

> 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.

Clampitt, 786 So. 2d at 574 (emphasis supplied). In the instant case the Fifth District did not analyze the facts according to this evidentiary standard. The Fifth

District did not review the evidence to determine whether Petitioner stopped "at a time and place where it could not reasonably be expected *by the following driver*."

Instead of analyzing the facts under this standard, the Fifth District determined that "the inquiry is not whether Smith should have anticipated Birge's sudden stop, but whether Birge's sudden stop on 17-92 was negligent." (5D.82-83) The Fifth District concluded that "under one view of the evidence, [Respondent] 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." (5D.83) This conclusion was contrary to the evidence because there was no testimony from which it could be inferred that Respondent "believ[ed] Christie had the right-of-way." Respondent testified that he slowed as he approached the merger point because it looked to him as though he and Christie "were bound for a collision." (R.3.375-376)

The Fifth District went on to say, "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." (5D.83) If this is a correct statement of the law, it places Florida drivers in an impossible quandary. While Justin Christie knew what he was doing, Respondent did not. Under the Fifth District's rationale, Respondent not only was required to

guess what Christie was doing but also to guess correctly what Christie was going to do. No reasonable person should or could be required to meet such a standard.

Petitioner testified that, before he slowed down, he looked in both the rearview mirror and the side view mirror and there was nothing in sight. (R3.376) This testimony is consistent with Mr. Smith's testimony that he drove the motorcycle along the right side of the travel lane, near the curb. (R2.249-50) Even if the motorcycle had been visible, should Respondent have been required to correctly and instantaneously decide whether to proceed forward and potentially collide with the Christie vehicle or to stop and possibly be hit from the rear?

There is simply no evidence in this case to create a factual issue as to whether this accident was caused by anything other than Mr. Smith's failure to follow at a reasonable distance behind Petitioner's vehicle, as required by *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.

Clampitt, 786 So. 2d at 575-76 (emphasis supplied), quoting from *Lynch v. Tennyson*, 443 So. 2d 1017, 1020-21 (Fla. 5th DCA 1983) (Cowart, J., dissenting). In this case the Fifth District characterized the statement that failure to maintain an adequate zone within which to stop "is normally the sole proximate cause" of a rear end collision as "dicta, likely from decision that predated the adoption of comparative negligence." (5D.82) Respondent argues that the "*McNulty*" presumption arose before this Court adopted comparative negligence. (AB.13)

The words "sole proximate cause" do not appear anywhere in *McNulty v. Cusack*, 104 So. 2d 785 (Fla. 2d DCA 1958). Judge Cowart's dissent in *Lynch*, quoted above, appears to be the first mention of a rear driver's presumed negligence as the sole proximate cause of a collision with an object ahead.[2] *Lynch* was decided in 1983, a decade *after* this Court in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), adopted comparative negligence. Therefore, the "sole proximate cause" analysis was *not* the product of the contributory negligence doctrine.

Judge Cowart provided cogent reasoning in *Lynch* for why a rear driver's presumed negligence should be deemed the sole proximate cause of a collision with the leading vehicle:

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[2]This is not to say that cases decided under the contributory negligence rule did not hold as a matter of law under the circumstances that a rear driver's negligence was the sole proximate cause of an accident. *See, e.g., Jackson v. Harrell*, 171 So. 2d 633 (Fla. 1st DCA 1965).

> Drivers can control the distance between themselves and the car ahead but cannot effectively control the distance to the car behind them and the law should put no burden on them to do so.

443 So. 2d at 1024. The pragmatism of this statement is obvious. In the context of this case, Mr. Smith could effectively control the distance between his vehicle and Petitioner's, but Petitioner could not. The law should put no such burden on him.

The issue before the court in *Lynch* was whether or not Lynch was the sole cause of a collision with Tennyson. 443 So. 2d 1018. Tennyson stopped suddenly, having collided with the rear of the car in front of her. *Id.* The majority concluded there was "an available inference" that Tennyson's sudden stop occurred because she was driving too close to the car in front of her and thus contributed to some degree to the second impact by Lynch's vehicle. *Id.* The majority reversed the summary judgment in favor of Tennyson. *Id.* at 1019.

Some eight years later, a majority of all the judges of the Fifth District receded from the opinion in *Lynch*. In *Pierce v. Progressive American Insurance Co.*, 582 So. 2d 712 (Fla. 5th DCA 1991) (en banc), which also involved a chain of collisions, the Fifth District implicitly adopted the reasoning of Judge Cowart's dissent in *Lynch*. The court held in *Pierce* that the presumption of negligence arising from the collisions ahead could not benefit Pierce, who was the last driver

in the chain. *Id.* at 714. The court rejected the argument that a jury question was presented because the vehicles ahead of Pierce came to abrupt stops:

> The fallacy in that argument is that it oversimplifies the burden placed upon the rear driver to overcome the presumption of negligence against him. 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.

Id. (citations omitted). This Court approved this reasoning. *Clampitt*, 786 So. 2d at 784.

Respondent argues that the Fifth District's opinion provided an example of a situation which "could" arise where a rear driver is unable to rebut the presumption but is still able to produce evidence suggesting the lead driver's negligence was a cause of the collision. (AB.14) The Fifth District's "example" was an extreme situation which was far removed from the facts of this or any other reported case located by the undersigned. (5D.81 n.6) It is difficult to believe that such outlandish facts would not rebut the presumption. If a similar fact situation ever presents itself, then that case may be an appropriate one in which to address applicability of comparative negligence when the presumption of negligence on the part of the following driver is unrebutted. This was not such a case.

In this case the Fifth District concluded that summary judgment in favor of Petitioner was improper because there was "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." (5D.85) This finding implicitly holds that Petitioner owed a legal duty to Respondent to guess what was on Christie's mind and to correctly choose between proceeding through the intersection and potentially colliding with Christie or to stop and be hit by a vehicle which might possibly be coming from behind, exposing himself to liability under either situation. The law should not require any motorist to make such a Hobson's choice at the risk of being held liable for choosing incorrectly, especially when any following vehicle should have ample distance to stop.

In the instant case the Fifth District stated that it found nothing in *Clampitt* that the presumption was created in furtherance of some "public policy" against rear-end collisions. (5D.82) To the contrary, *Clampitt* made it clear, as recognized in *Cevallos*, that the very reason for the presumption is to further the 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." *Clampitt*, 786 So. 2d at 575-576 (quoting Judge Cowart's dissent in *Lynch*); *Cevallos*, 18 So. 3d at 664. Additionally,

> Each driver must be prepared to stop suddenly . . . . 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.

Clampitt, 786 So. 2d at 576.

Contrary to the Fifth District's dicta finding it "odd that even drunk drivers get a better break than do following drivers," the presumption does not have such an effect. The Fifth District cited Section 768.36, Florida Statutes (2009), for this proposition. (5D.82) However, Section 768.36 precludes a plaintiff from recovering *any* damages if at the time the plaintiff was injured he or she was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired, or the plaintiff had a blood or breath alcohol level of 0.08 percent or higher, and as a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm. This statute presents a bright line beyond which a drunk-driver plaintiff could recover *no* damages. The presumption of negligence on the part of a rear driver is not so harsh, as it is rebuttable. If a rear-driver plaintiff is able to rebut the presumption, then principles of comparative negligence would apply in that case and the plaintiff could recover proportionate damages.[3]

[3]Respondent asserts that *Cevallos* is in direct conflict with two prior decisions from the same Fourth District (AB.17) but fails to acknowledge that the Fifth District's decision in the instant case is in conflict with its prior en banc decision in *Pierce*.

Public policy would be promoted by adhering to the rebuttable presumption that a rear driver's failure to stop in time to avoid a collision with a leading vehicle is normally the sole proximate cause of the collision. As this Court noted in *Clampitt*, 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. The presumption does not violate comparative negligence principles, because rebutting the presumption deposits the case with the fact finder to reconcile conflicts in the evidence and evaluate the credibility of the witnesses and the weight of the evidence. *Clampitt*, 786 So. 2d at 573.

CONCLUSION

The Court should quash the Fifth District's decision, approve *Cevallos*, confirm that the presumption of negligence applies when the defendant was the leading driver and the plaintiff was the driver or a passenger in the rear-ending vehicle, and that principles of comparative negligence do not apply when the presumption is not rebutted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of Petitioner's Reply Brief were mailed this _____ day of July, 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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