IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY,

Appellant,

v.

JOSEPH POPLAWSKI, Individually, and BARBARA ROSENBLOOM, his wife, DAVID W. SCHROEDER, as Personal Representative of the Estate of GAIL S. SCHNELL, SUSANA ALCALA, MARIE ELSTON and WALTER ELSTON,

Appellees.
_____/

CASE NO.: 1D2023-3363
L.T. CASE NO.: 2021-CA-437

ANSWER BRIEF BY APPELLEES DAVID W. SCHROEDER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GAIL S. SCHNELL AND SUSANA ALCALA

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT IN AND FOR TAYLOR COUNTY, FLORIDA

MARKS GRAY, P.A.

RHONDA B. BOGGESS
Florida Bar No. 822639
1200 Riverplace Blvd., Suite 800
Jacksonville, FL 32207
rboggess@marksgray.com
cthomas@marksgray.com
Telephone: (904) 398-0900
Facsimile (904)-399-9440
Appellate Counsel for Defendants David W. Schroeder, as Personal Representative of The Estate of Gail S. Schnell and Susana Alcala

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF CASE AND FACTS

A. The Final Judgment and the Appellant

On appeal is an "Order Granting Defendants Schroeder and Alcala's Motion for Final Summary Judgment and Incorporated Order of Final Judgment" (hereinafter "Final Judgment") in favor of Defendants/Appellees David W. Schoeder, as Personal Representative of The Estate of Gail S. Schnell and Susana Alcala (hereinafter the "Alcala Defendants"), as to the claims asserted against them by Plaintiffs/Appellees Joseph Poplawski and Barbara Rosenbloom, his wife (hereinafter "Plaintiffs/Appellees") in Counts I and IV of the Complaint. (R.14, 15-18, 411-418).

Plaintiffs/Appellees did not appeal the Final Judgment unfavorably resolving their claims against the Alcala Defendants, nor did they file a notice of joinder in the appeal. (R). Instead, the Final Judgment was appealed by another Defendant, Allstate Fire and Casualty Insurance Company (hereinafter "Allstate"). (R.429-442).

B. The Pleadings and Parties Pursuant to the Complaint

Plaintiffs/Appellees asserted tort claims arising out a multi-car rear-end accident that occurred in September of 2017, in stop and go or slow-moving traffic attempting to evacuate from Hurricane Irma. (R.14-18, 158,

270-71, 344). The Plaintiff's Complaint alleged negligence by driver Alcala, driver Elston, and a phantom driver. (R.14-16).

1. Count I – Resolved by the Judgment on Appeal

In Count I of the Complaint, Plaintiffs/Appellees asserted a negligence claim against Gail S. Schnell, as the owner of an accident vehicle, and Defendant Alcala as operator of the Schnell vehicle. (R.14-15). While the Complaint alleged that the Alcala vehicle collided with Plaintiffs' vehicle (R.14), the Alcala vehicle was the third car of four in the chain reaction accident. (R.160-61, 200-201, 203, 270, 310, 344). Thereafter, Mr. Schoeder as Personal Representative of the Estate of Gail S. Schnell was substituted as a defendant for the deceased Ms. Schnell. (R.63).

Defendant Susana Alcala filed her answer to Count I, which included a denial of all liability, and asserted, in part, affirmative defenses that the sole legal cause of the plaintiff's injuries and damages was the result of negligence of third parties for whom the defendant had no control or supervision so that the plaintiff is barred from recovery, (R.47), as well as pled the Court should enter judgment on the basis of each party or non-party's percentage of fault, citing section 768.81, Florida Statutes, and *Fabre v. Marin.*[1] (R.48). Plaintiffs/Appellees denied the affirmative defenses and

[1] *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

did not file any motion directed to the answer and affirmative defenses of Ms. Alcala. (R.51).

David Schroeder, as personal representative of the Estate of Gail S. Schnell, answered the Complaint denying liability, and asserted affirmative defenses, including "investigation, discovery or both may establish" that acts of a "third party or parties were the sole proximate cause of the accident" or a contributing proximate cause of the accident such that recovery would be reduced in direct proportion to their negligence pursuant to section 768.81, Florida Statutes (R.66-67). The Personal Representative also asserted that the Plaintiff Poplawski's damages "were caused directly and proximately in whole or in part, by the negligence, fault and acts of other person, parties or entities, over which this Defendant had no control, or other third parties which are presently unknown, but which may be revealed during the normal course of discovery," citing *Fabre* and *Nash v. Wells Fargo Guard Services, Inc.*, 678 So. 2d 1262 (Fla. 1996), with Mr. Shroeder reserving the right to amend the defense "with respect to liable non-parties." (R.68). Plaintiffs/Appellees did not file any motion directed to the answer and affirmative defenses. (R.)

2. Count II against the Elstons

Count II of the complaint was against Defendants Maria Elston and Walter Elston. (R.15-16). Walter Elston was driving another vehicle involved

in the collision, and the vehicle was alleged to have been owned by Maria Elston. (R.15). While the Complaint alleges that the Elston vehicle hit the Schnell vehicle which hit the Plaintiffs/Appellees' vehicle (R.15), the Elston vehicle was thereafter identified in depositions as the second vehicle. (R.165, 200-01, 203, 270, 310-11).

In their answer the Elstons, who were represented by counsel, alleged as an affirmative defense that "the driver of a phantom vehicle involved in the subject accident, was negligent, and that driver's negligence was the sole proximate cause" or alternatively "the negligence of the unknown driver, contributed to producing at least a portion of" Plaintiff Poplawski's injuries and damages and "his recovery should be reduced in proportion to the unknown driver's negligence," as well as that Ms. Alcala was the sole or contributing cause of the accident. (R.32). Plaintiffs/Appellees denied the affirmative defenses and did not file any motion directed to the answer and affirmative defenses. (R.36)

Count II was not resolved by the Judgment on appeal, and the Elstons did not file any papers or present any arguments as to the summary judgment at issue or appear to participate in this appeal.

3. Count III against Allstate

Plaintiffs/Appellees asserted claims against Appellant Allstate in Count III of the Complaint seeking to recover uninsured/underinsured motorist benefits from their insurance policy with Allstate arising from damages in the September of 2017 accident. Specifically, Count III against Allstate seeks underinsured/uninsured motorist coverage benefits for injuries to Joseph Poplawski on the basis of:

> A. Wherein Defendant, Gail S. Schnell, owned a motor vehicle operated by Susana Alcala, both of whom had insufficient liability insurance coverage through their insurance carrier to fully compensate the Plaintiff's for their damages; and/or
>
> B. Wherein Defendant, Marie Elston, owned a motor vehicle operated Walter Elston, both of whom had insufficient liability insurance coverage through their insurance carrier to fully compensate the Plaintiff's for their damages; and/or
>
> C. Wherein there was a phantom vehicle which caused all or a portion of the accident. (R.16-17)

Thus, the Plaintiffs/Appellees seek to recover uninsured/underinsured motorist benefits from Allstate for damages caused by not only the Alcala Defendants, but also the Elstons, or the "phantom vehicle which caused all or a portion of the accident." (R.17)

In response to Count III, Defendant Allstate answered the Complaint, asserted affirmative defenses, and moved to strike the demand for attorney's fees. (R.22-27). The allegation by Plaintiffs/Appellees that a phantom

vehicle caused "all or a portion of the accident" was not the subject of a motion to strike, motion for more definite statement, or motion to dismiss by Allstate. (R.22-27).

4. Count IV – Consortium Claim

Count IV was a loss of consortium claim by Ms. Rosenbloom against all defendants. (R.18).

C. Deposition Testimony by the Plaintiffs/Appellees and the Elstons

Plaintiff Mr. Poplawski when asked about the accident in his deposition said, "we were on the way to Mississippi running from the hurricane, and we were stopped in traffic, and then I got rammed from the back, rear ended." (R.158). He said that the traffic was stop and go but he was stopped at the time. (R. 158). At the time of the accident Mr. Poplawski had "turned towards my wife to ask a question or to speak to her or whatever and that was the moment of impact when I was looking at my wife". (R.162). He was not looking in the rear-view mirror (R.200).

When asked, he could not state what kind of vehicle hit his car, other than to say that it was the one behind him. (R.200). He did not see the vehicle behind him or the vehicle behind that vehicle before the accident happened. (R.207-08)(*see also* R.159-60). Only after the accident did he notice or see any vehicle involved in the accident. (R.205, 208)

The accident occurred in the left lane (R.205), and after the accident, cars pulled over. (R.199). Mr. Poplawski thinks he pulled off the road "right after the collision." (R.199). The first time he "noticed the other vehicles that were involved in the accident" was after the accident happened. (R.205). The Alcala vehicle and Elston vehicles stopped and pulled over, and he spoke with Ms. Alcala and Mr. and Mrs. Elston. (R.159-60, 165).

When asked about his "understanding" of how many cars were involved, he said three, as he only saw his car and the two cars behind him which were the "only cars that stopped after the impact." (R.160). He stated "people were talking about a fourth car," but explained, "I really don't have any understanding. I didn't see one, so I don't know." (R.161).

Mr. Poplawski did not know of any negligent act that Ms. Alcala did to cause the accident (R.161). When he checked if the occupants of the car were all right, he stated, "I believe she [Ms. Alcala] said she was sorry and words to that effect. But I didn't think much of it at the time. It's an accident." (R.161). When Mr. Poplawski was asked if he observed any rear-end damage to the Alcala vehicle, he stated that he went behind the vehicle "to look at the license plate to make a note of it, and I didn't see any noticeable damage. But then again, I was looking at the license plate to make sure I had it." (R.206).

In her deposition Mr. Poplawski's wife, Ms. Rosenbloom, testified she did not see the car that rear ended the car she was in before the accident and did not see any of the vehicles involved in this accident before the impact. (R.231). She had no personal knowledge of the number of cars stating "the only understanding I have is what I've heard is because I didn't get out of the car. I just stayed in the car, so I've heard there were three, I've heard there were four. I don't know. I really don't know." (R.231). When asked, "[d]o you know which car started this chain reaction of impacts," she responded, "No, I don't. I have no way of knowing." (R.232). When asked what negligent act Ms. Alcala did to cause the accident, she said, "I don't know. I have no idea." (R.232). She really had no understanding what caused the accident (R.250) and when asked if a car involved in the accident left the scene explained, "I don't remember observing any cars around me." (R.252).

The Elstons were in the second vehicle, travelling in the left lane with a right lane to their right. (R.282). Mr. Elston did not know what the traffic was doing in the right lane before, during, or after the accident. (R.280-81). Mr. Elston stated that they were in the left lane in "very slow-moving traffic" "stop-and-go kind of" (R.270) when they were "struck from behind which pushed us forward into the truck in front of us." (R.270). Mr. Elston confirmed

that he did not see the SUV that struck his vehicle before the impact (R.272), and he could not identify a negligent act of Ms. Alcala that caused the accident or articulate what she could have done differently to avoid the accident. (R.273). He does not remember the vehicle behind him. (R.283).

When asked what his "understanding" was of how many vehicles were involved he said three vehicles were involved, and he did not have "any recollection or knowledge about" a fourth vehicle although he "understood that the driver of the SUV claimed that." (R.272). When asked if it is "possible there's four cars that were involved in this accident, but only three stopped," he answered, "I can't answer that. Anything's possible." (R.272). After the accident he explained,

> we all moved into the median strip, and of course, vehicles moved up, filling the empty space. And after that, I really wasn't paying attention to what the traffic was doing. (R.273)

After the accident, Mr. Elston was not looking over to see what the traffic in the right-hand lane was doing. (R.282-83).

Mrs. Elston, who was a passenger in the car being driven by Mr. Elston, also stated that they were hit from behind and pushed into the truck in front of her (R.308). She does not recall the vehicle moving at the time of the accident but "if we were, it was at a crawl." (R.309). She was looking down at her phone when the accident occurred. (R.330). She did not see the

vehicle before impact, and when asked to describe the vehicle that rear ended her, she said, “I have no idea” other that it was “sedan maybe.” (R.310). She does not know what Ms. Alcala did wrong or could have done to avoid the accident, other than “[N]ot hit us.” (R.311). When asked her understanding of how many cars were involved, she answered, “[w]ell three; the one that hit us and then the car that we were pushed into, the truck we were pushed into. And the car that hit us said that another vehicle was involved somehow, and I don’t understand what that implication was.” (R.310). She knew three vehicles were involved, the “three that stopped,” but she heard of a fourth. (R.310). She did not look at the back of the car that was behind her. (R.331). She said the traffic going north was pretty much the same but did not recall information about traffic in the right lane. (R.315).

D. The Alcala Defendants’ Motion for Final Summary Judgment and the Opposition by Allstate, Joined by the Plaintiffs/Appellees

The Alcala Defendants moved for an order granting final summary judgment in their favor as to Count I and Count IV of the Complaint against them, asserting there were no genuine issues of fact, and the Alcala Defendants were entitled to summary judgment as a matter of law. (R.110-345). The motion asserted that, as set forth in affirmative defenses, intentional, negligent or reckless acts of a third, unknown party or parties

were the sole proximate cause of the accident. (R.110, citing R.49, 67-68). The motion was supported by the Complaint allegations (R.111), Plaintiff Poplawski's answer to David Schroeder's interrogatory number eight (R.111), Plaintiff Poplawski's deposition testimony, (R.111), plaintiff Barbara Rosenbloom's deposition testimony (R.111), Co-Defendant Walter Elston's deposition testimony (R112), Co-Defendant Marie Elston's deposition testimony, (R.112) and Defendant Alcala's sworn affidavit. (R.113, 344). The interrogatory answer, deposition transcripts, and the Alcala affidavit were attached to the motion. (R.118-345).

Ms. Alcala in her affidavit filed in support of the summary judgment motion averred based upon "personal knowledge" that the Schnell vehicle she was driving, a 2013 Honda Odyssey, "was impacted from the rear by another car" and the "impact of the other vehicle caused the 2013 Honda Odyssey to be pushed into the car in front of us." (R.344). She does "not know who was operating the vehicle that rear-ended our car," and the "vehicle that impacted our car fled the scene without stopping." (R.344). She stated that there was nothing she could do to prevent the accident, and but for the car rear-ending her car, "this accident would never have occurred." (R.344).

The defense of the summary judgment was primarily propounded by defendant Allstate with the Plaintiffs/Appellees adopting defendant Allstate's response. (R.346-357 357-58). The opposition to the summary judgment relied upon the same depositions as the Alcala Defendant's motion. (R.346-357, citing 160-61, 203, 206, 208, 231, 252, 272-73, 283, 314, 316, 330).

In response, the Alcala Defendants moved to strike Allstate's response to the motion for final judgment, arguing that it lacked standing to file a response as it was not an adverse party to the claims at issue. (R.359-362).

The Alcala Defendants also replied to Allstate's contention that material facts existed as to the failure to identify the "phantom vehicle" and the argument that the "purported lack of evidence of any 'noticeable damage' to the 2013 Honda Odyssey" created an issue of fact. (R.362). The reply argued that these assertions were not material. (R.363, 365). The reply contended the argument as to no damage was not only immaterial but also "incorrect," citing photographs and repair estimates as to the Schnell vehicle provided in discovery to Plaintiffs/Appellees (R.365-66), with documents attached to the reply. (R.369-405).

Allstate then moved to strike the Alcala Defendants' "Motion to Strike," arguing that the exhibits to the document were not timely served with the summary judgment motion. (R.406-11). The "motion to strike" also asserted

that Allstate had standing and was an "adverse party to Co-Defendant Alcala and the Estate of Gail S. Schnell" since "Co-Defendant has alleged a phantom vehicle caused the accident" and "Allstate would have had a legal contractual obligation as to the specifically identified vehicle and would stand in the shoes of the alleged phantom vehicle at trial." (R.409).

At the hearing, counsel for Defendants/Appellees acknowledged that "given the fact that Plaintiffs have adopted their [Allstate's] response," the argument at the hearing would "focus" on the motion for summary judgment. (SR.532). During the hearing Allstate orally moved to strike the affirmative defenses filed by the Alcala Defendants for failure to describe with specificity the phantom vehicle (SR.544) and contended the photographs and repair estimates were not timely submitted under the rule and were not "qualified." (SR.537-38). While the argument at the hearing was made by Allstate's counsel, Plaintiffs' counsel adopted the arguments by Allstate. (SR.545). During the hearing the Court stated that it would view the photographs and repair estimate as a proffer. (SR.548).

The Court granted the summary judgment in favor of the Alcala Defendants and entered Judgment in their favor on November 16, 2023. (R.416-419). The Court, after viewing the evidence most favorable to the non-moving party, found that there is "no genuine issue of material fact that

Defendant Alcala operated the 2013 Honda Odyssey in a reasonably safe manner so as to avoid collisions with forward objects before she was impacted by an unknown vehicle" as the vehicle was "impacted from the rear by an unknown third party." (R.416). The Order states the accident "was the result of the unknown driver rear-ending Defendants' 2013 Honda Odyssey causing the 2013 Honda Odyssey to be pushed into the vehicles in front of them." (R.416). The Court also found that the failure of any party to establish the identity of a driver and vehicle does not prohibit the Court from finding the unknown driver negligent and the sole and proximate cause of the accident. (R.416-17). The Court reasoned that the Plaintiffs/Appellees and Allstate did not present affirmative evidence that "disputes the above facts supported by the documents, deposition transcripts, and affidavits of the record and presented to the Court," and their arguments were based upon "nebulous theories" insufficient to defeat summary judgment. (R.417).

Plaintiffs/Appellees timely served a Motion for Rehearing and/or Reconsideration on November 27, 2023. (R.419-21). The Motion asserted the Court "erred in applying the facts to the law in this case," that "there is absolutely no evidence to support" that another vehicle was involved, arguing no other party or witness "observed any vehicle leaving the scene" and "it would have been impossible" for the phantom vehicle to have struck

the rear of the Schnell vehicle and "then leave the scene without having at least one person involved in the accident or single witness observing the vehicle fleeing," there "should be or would be some significant damage" to the Schnell vehicle driven by Alcala, and the "question of whether there was a phantom vehicle" was sufficient to create a jury question. (R.419-420).

After the time had passed to serve a motion for rehearing, Defendant Allstate on December 5, 2023, filed a notice of joinder and adoption of argument of Plaintiffs' rehearing motion, which "joinder" added the contention that the Alcala Defendants had not "properly pled the *Fabre* affirmative defense" and the "credibility of Susan Alcala and evidence to include photographs of all vehicles involved should be considered by the jury in determining whether there was enough/any damage to cause a four car rear end accident." (R.423-24).

Thereafter on December 18, 2023, Allstate filed a "supplemental memorandum of law in support of rehearing" which not only argued that the court improperly determined a disputed question of material fact and "Alcala did not specifically identify the *Fabre* defendant – the phantom vehicle in the answer and affirmative defenses," but also argued that the Court considered inadmissible evidence of the repair estimates and damage. (R.443-448).

The Alcala Defendants filed a response to the Motions for Rehearing (R.454-65), which addressed the timely arguments by Plaintiffs which arguments were adopted by Allstate (R.455-58) and asserted that arguments presented only by Allstate, and which were not timely presented by Plaintiffs/Appellees, could not be considered. (R.459-462). The response also contended that Allstate had no standing to complain about affirmative defenses asserted as to Plaintiffs/Appellees' pleading, which affirmative defenses have not been stricken. (R.461-62).

Allstate, but not Plaintiffs/Appellees, filed a reply in support of the Motion for Rehearing presenting arguments as to the rear-end presumption. (R.465-69). After a hearing in which the Court heard arguments, with Plaintiffs/Appellees "deferring to the argument of Allstate" (R.479), the Court denied both Plaintiffs/Appellees' and Allstate's motions for rehearing. (R.515-16). Allstate had timely appealed the Final Judgment prior to rendition. (R.228-42). Plaintiffs/Appellees did not join in the appeal. (R).

SUMMARY OF ARGUMENT

At issue is a summary judgment and resulting Final Judgment in favor of the Alcala Defendants Susana Alcala and David W. Schroeder as Personal Representative of the Estate of Gail S. Schnell as to the negligence claims bought against them by Plaintiffs/Appellees Joseph Poplawski and Barbara Rosenbloom in Counts I and IV of the Plaintiffs/Appellees' Complaint. (R.411-18). Plaintiffs/Appellees are not attacking the validity of the Final Judgment entered against them. Allstate has not asserted a claim against the Alcala Defendants, and the claims against it seeking uninsured/underinsured benefits for damages caused by Ms. Schnell, Mr. Elston, or a phantom motorist remain pending. (R.16-17). Allstate has no standing to appeal the Final Judgment in favor of the Alcala Defendants as it has asserted no crossclaim, contribution claim, or subrogation claim against them, and the Final Judgment did not affect its right to plead a *Fabre* defendant. Accordingly, this Court should dismiss the appeal.

Alternatively, this Court should affirm the Final Judgment as the undisputed material facts establish that the sole proximate cause of the accident in question was the actions of a phantom vehicle motorist which impacted the vehicle Ms. Alcala was driving owned by decedent Schnell. Ms. Alcala was the third car in the multi-car collision, and she averred under oath

in her affidavit that the car she was operating was impacted from the rear by another vehicle with the impact causing her car to be pushed into the car in front of her, and there was nothing she could do to prevent the accident. (R.344). She averred the phantom motorist left the scene without stopping (R.344), a statement consistent with the testimony of witnesses that only three cars pulled over into the median after the accident. (R.205, 272, 310). The driver and passenger in the car in front of her, the Elstons, did not see any vehicle before the accident, and their knowledge of the vehicles involved only came from the three vehicles that pulled over after the accident. (R.272, 283, 309-10). The Elston vehicle impacted the Plaintiffs/Appellees' vehicle. The Plaintiffs/Appellees also only saw cars after the accident when they pulled over, (R.205, 208, 231), with passenger Rosenbloom confirming she did not know what car started the chain reaction. (R.232). None of the drivers or passengers testified that Ms. Alcala did anything to cause the action or failed to take any action to avoid the accident. (R.161, 232, 272, 311).

Given the failure to provide competent record evidence creating a disputed issue of fact, the facts set forth in Ms. Alcala's affidavit were not disputed. Contrary to the brief, no conflict exists between the testimony of the other drivers and passengers, who had no personal knowledge of the vehicles behind them at the time of the accident, and Ms. Alcala. Allstate,

standing in the shoes of the fourth vehicle, the phantom motorist, cannot seek to rely upon the rear-end presumption to establish Ms. Alcala's negligence as the third vehicle. Furthermore, the presumption vanished as to Ms. Alcala given her affidavit which provided evidence that she was not the sole cause of the accident. *Cevallos v. Rideout,* 107 So. 3d 348, 350 (Fla. 2012). The phantom motorist as the rear-end driver is the presumed negligent cause of the accident.

While Allstate complains the Alcala Defendants did not properly plead the phantom motorist as a *Fabre* defendant, not only does Allstate have no standing to complain about a pleading not directed to them, but a *Fabre* affirmative defense was not at issue. At issue was the Alcala Defendants' denial of negligence and legal causation, and their assertion a third-party was the sole legal cause of the accident such that *Fabre* apportionment was not at issue. No description of a phantom vehicle is required or material in determining whether such a vehicle caused a rear-end collision. Summary judgment was properly granted to the Alcala Defendants as the fourth, rear phantom vehicle was the sole, proximate cause of this accident, and no disputed issues of material fact exist.

ARGUMENT

I. The Appeal Should be Dismissed or Affirmed as Allstate Lacks Standing to Appeal the Final Judgment Which Only Resolves the Claim Between the Alcala Defendants and the Plaintiffs/Appellees

A. Standard of Review

Whether Allstate as co-defendant has standing to appeal the Final Judgment in favor of the Alcala Defendants against the Plaintiffs/Appellees is an issue of law reviewed de novo. *See generally, Carmel v. Fleischer*, 2024 WL 3057578, 49 Fla. L. Weekly D1339 (Fla. 4th DCA June 20, 2024); *Biza, Corp. v. Galway Bay Mobile Homeowners Ass'n, Inc.*, 304 So. 3d 1227, 1231 (Fla. 3d DCA 2019)(“Generally, standing is a legal issue subject to de novo review.")

B. Allstate Has No Standing to Appeal the Final Judgment as to the Alcala Defendants

The claim against Allstate was not resolved by the Final Judgment between the Plaintiffs and the Alcala Defendants, and the claims against Allstate asserted in Counts III and IV remain. The Final Judgment on appeal is not adverse to Allstate, and Allstate has not identified a sufficient interest or stake in the controversy affected by the outcome of this appeal. *King v. Brown,* 55 So. 2d 187, 188 (Fla. 1951)(to appeal order party must show it is or will be “injuriously affected by the order sought to be reviewed”); *see, e.g., Wilson v. Liberty Mut. Ins. Co.*, 56 So. 3d 895, 897 (Fla. 1st DCA

2011)(defendant in a tort action does not have standing to appeal a judgment in favor of a co-defendant where there is no right to contribution as the judgment did not "adversely affect appellant's rights" against the co-defendant"). Accordingly, while this Court would have had jurisdiction to review the Final Judgment if appealed by Plaintiffs/Appellees, the Final Judgment is not appealable by Allstate, such that this Court has no jurisdiction over the Final Judgment, and the appeal should be dismissed. *Cf. Cobb v. Suncoast Primate Sanctuary Foundation, Inc.,* 387 So. 3d 1277, 1277 (Fla. 2d DCA 2023)(per curiam opinion affirming partial final judgments as to claims and counterclaims between parties but dismissing appeal as to party with interdependent claims still pending as nonfinal and nonappealable).

At the trial level, while the Alcala Defendants contended that Allstate lacked standing to oppose the summary judgment as to a co-defendant,[2] the

[2] The Alcala Defendants argued that Federal courts have ruled co-defendants without any affirmative claims against one another do not have standing to oppose a summary judgment in favor of a co-defendant, citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Queen Carpet Corp.*, 5 F. Supp. 2d 1246, 1247-48, 1250 n.1 (D. Utah 1998)(requiring a cross-claim for standing); *Dixon v. Cnty. of Alameda*, No. C 95-4617-SI, 1997 WL 220311 (N.D. Cal. Apr. 18, 1997)(refusing to consider the codefendant's arguments made in the opposition to defendant's motion for summary judgment because codefendant lacked standing); *Brewer v. Dodson Aviation*, No. C04-2189Z, 2006 WL 3231974 (W.D. Wash. Nov. 7, 2006)(ruling that the co-defendant lacked standing and thus refusing

Plaintiffs/Appellees joined in Allstate's opposition to the summary judgment. (R.357-58, SR.545). Plaintiffs/Appellees also filed a motion for rehearing/reconsideration (R.419-421) in which Allstate then joined. (R.422). Contrary to the assertion in the Initial Brief the Alcala Defendants did not withdraw their motion to strike at the hearing on the motion for summary judgment. Instead, the Alcala defendants acknowledged Plaintiffs/Appellees had adopted the arguments made by Allstate, such that the arguments were before the trial court. (R.532). *See also Hall v. Norfolk S. Ry. Co.*, No. 1:06-CV-0607-JOF, 2007 WL 2765540, at *4 & *9 n.1 (N.D. Ga. Sept. 18, 2007)(declining to decide whether a codefendant can oppose a defendant's motion for summary judgment where the plaintiff has adopted the codefendant's arguments); *Robinson v. Hartzell Propeller, Inc.,* 326 F. Supp. 2d 631, 660 n.14 (E.D. Pa. 2004)(refusing to address standing where the co-defendant's opposition duplicated the plaintiff's argument). Since

---

to consider the co-defendant's opposition to the defendant's motion for summary judgment); *Fraioli v. Lemcke*, 328 F. Supp. 2d 250 (D.R.I. 2004)(dismissing the co-defendant's opposition to the motion for summary judgment due to lack of standing). *See also Mizell v. Pilgrim's Pride Corp.,* No. CV 509-064, 2012 WL 13005600, at *4 n.8 (S.D. Ga. Mar. 14, 2012)(collecting cases); *Jarrett v. Green*, 320 F. Supp. 1132, 1134 (N.D. Ga. 1970). *But see Independent Living Ctr. Of Southern California v. City of Los Angeles*, 205 F. Supp. 3d 1105, 1109 (C.D. Cal. 2016)(finding standing where co-defendant had "strong interest" in outcome); *Helen of Troy, L.P. v. Zotos Corp.*, 235 F.R.D. 634, 640 (W.D. Tex. 2006).

Plaintiffs/Appellees had standing, the arguments asserted by both Plaintiffs/Appellees and Allstate were properly before the Court.

However, unlike at the trial level, the Plaintiffs/Appellees have not joined in the appeal of the Final Judgment and remain Appellees. Plaintiffs/Appellees did not file a notice of joinder of Allstate's appeal pursuant to Florida Rule of Appellate Procedure 9.360(a), and the failure to do so waived the right of the Plaintiffs/Appellees to "attack the validity of the order being reviewed on appeal." *Premier Industries v. Mead,* 595 So. 2d 122, 124 (Fla. 1st DCA 1992)(striking brief in support of appellant filed by appellee who did not timely join in appeal). Thus, Allstate must have standing apart from the Plaintiffs/Appellees to appeal the Final Judgment. As no standing has been established this appeal should be dismissed.

While Florida courts have set forth when a co-defendant has standing to oppose and appeal a judgment in favor of a co-defendant, Allstate has not established or even asserted any of the bases for standing. For example, while a party can appeal a judgment in favor of a co-defendant where the judgment adversely affects the party's right to seek contribution from the exonerated defendant under section 768.31, Florida Statutes, *See, e.g., Pensacola Interstate Fair, Inc. v. Popovich*, 389 So. 2d 1179, 1181 (Fla. 1980); *U-Haul Co. of E. Bay v. Meyer,* 586 So. 2d 1327, 1331 (Fla. 1st DCA

1991); *Wilson*, 56 So. 3d at 897, Allstate has no right of contribution in this tort action. § 768.81, Fla. Stat.

A party also has standing to oppose and to appeal a summary judgment in favor of a co-defendant where the judgment in favor of a co-defendant as to fault would preclude the party from identifying the co-defendant as a *Fabre* defendant. *See Crowell v. Kaufmann*, 845 So. 2d 325, 327 (Fla. 2d DCA 2003); *Dickey v. Kitroser*, 53 So. 3d 1182, 1184 (Fla. 4th DCA 2011); *Southern Bell Tel & Tel. Co. v. Fla. Dep't of Transp*, 668 So. 2d 1039, 1041 (Fla. 3d DCA 1996); *Tampa Bay Water v. HDR Engineering, Inc*., No. 8:08-cv-2446, 2012 WL 12952412 (M.D. Fla. Feb. 8, 2012). Allstate would not be naming Ms. Alcala as a *Fabre* Defendant. Plaintiffs/Appellees sought to recover UM benefits for damages incurred in the accident for the actions of Ms. Alcala, Mr. Elston, and the phantom motorist. (R.16-17). Thus, Allstate will not be able to apportion its liability by seeking to name Ms. Alcala as a *Fabre* defendant, and its Answer did not assert a *Fabre* defense. (R.24-25). While the UM claim against Allstate will now be based upon the negligence of the phantom motorist and the Elstons and not the Alcala Defendants, Allstate has not identified any basis that it is adversely affected by the removal of one of the three asserted tortfeasors from the claim.

In addition, a contention that a defendant is not negligent and the cause of the accident, but another person is negligent and the cause of the accident, is not a *Fabre* affirmative defense but is instead a defense to the negligence claim. *See, e.g*., *Vila v. Philip Morris USA Inc.*, 215 So. 3d 82, 85-86 (Fla. 3d DCA 2016); *Clement v. Rousselle Corp.,* 372 So. 2d 1156, 1158 (Fla. 1st DCA 1991); *King ex. rel. Murray v. Rojas,* 767 So. 2d 510, 511, n.1 (Fla. 4th DCA 2000). The *Fabre* cases do not provide standing for Allstate.

Similarly, while an underinsured motorist carrier who has preserved its subrogation rights against a tortfeasor has an interest in a judgment affecting the liability of that tortfeasor, *Metropolitan Cas. Ins. Co. v. Tepper,* 969 So. 2d 403, 405 (5th DCA 2007), *aff'd,* 2 So. 3d 209 (Fla. 2009)(finding standing of UM carrier where carrier retained subrogation rights and order expressly addressed rights as potential third party plaintiff and "implicitly address subrogation rights"), Allstate has not identified any right of subrogation against Ms. Alcala which would be affected by this Final Judgment.

The sole basis asserted by Allstate for its standing to oppose the summary judgment was that it "would have a legal contractual obligation as to the specifically identified vehicle and would stand in the shoes of the alleged phantom vehicle at trial." (R.409). Allstate in that same document

argued that the "phantom vehicle" was not appropriately identified, such that their allegation of standing is conditional (R.407, see also R.355) and insufficient. In addition, this argument ignores the reality that Allstate also stands in the shoes of Ms. Alcala and Mr. Elston as uninsured/underinsured tortfeasors, and the judgment in Ms. Alcala's favor is also in favor of the claim against Allstate based upon her liability. Allstate has not established that the summary judgment in favor of the Alcala Defendants has adversely affected the claim against it.

Plaintiffs/Appellees have chosen not to appeal the final summary judgment entered against them, and it is their claim that was unfavorably resolved. Allowing another defendant to usurp control over a final judgment to which it is not a party is contrary to the purposes of the summary judgment rule to resolve matters short of trial when appropriate. *See Blonder v. Casco Inn Residential Care, Inc.*, CIV. 99-274-P-C, 2000 WL 761895, at *1 (D. Me. May 4, 2000)(where plaintiff did not object to summary judgment but co-defendant did, court determined that to require the plaintiff to prosecute the claim despite the decision not to pursue the claim and to require defendants to endure the resulting trial was contrary to the purpose of the summary judgment rule such that the co-defendant's objection would be disregarded). Allowing Allstate to appeal the claim where it has not pled or articulated a

claim against the Alcala Defendants is contrary to the law on the authority to appeal and standing. The appeal should be dismissed.

II. The Alcala Defendants were Entitled to Summary Judgment as No Material Issue of Fact Existed as to the Cause of the Accident *(Allstate Issue I)*

A. Standard of Review

Whether the Court properly granted summary judgment as no genuine issue of material fact existed is a matter of law reviewed de novo. *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc*., 127 So. 3d 1258, 1268 (Fla. 2013); *Harrison v. Lee Auto Holdings, Inc.,* 295 So. 3d 857, 860 (Fla. 1st DCA 2020).

B. The Alcala Affidavit Was Not Contradicted by Any Other Evidence and the Other Witnesses Had No Personal Knowledge as to the Number of Vehicles Involved in the Accident as Their Knowledge was Derived from Events After the Accident Occurred *(Allstate Issue IA)*

1. The Alcala Defendants Met Their Burden as to the Motion

The Alcala Defendants provided evidence by the affidavit of Ms. Alcala and the depositions of the other drivers and passengers that the sole proximate cause of the accident was a third unknown party, the phantom motorist, who impacted the rear of Ms. Alcala's car causing it to be pushed forward into the Elston car which was then pushed into the Plaintiffs' vehicle. (R.110-345). The defense that a third party is the sole cause of the accident,

is not a true affirmative defense but is a defense to the Plaintiff's claim. *See, e.g.*, *Vila*, 215 So. 3d at 85-86; *Clement,* 372 So. 2d at 1158; *King,* 767 So. 2d at 511, n.1. The Plaintiff has the burden in a negligence claim to have evidence supporting all four elements of actionable negligence: (1) the existence of a legal duty; (2) a breach of that duty; (3) causation; and (4) damages. *Sorel v. Koonce*, 53 So. 3d 1225, 1227 (Fla. 1st DCA 2011); *Kohl v. Kohl,* 149 So. 3d 127, 134 (Fla. 4th DCA 2014). Thus, while the motion for summary judgment references the affirmative defenses alleging that Ms. Alcala was not the cause of the accident but a third party was the sole cause (R.110), the burden of proof was with the Plaintiffs/Appellees, and not with the Alcala Defendants.

But regardless, even if the motion for summary judgment is viewed as based upon the affirmative defenses, the Alcala Defendants met their initial burden. Ms. Alcala's vehicle was behind the Elstons, whose vehicle was behind the Plaintiffs. Florida courts have ruled that a driver has a duty to operate their vehicle in a reasonably safe manner so as to avoid collisions with forward objects. *Birge v. Charron*, 107 So. 3d 350, 361 (Fla. 2012). Florida law therefore imposes a vanishing presumption that a vehicle that rear-ends another is presumed to be at fault and the sole cause of the accident. *Bellere v. Madsen*, 114 So. 2d 619, 621 (Fla. 1959). Such

presumption of negligence benefits the front driver. *Pierce v. Progressive Am. Ins. Co*., 582 So. 2d 712, 714 (Fla. 5th DCA 1991). "[T]he presumption that the rear driver's negligence is the sole cause of a rear-end motor vehicle collision is available in rear-end collision cases whether the plaintiff is the driver of the front or rear vehicle or a passenger in either, and regardless of whether the driver of the rear vehicle is a party to the litigation." *Birge,* 107 So. 3d at 362 (Fla. 2012).

Where evidence is produced "that the negligence of the rear driver was not the sole proximate cause of the accident" the presumption is rebutted, and "all issues of disputed fact regarding comparative fault and causation should be submitted to the jury." *Cevallos*, 107 So. 3d at 349. The presumption only applies where "there is an absence of evidence creating a jury question on the legal cause of a rear-end collision other than the presumed negligence of the rear driver." *Birge,* 107 So. 3d at 362. Evidence by the rear driver of a "substantial and reasonable explanation for his actions" is sufficient to rebut the presumption. *Davis v. Chips Express, Inc.,* 676 So. 2d 984, 986 (Fla. 1st DCA 1996)(quoting *Sistrunk v. Douglas*, 468 So. 2d 1059, 1060 (Fla. 1st DCA 1985)).

Given the Affidavit by Ms. Alcala, the presumption of negligence and legal causation as it related to Ms. Alcala vanished. Ms. Alcala averred her

vehicle “was impacted from the rear by another car,” and the “impact of the other vehicle caused the 2013 Honda Odyssey to be pushed into the car in front of us.” (R.344). She stated that there was nothing she could do to prevent the accident, and but for the car rear-ending her car, “this accident would never have occurred.” (R.344). Having provided evidence that she was not the sole cause of the accident or even a legal cause, the rear-end presumption vanished as applied to her. *Cevallos*, 107 So. 3d at 349. Furthermore, according to her affidavit, the phantom vehicle was the “rear” car, and the rear-end presumption applies to that vehicle and not to Ms. Alcala.

2. Plaintiffs/Appellees (and Allstate if It had Standing) Did Not Meet Their Evidentiary Burden

Having met their burden as movant, *Celotex Corp. v. Catrett*, 477 U.S. 317, 319 (1986), the burden shifted to Plaintiffs/Appellees (and assuming standing, Allstate) to submit evidentiary materials of specific facts showing the presence of a genuine issue of fact for trial. As the rear-end presumption as to Ms. Alcala vanished, the Plaintiffs/Appellees could not rely upon the presumption to meet their burden of providing evidence under Rule 1.510(c)(1)(2023) as to Ms. Alcala.

The Plaintiffs/Appellees’ burden could not be met by speculative allegations as a nonmovant is required to present enough evidence that a

jury could rule in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)(party is entitled to summary judgment if no reasonable finding of fact could return a verdict for the nonmoving party); *Bedford v. Doe,* 880 F.3d 993, 996-97 (8th Cir. 2018); Fla. R. Civ. P. 1.510(c)(1)(A)-(B)(2023); *Chowdhury v. BankUnited, N.A.,* 366 So. 3d 1130, n.2 (Fla. 3d DCA 2024); *G & G In-Between Bridge Club Corp. v. Palm Plaza Assoc., Ltd.,* 356 So. 3d 292, 299 (Fla. 2d DCA 2023).

Allstate's speculative argument that the jury could not believe the accident occurred as Ms. Alcala averred is insufficient to defeat summary judgment. *See, e.g., 5350 Park, LLC v. Grycon, LLC,* 388 So. 3d 1015 (Fla. 3d DCA 2024)(memorandum) (citing cases stating that "mere speculation" and "conclusory, general assertions" do not create factual disputes necessary to avoid summary judgment); *Mane FL Corp. v. Beckman*, 355 So. 3d 418, 425 (Fla. 4th DCA 2023)(existence of scintilla of evidence is not sufficient to defeat summary judgment); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)(evidence that is "merely colorable" or is "not significantly probative" is not enough to defeat a properly supported motion for summary judgment). An "argument that a witness simply isn't believable" does not create an issue of material fact. *Citizens Prop. Ins. Corp. v. Zamanillo*, 388 So. 3d 912, 913 (Fla. 3d DCA 2024). The Third

District Court of Appeal, in affirming a summary judgment where the nonmoving party argued that the trial court should have denied summary judgment as the movants' version of the events "isn't believable," stated:

> We've moved beyond a scintilla of doubt sometimes being sufficient to defeat summary judgment in Florida by adopting the federal summary judgment standard. If there's a genuine dispute, based on admissible summary judgment evidence, over a material issue of fact, a trial court can't usurp the fact finder's ultimate role. But absent contradictory or conflicting statements or evidence, an argument that a witness simply isn't believable, or a jury possibly could find differently – without pointing to disputed facts in the record – isn't enough to create an issue of material fact.

Id. at *1.

As found by the Trial Court the arguments by Plaintiffs/Appellees (and Allstate), were "nebulous theories of negligence, without concrete evidence" (R.417), and did not meet their evidentiary burden.

a. Arguments Based Upon Testimony of Other Drivers and Passengers Who Had No Personal Knowledge of What Occurred Behind Them

Allstate argues that issue of facts exists as to whether there was a fourth vehicle that hit the Alcala vehicle, but none of the other witnesses had any personal knowledge as to how the accident occurred, other than they were hit. Allstate contends the testimony of the other drivers and passengers should be characterized as "I don't see" or "negative evidence," but the other drivers and passengers lack personal knowledge and did not see ANY car

before or during the accident. (R.200, 205, 207-08, 232, 272-73, 310). None saw the accident occur, and none has any personal knowledge from the accident itself as to the number of cars involved in the accident. The accident occurred behind them and thus they did not observe what happened.

Specifically, the first time Mr. Poplawski "noticed the other vehicles that were involved in the accident" was after the accident happened, (R.205), and he did not "see the vehicle that was directly behind you and did not see the vehicle that was behind him" "until after the accident." (R.208). Ms. Rosenbloom also did not see any of the vehicles involved in this accident before the impact (R.231), and did not know which car started the chain reaction of impacts. (R.232). Mr. and Mrs. Elston also did not see cars behind them prior to the accident. (R.272-73, 310-11). As Mr. Elston explained, he really "can't answer" whether there was a fourth vehicle. (R.272). Their "understanding" of the accident was through their conversations and observances from after the accident when three cars pulled over to exchange information and wait for the police officer. (R.160, 205, 231-32, 272, 310).

An issue of fact cannot be created by testimony not based on personal knowledge but instead based on the person's belief in a fact. *Wiley v. Nobles*, 3:16-CV-717-J-34JBT, 2018 WL 4146135, at *8 (M.D. Fla. Aug. 30,

2018)(issue of fact cannot be created by testimony not based on personal knowledge but on a belief about the existence of a fact); *cf.* Fla. R. Civ. P. 1.510(c)(2) & (4).

While the drivers and witnesses did know that three cars and not four pulled over to wait for the police, (R.160, 199, 205, 272-73, 310), the knowledge of how many cars stopped after the accident does not create a disputed issue of material fact as to what happened in the accident itself. Ms. Alcala averred that the phantom motorist left the scene, and thus only three out of the four involved vehicles stayed at the scene. *Cf. Protective Ins. Co. v. Palma*, 507 So. 2d 649, 649 (Fla. 3d DCA 1987)(referring to phantom driver as a hit-and-run driver).

The cases cited by Plaintiff are inapposite. The other drivers and passengers did not see any of the vehicles behind them at the time of the accident as they were not looking behind them, and thus their testimony is not "negative testimony" that something did not occur as they have no personal admissible knowledge as to that matter. (See cases cited on p. 17 and p. 18 of Initial Brief as to discrepancy of witness testimony as to whether a train whistle was heard).

b. The Argument that the Jury Could "Infer" that Ms. Alcala's Affidavit was Inaccurate

Allstate then argues that the jury could "infer" that because the traffic was heavy that there was "effectively no place for this elusive vehicle to go and therefore a witness would have seen it." To the contrary, the undisputed testimony is that after the accident three cars stopped and pulled over into the median (R.160, 199, 205, 272-73, 310), and the traffic in the left lane they were in pulled up, and traffic continued to move slowly in the right lane as well. (R.273). Thus, traffic was moving past the pulled over cars. Given that none of the drivers and passengers knew what the fourth car looked like the argument that "other witnesses would have seen it" is logically flawed. Plaintiffs point to "heavy traffic," but the presence of many cars does not contradict Ms. Alcala's sworn statement that one of the cars (in such heavy traffic) rear-ended the vehicle she was driving and left in the traffic. (R.344). None of the drivers and passengers saw what happened, none of them had any knowledge as to what the fourth car looked like, and none of them had any personal knowledge that the fourth car could not have chosen to proceed with the traffic and not pull over onto the median. (R.205, 252, 273, 315).

Allstate also argues that a jury could infer that Ms. Alcala's affidavit was inaccurate because Mr. Poplawski stated he did not observe "noticeable damage" to the back of Ms. Alcala's car when he went to check her license tag number. (R.206). As Mr. Poplawski noted, the purpose of

looking at the back of the Alcala car was to check the tag number, as he stated, "[b]ut then again, I was looking at the license to make sure I had it." (R.206). Mr. Poplawski did not testify that he examined the vehicle Ms. Alcala was driving to determine if it were damaged and that he was qualified to make that determination. No qualified witness testified that a certain amount of damage must exist in a rear impact accident, nor did any witness testify that the physical evidence of the vehicles was inconsistent with a phantom vehicle hitting the rear of the Alcala vehicle. This argument rests upon speculation and not summary judgment evidence.

c. The Argument that Ms. Alcala Apologized

Allstate then argues that Ms. Alcala's "apology" creates an issue of fact. Specifically, Mr. Poplawski testified that when he checked if the occupants of the car were all right, "I believe she [Ms. Alcala] said she was sorry and words to that effect. But I didn't think much of it at the time. It's an accident." (R.161). Section 90.4026, Florida Statutes, provides that the portion of a statement "expressing sympathy or a general sense of benevolence relating to the pain, suffering . . . of a person involved in an accident and made to that person . . . shall be inadmissible as evidence in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above should be admissible pursuant to this section." The

statement of Ms. Alcala that she was sorry was not an admission of fault, but instead was a statement of benevolence toward Mr. Poplawski. While the statement can be seen as an acknowledgement that Ms. Alcala was involved in the accident, that fact is not disputed. The statement is not one of legal causation and fault. Ms. Alcala's vehicle did impact the car in front of her, but the legal cause of that impact was the actions of the phantom motorist.

d. The Argument that How an Accident Occurred is an Issue of Fact

In its brief, Allstate cites cases stating the undisputed contention that how an accident occurred and whether a phantom vehicle is involved are questions of fact. But where there are no disputes as to material issues of fact, summary judgment is appropriate. Fla. R. Civ. P. 1.510. The cases cited by Allstate on page 21 of this brief do not affect the analysis and are also distinguishable. *Brown v. Progressive Mut. Ins Co*., 249 So. 2d 429, 430 (Fla. 1971)(issue was not summary judgment but was whether UM policy can require physical contact with the hit and run vehicle); *Legion Ins. Co. v. Moore,* 846 So. 2d 1183, 1187 (Fla. 4th DCA 2003)(dismissing declaratory judgment in UM claim where dispute was cause of accident).

Allstate then cites cases applying the old summary judgment standard in which the court decided the burden for summary judgment was not met

given evidence presented in opposition to the motion. Those cases do not control this case where no conflicting evidence exists. For example, Allstate cites *Red Top Sedan v. Applebaum*, 495 So. 2d 786 (Fla. 4th DCA 1986), but in that case the court not only applied the old summary judgment standard but also concluded that evidence existed creating issues as to a driver's reasonable actions as to speed and actions in avoiding the accident given the wet conditions. No evidence exists here as to the negligent actions or failure to take evasive action taken by Ms. Alcala.

Similarly, in *Valle v. Childs,* 585 So. 2d 478, 478-79 (Fla. 3d DCA 1991), the court, applying the old summary judgment standard, found issues of fact existed as to comparative negligence of the plaintiff where the defendant turned slowly in front of the plaintiff while the plaintiff was passing him, such that evidence existed that the plaintiff may have been inattentive. No evidence exists in this case that Ms. Alcala was inattentive.

Finally, in *Goodberry v. Phoenix Rent-A-Car, Inc*., 533 So. 2d 1193, 1194 (Fla. 2d DCA 1988), the court, applying the old standard, denied summary judgment given conflicting evidence as to vehicle speeds, locations, whether headlights were on, whether turn signals were being used, the time for observation, and the manner of the turn. These cases are not properly part of this Court's analysis.

No testimony was presented based upon personal knowledge that no car impacted the rear of the Alcala Defendant's vehicle. No evidence was presented that Ms. Alcala failed to use reasonable care or failed to take actions to avoid the accident. The only evidence was that the phantom motorist was the sole legal cause of the accident as well. No admissible evidence exists by which a reasonable jury could return a verdict for the Plaintiffs/Appellees against Ms. Alcala. *In re Amendments to Fla. Rule of Civ. P. 1.510*, 317 So. 3d 72, 75 (Fla. 2021)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

It was the Plaintiffs' burden to present controverting evidence to Ms. Alcala's affidavit, and they have failed to provide any such evidence. The only record evidence before this Court is that a phantom vehicle hit the rear of Ms. Alcala's car. No expert has opined that the accident could not have happened the way Ms. Alcala has sworn. No witness has testified that they have personal knowledge that no vehicle hit the rear of the Alcala vehicle as no driver or passenger saw the accident. As the Alcala Defendants presented evidence that the sole cause of the accident was the negligent act of an unknown third party, Plaintiffs/Appellees had to present controverting evidence. Plaintiffs/Appellees failed to do so, and summary judgment was properly entitled to summary judgment. *Cf. Rupert v. State Auto Prop & Cas.*

Co., 596 So. 2d 1215, 1216 (Fla. 2d DCA 1992)(affirming summary judgment under old standard where evidence presented that sole proximate cause of accident was the negligence of a phantom vehicle and nonmovant, the UM carrier, did not show that phantom vehicle was not driven negligently).

C. Allstate Cannot Rely Upon the Rear-End Presumption, and the Rear-End Presumption Vanished as to Ms. Alcala But Does Apply to the Phantom Vehicle *(Allstate Issue IB)*

Allstate argues that Ms. Alcala could not obtain a summary judgment in her favor because of the rear-end presumption. As a preliminary matter, in a multi-car rear-end collision, the rear-end presumption inures only in favor of the vehicle in front of the rear vehicle behind it, and the presumption does not benefit a party seeking to establish the negligence of the driver of the vehicle in front of the party. *Pierce v. Progressive Am. Ins. Co*., 582 So. 2d 712, 714 (Fla. 5th DCA 1991), *approved, Clampitt v. D.J. Spencer Sales,* 786 So. 2d 570 (Fla. 2001). Thus, Allstate, who has alleged it stands in the shoes of the phantom motorist in the fourth rear vehicle, cannot benefit from the application of the presumption as applied to Ms. Alcala the third rear vehicle.[3] In short, the phantom motorist (and Allstate standing in the shoes

[3] Count III against Allstate also seeks to recover damages caused by Mr. Elston, (R.17), who is a forward driver as to Ms. Alcala. However, Mr. Elston has not opposed the entry of the summary judgment in favor of Ms. Alcala.

of the phantom motorist), cannot contend that Ms. Alcala is not entitled to summary judgment because of the rear-end presumption. *Id.* Thus, Allstate's argument should be rejected as it and the phantom vehicle do not get the benefit of the presumption.

Because the Plaintiffs/Appellees were opposing the Alcala Defendants summary judgment, the parties at the trial level presented arguments as to the presumption as applied to Ms. Alcala. The presumption is an evidentiary tool to fill an "evidentiary void" as to the issue of "liability and causation." *Birge,* 107 So. 3d at 360-61. The presumption "shifts the burden to the defendant to explain his or her inability to avoid the collision." *Ortlieb v. Butts,* 849 So. 2d 1165, 1168 (Fla. 4th DCA 2003). The rear driver has a "duty to explain by competent evidence that the occurrence was not the result of his negligence." *Gulle v. Boggs*, 174 So. 2d 26, 29 (Fla. 1965). The presumption is rebutted by evidence that the rear driver's presumed negligence was not the "sole proximate cause of the accident." *Cevallos,* 107 So. 3d at 350. At that point, the "plaintiff could then, of course, offer available evidence in reply." *Id.*

When the presumption is rebutted it vanishes, and the case proceeds like a standard comparative negligence case, with all "issues of disputed fact

regarding comparative fault and causation . . . submitted to the jury." *Cevallos,* 107 So. 3d at 349; *Gulle,* 174 So. 2d at 29.

Allstate's contention that "Alcala was the last vehicle in line, and she was presumed negligent" completely ignores the Alcala affidavit which constitutes summary judgment evidence that she was not the last vehicle in line and was not negligent or cause of the accident given the actions of the vehicle that impacted the rear of her car causing it to hit the car in front of her. When evidence is presented that the "rear car" is not the sole proximate cause of the collision, the rear-end presumption is rebutted and disappears. *Cevallos*, 107 So. 3d at 349, 350. Evidence existed from the affidavit of Ms. Alcala by which the jury could determine the phantom motorist, and not Ms. Alcala, was the sole proximate cause of the accident, and therefore the presumption vanished. *Birge,* 107 So. 3d at 359 (presumption is evidentiary tool that is only applicable where there is no evidence from which the jury could conclude that the "real fact is not as presumed"); *McGill v. Perez*, 59 So. 3d 388, 390 (Fla. 2d DCA 2011).

Because Ms. Alcala's affidavit is evidence that she was not the cause of the accident and that the phantom vehicle is the rear car and at fault, "the presumption is rebutted and all issues of disputed fact regarding negligence and causation should be submitted to the jury to make a finding of fault

without the aid of the presumption." *Birge,* 107 So. 2d at 358-60. The rear-end presumption is a "bursting bubble presumption" and once it disappears the jury is not told of it. *Id.* at 359 n.16.; § 90.303, Fla. Stat. Thus, Plaintiffs/Appellees (and Allstate if it is assumed that Allstate is a party with the right to present controverting evidence) could not rely upon the rear-end presumption.

Allstate argues that when the presumption is rebutted, "she [Ms. Alcala] could avoid summary judgment or directed verdict against her, but it does not entitle her to judgment," citing pre *Birge/Cevallos* cases, *Sorel v. Koonce*, 53 So. 3d 1225, 1227 (Fla. 1st DCA 2011) and *Hunter v. Ward*, 812 So. 2d 601, 605 (Fla. 1st DCA 2002). In those cases, the issue was whether the presumption was rebutted, and not whether a summary judgment was proper given the facts once the presumption vanishes. As held by the Florida Supreme Court, rear-end collision negligence cases are still tort cases governed by principles of comparative negligence and rear-end cases are not governed by a "different system of recovery" such that when the presumption vanishes, the case becomes a standard comparative negligence case. *Birge*, 107 So. 3d at 353, 359, 360.

Accordingly, once the presumption is rebutted, the analysis of whether a summary judgment is proper is made by the same standards that apply in

other types of negligence cases. In short, after the presumption vanishes, and there are "disputed" facts, the jury decides the issues of causation and negligence. *Cevallos*, 107 So. 3d at 349. Where there are no disputed facts and a reasonable jury would not decide in favor of the nonmovant, the Court can grant summary judgment.

Allstate's argument complaining about the summary judgment in the Alcala Defendants' favor also ignores the rear-end presumption that attached to the phantom vehicle in favor of the Alcala Defendants. The rear-end presumption applies "regardless of whether the driver of the rear vehicle is a party to the litigation." *Birge*, 107 So. 3d at 362. No evidence rebutted that presumption, and the Trial Court did not err in finding the phantom vehicle the legal cause of the accident.

D. The Extent of Damage to the Alcala Vehicle is Not Material and Allstate has No Evidence Creating an Issue of Fact in any Event *(Allstate Issue IC)*

Allstate contends the Trial Court "considered untimely and inadmissible evidence: the photographs and property damage estimate of the vehicle Alcala was driving." However, the Alcala Defendants' motion for summary judgment was not based upon the extent of damage to the Schnell vehicle. (R.110-345). The Alcala Defendants filed the photographs and damage estimates to the vehicle in reply to Allstate's opposition arguing no

"noticeable damage" to the 2013 Honda Odyssey. The Alcala Defendants first contended that whether he vehicle was noticeably damaged was not a material fact as it did not have any "bearing on the outcome of the case." (R.362, 365). *See also (*R.436, 493, arguing evidence of any noticeable damage is not material); *Fision Corp. v. Frueh*, 369 So. 3d 1211, 1214 (Fla. 2d DCA 2023)(only disputes over "facts" that might affect the outcome preclude summary judgment). While arguing the fact was not material, the photographs and repair estimates as to the vehicle Ms. Alcala was driving previously produced to Plaintiffs/Appellees in discovery were attached to the Reply to show that Allstate's assertion that the vehicle was not damaged was also incorrect. (R.365, 366, 371-405).

Because the reply was served nine days before the hearing, Allstate filed a written motion to strike argued that the photographs and repair estimates were not served 40 days prior to the hearing and must be stricken. (R.407). At the hearing Allstate's counsel also argued that the photographs have not been "qualified." (SR.538).

In its brief, Allstate contends the photographs and repair estimates were hearsay and inadmissible, but such argument was not made by Allstate until service of a "supplemental memorandum of law" on December 18, 2023. (R.446). While such "supplemental" memorandum was ostensibly in support

of Plaintiffs/Appellee's timely motion for rehearing served November 27, 2023, (R.419-21) directed to the November 16, 2023, judgment (R.411-20), this new argument was not made by Plaintiffs/Appellees in their timely motion for rehearing, which motion was never amended. *Balmoral Condo. Ass'n v. Grimaldi*, 107 So. 3d 1149, 1151-52 (Fla. 3d DCA 2013)(court can grant leave to amend timely filed rehearing motion); *Stella v. Stella*, 418 So. 2d 1029, 1030 n.1 (Fla. 4th DCA 1982)(referencing a motion to amend the 1.530 motion as the process to amend same). Thus, this argument made by Allstate after the time for it to move for rehearing is not preserved and has been waived. (R.445-46).[4] *Aills v. Boemi,* 29 So. 3d 1105, 1108 (Fla. 2020)(appellant must make a timely objection at the trial level to preserve issue for appeal); *Fla. Organic Aquaculture, LLC. v Advent Env't Sys., LLC,* 268 So. 3d 910, 912 (Fla. 5th DCA 2019)(successive motions for rehearing are not authorized by rules of civil procedure); *Shelby Mut. Ins. Co. of Shelby,*

[4] As Allstate (or Plaintiffs/Appellees) did not make this argument in a timely served rehearing motion, this Court does not need to address whether a new argument in opposition to the summary judgment can be made in a timely rehearing motion. *Compare Trinchitella v. D.R.F., Inc.*, 584 So. 2d 35 (Fla. 4th DCA 1991)(cannot make argument for first time in rehearing); *School Board of Pinellas County v. Pinellas County Comm'n*, 404 So. 2d 1178, 1178 (Fla. 2d DCA 1981)(same); *Buchanan v. Gulf Life Ins. Co*., 286 So. 2d 223 (Fla. 1st DCA 1973), *with Kawsar v. Alhamdi Group, LLP,* 369 So. 3d 1227, 1228 (Fla. 5th DCA 2023)(can consider arguments in opposition to summary judgment made in timely rehearing motion).

Ohio v. Pearson, 236 So. 2d 1, 4, 5 (Fla. 1970)(no authority to alter, modify or vacate final judgment apart from proper and timely filed 1.530 and 1.540 motions).

Allstate argues for the first time in its brief that the "documents themselves were not filed with the trial court" and therefore cannot be considered under Rule 1.510(c)(3), and thus this argument is also not preserved. *Aills,* 29 So. 3d at 1108. In any event, the photographs and estimates were attached to the Alcala Defendants' Reply memorandum and therefore were of record prior to the ruling. (R.359, 370-410).

Allstate is correct that the photographs and repair estimates documents were provided by the Alcala Defendants less than 40 days before the hearing. The Trial Court's order referenced the estimates and photographs in the Order (R.414). The reference, however, is not problematic for four reasons. First, the Alcala Defendants are entitled to summary judgment as a matter of law, and this Court in reviewing the summary judgment by de novo review should affirm the summary judgment if the Trial Court's decision was correct, even if it finds the Trial Court's order should have omitted the reference to the photographs and the estimate. *Cf. Bogatov v. City of Hallandale Beach*, 192 So. 3d 600, 602 n.1 (Fla. 4th DCA 2016)(in case applying old summary judgment standard appellate court

considered matters stricken as hearsay by court as it considered the evidence proper). Second, as consistently argued by the Alcala Defendants, whether the 2013 Honda Odyssey sustained "noticeable" damage was not a material fact and was not the basis of the motion. Third, the Trial Court's ruling did not rely upon whether there was damage to the car, and the reasons stated by the Court for granting the summary judgment do not address damage to the Alcala Defendants' vehicle, such that any reference to the materials did not affect the Trial Court's ruling. (R.416-18). Finally, while the material was provided less than 40 days before the hearing, under Rule 1.510(c)(3) the trial court is allowed to consider other materials in the record, and Federal case law on summary judgment views consideration of untimely submissions as to a summary judgment motion as a matter within the trial court's discretion *Young v. City of Palm Bay, Fla.*, 358 F.3d 859 (11th Cir. 2004); *Mosley v. MeriStar Management Co., LLC*, 137 F. App'x 248, 250 (11th Cir. 2005)(court has discretion to not accept untimely summary judgment affidavits). Any such consideration by the Trial Court would not be an abuse of discretion.

Thus, even if Allstate is correct and the photographs and estimates should not have been considered by the Trial Court, the Alcala Defendants were entitled to a Final Summary Judgment in their favor.

III. A *Fabre* Affirmative Defense is Not at Issue, as the Issue is Whether Alcala Defendants are Entitled to Summary Judgment Where the Only Evidence is that a Third Party, the Phantom Motorist, Caused the Accident *(Allstate Issue II)*

A. Standard of Review

Whether the summary judgment is based upon a defense, or an affirmative defense is a matter of law reviewed de novo. *See, e.g.*, *Vila,* 215 So. 3d at 85-86 (Fla. 3d DCA 2016)(discussing the "legal difference" between an empty chair defense and a *Fabre* affirmative defense).

Whether Allstate has standing to move to strike the Alcala Defendants' affirmative defenses under the rules of civil procedure, as well as whether the Alcala Defendants adequately pled the identity of the phantom motorist, are matters of law reviewed de novo. *Knight v. State*, 286 So. 3d 147, 151 (Fla. 2019)(pure question of law reviewed de novo)

B. Pleading of a Phantom Vehicle Does Not Require the Pleading of Information Describing the Vehicle and Allstate Therefore Did Not Move to Strike or for a More Definite Statement When Responding to the Allegations of a Phantom Motorist in the Claim Asserted Against Them by Plaintiffs/Appellees

Allstate argues that the Alcala Defendants in their respective answers to the Plaintiffs/Appellees' Complaint (R.48-50, 64-70) did not "specifically assert a phantom vehicle as a *Fabre* defendant." First, Allstate lacks

standing to complain about a pleading which was not directed to it. Allstate has not asserted a claim against the Alcala Defendants, and accordingly, the Alcala Defendants have not filed an affirmative defense directed to an Allstate pleading. Only an "opposing party" can file a reply containing an avoidance to an affirmative defense asserted in an answer. Fla. R. Civ. P. 1.100(a). Allstate has no standing to complain about the Answers with defenses and affirmative defenses that the Alcala Defendants served upon Plaintiffs/Appellees. In response to the Answers with Affirmative Defenses by Ms. Alcala (R.46-50), Plaintiffs/Appellees merely denied the affirmative defenses and did not move to dismiss or strike the affirmative defenses (R.51). No response was filed to the answer with affirmative defenses filed by Mr. Shroeder as Personal Representative (R.64-70). While Allstate at the hearing moved to "strike" the affirmative defense, and Plaintiffs/Appellees joined in all arguments (R.544), the time to move to strike the defenses had passed. Fla. R. Civ. P. 1.140(b). Allstate is not authorized to attack the Alcala Defendant's pleadings in this appeal.

Even if Allstate had standing, its argument fails. Allstate contends the Alcala Defendants were required to "specifically identify" the *Fabre* defendant, a phantom motorist, and therefore the summary judgment must be denied. To the contrary, a *Fabre* affirmative defense was not at issue in

the motion. The summary judgment motion addressed whether evidence would support the Plaintiffs' negligence claim against the Alcala Defendants. The Alcala Defendants were not seeking to apportion negligence with a *Fabre* defendant but were seeking to establish that the phantom motorist was the sole cause of the accident, not them. *See* (R.67-68, Ninth Affirmative Defense; R.49, Twelfth Affirmative Defense; R.110) A contention that a third party that is not a defendant is the sole legal cause of fault responsible for the plaintiff's injury is not a *Fabre* affirmative defense but is an empty chair defense. *Vila*, 215 So. 3d at 85. The argument is a defense placed at issue by a general denial in an answer. *Vila,* 215 So. 3d at 86. A defendant who denies the allegations of negligence against him is entitled to prove and argue that the injury was due to the negligence of a third-party not a party to the suit. *Clement v. Rouselle Corp.*, 372 So. 2d 1156, 1158 (Fla. 1st DCA 1979). The Answers by Ms. Alcala and Mr. Schroeder as Personal Representative not only denied negligence by Ms. Alcala as asserted in paragraph 3 of the Complaint (R.14, 46, 64), but also alleged as an "affirmative defense" that the accident was solely caused by a third party. (R.49, 66-67). Thus, Allstate's argument that the Alcala Defendants failed to adequately plead is without support.

In addition, the pleading of a phantom motorist does not require a specific description of the vehicle. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Hanania,* 261 So. 3d 684, 686 (Fla. 1st DCA 1998)(phantom motorist with no description or identity of vehicle negligent); *Rupert v. State Auto Prop & Cas. Co.*, 596 So. 2d 1215, 1216 (Fla. 2d DCA 1992)(reference to phantom vehicle). For example, Plaintiff's Complaint referenced a "phantom vehicle" in the claim against Allstate (R.17) and Allstate did not move to dismiss/strike or for a more definite statement to specify the vehicle in its answer. (R.22-27). The Elstons pled the negligence of the "driver of a phantom vehicle" as an affirmative defense (R.32), and Plaintiffs/Appellees did not move to dismiss/strike that defense. (R.35).

In any event, the description of the phantom vehicle was not material to whether this vehicle was negligent and the sole and proximate cause of the September 2017 accident. *Massa v. S. Heritage Ins. Co.,* 697 So. 2d 868 (Fla. 4th DCA 1997)(discussing hit and run vehicle and finding inability to describe did not preclude recovery under UM policy). The Alcala Defendants were properly entitled to a final summary judgment as a phantom motorist, not Ms. Alcala, was the sole legal cause of the accident.

CONCLUSION

This appeal should be dismissed as Allstate does not have standing to seek to reverse a Final Judgment against the Plaintiffs/Appellees where the Plaintiffs/Appellees have not appealed or joined in the appeal. Alternatively, this Court should affirm the Final Judgment.

Respectfully submitted this 2nd day of October 2024.

MARKS GRAY, P.A.

/s/ Rhonda B. Boggess
RHONDA B. BOGGESS
Florida Bar No. 822639
1200 Riverplace Blvd., Suite 800
Jacksonville, FL 32207
rboggess@marksgray.com
cthomas@marksgray.com
Telephone: (904) 398-0900
Facsimile (904)-399-9440
Appellate Counsel for Defendants David W. Schroeder, as Personal Representative of The Estate of Gail S. Schnell and Susana Alcala

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing notice was filed with the Clerk of Court, via the Florida Courts E-Filing Portal and that a true and correct copy of the foregoing or link to the foregoing has been furnished by email via the E-Filing Portal on October 2, 2024, to the following:

Jennifer A. Karr, Esq.
Boyd & Jenerette, P.A.
2290 Lucien Way, Suite 260
Maitland, Florida 32751
jkarr@boydjen.com
apstaff@boydjen.com
and
Kevin D. Franz, Esq.
Boyd & Jenerette, P.A.
1001 Yamato Road, Suite 102
Boca Raton, Florida 33431
kfranz@boydjen.com
Appellate Counsel for Appellant

Virgil W. Wright, III, Esq.
Chase A. Fifner, Esq.
Cameron, Hodges, Coleman,
LaPointe & Wright, P.A.
1820 S.E. 18th Avenue, Suite 1
Ocala, Florida 34471
Servicevww@cameronhodges3.com
Trial counsel for Allstate Fire and Casualty Insurance Company

Julie L. Hauf, Esq.
Law Office of Julie Lewis Hauf
700 Beachland Blvd.
Vero Beach, Florida 32963
julie@lewishauf.com;
pleadings@lewishauf.com
Trial counsel for Defendant Susana Alcala

Erin M. Brosious, Esq.
Melton H. Little, Esq.
Kallins, Little, & Brosious, P.A.
433 8th Avenue West
Palmetto, FL 34221
Erin@hardballlaw.com
melton@hardballlaw.com
Trial counsel for Plaintiffs, Joseph Poplawski and Barbara Rosenbloom

Ryan L. Barker, Esq.
Vernis & Bowling of North Florida, P.A.
4309 Salisbury Rd.
Jacksonville, FL 32216
rbarker@florida-law.com
lnorman@florida-law.com
Trial counsel for Defendants Marie Elston and Walter Elston

David M. Gagnon, Esq.
Nicholas P. Busse, Esq.
Taylor, Day, Grimm & Boyd
50 North Laura Street, Suite 3500
Jacksonville, Florida 32202
bipleadings@taylordaylaw.com
nbusse@taylordaylaw.com
kroberts@taylordaylaw.com
nhamlin@taylordaylaw.com
Trial counsel for David W. Schroeder, as Personal Representative of the Estate of Gail Schnell and Susana Alcala

/s/ Rhonda B. Boggess
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the applicable font and word count limit requirements of Fla. R. App. P. 9.045(b) and 9.210(a)(2).

/s/ Rhonda B. Boggess
Attorney