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

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

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.
_____/

REPLY BRIEF OF APPELLANT

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I. ALLSTATE HAS STANDING TO PURSUE THE APPEAL.

A. Allstate Stands in the Shoes of the Phantom Vehicle.

As Poplawski's UM carrier, Allstate "effectually stands in the uninsured motorist's shoes and can raise and assert any defense that the uninsured motorist could urge." Allstate Ins. Co. v. Boynton, 486 So. 2d 552, 557 (Fla. 1986).

Alcala and Schroeder point to the "phantom" vehicle as the liable uninsured/underinsured tortfeasor. Allstate, as the UM carrier, stands "in the shoes of the driver of a 'phantom' vehicle" for purposes of this negligence action. Mayo v. Capital Assur. Co., 845 So. 2d 275, 276 (Fla. 3d DCA 2003) (affirming directed verdict for UM carrier who stood in shoes of non-negligent phantom vehicle). Allstate had standing to, and did, raise defenses available to the "phantom" vehicle to oppose entry of summary judgment. Allstate retains this standing on appeal.

B. Allstate has standing under Florida's UM Act based on the definition of UM coverage.

UM coverage "shall be over and above, but shall not duplicate, the benefits available to an insured . . . under any motor vehicle liability insurance coverage . . . ." § 627.727(1), Fla. Stat. (2024). Plaintiffs sued Alcala and Schroeder as underinsured motorists. (R.16-18). Such

damages are payable under any motor vehicle liability insurance covering them.

Any UM coverage owed would only be over and above but not duplicative of benefits available under their liability insurance coverage. "UM coverage is excess coverage and pays over and above the tort-feasor's liability coverage should said coverage be inadequate to fully compensate the injured insured." Allstate Ins. Co. v. Williams, 826 So. 2d 1017, 1018 (Fla. 3d DCA 2001) (cleaned up). Therefore, Allstate is adversely impacted by the judgment below given that Plaintiffs would recover *first* from Alcala and Schroeder should a jury find them liable.

C. Allstate Stands in the Shoes of the Plaintiffs for purposes of subrogation under Florida's UM Act.

Allstate stands in the shoes of the Plaintiffs as well. Allstate Ins. Co. v. Metro. Dade Cty., 436 So. 2d 976, 978 (Fla. 3d DCA 1983). Section 627.727(6)(b) gives Allstate a statutory right to subrogation, which further confers standing. See Metro. Cas. Ins. Co. v. Tepper, 969 So. 2d 403, 405 (Fla. 5th DCA 2007), aff'd Metro. Cas. Ins. Co. v. Tepper, 2 So. 3d 209 (Fla. 2009)) (discussed below). "Subrogation is designed to afford relief when one is required to pay a legal obligation which ought to be met, either wholly or partially, by another." Metro. Dade Cty., 436 So. 2d at 978.

> Subrogation rights place a party, like appellant in this case, in the legal position of one who has been paid money because of the acts of a third party. Thus, the subrogee 'stands in the shoes' of the subrogor and is entitled to all of the rights of its subrogor, but also suffers all of the liabilities to which the subrogor would be subject.

Id. (internal citation omitted).

Standing in the shoes of the subrogor, Allstate is "now in the same posture as the plaintiff/subrogor, acquires all rights as against the defendant/wrongdoer and is thus able to bring an action against that party to recover the monies paid." Id. This means Allstate is in the same position as Plaintiffs would be to challenge the final judgment in Alcala and Schroeder's favor. See id. And Alcala and Schroeder admit that Plaintiffs would have standing to pursue this appeal. (AB. 21).

In Tepper, the Fifth District Court rejected the argument Alcala and Schroeder make here: that a UM carrier has no standing to challenge an order finally dismissing a co-defendant tortfeasor. Tepper, 969 So. 2d at 405. "Generally, a party has standing to challenge a trial court's order when it has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation." Id. In Tepper, like here, the trial court's order dismissed a co-defendant tortfeasor, and the Court held that, because "the trial court's order implicitly addresses Metropolitan's subrogation rights against Lucas and expressly addresses its rights as a

potential third-party plaintiff. . . we find that Metropolitan has standing to appeal the trial court's order." Id. The final judgment here implicitly addresses Allstate's subrogation rights against Alcala and Schroeder. Id.

Alcala and Schroeder incorrectly argue that Allstate would only have standing had it pursued a cross-claim against them. The Tepper Court noted that UM carriers cannot bring a third-party claim against an underinsured until *after* the conclusion of the UM litigation. 2 So. 3d at 211-12. The limitations period for a subrogation claim has not commenced as this UM action remains pending. See id. at 215.

Alcala and Schroeder's reliance on Wilson v. Liberty Mut. Ins. Co., is misplaced. That case held that an employee did not have standing to challenge an order dismissing the alleged vicariously liable employer. 56 So. 3d 895, 897 (Fla. 1st DCA 2011). This Court noted that if the employee had a statutory right to contribution, the employee would have standing to appeal. Id. at 896. Allstate has a statutory right to subrogation, which like contribution, confers standing to challenge a judgment against a co-defendant. See § 627.727(6)(b), Fla. Stat.; Tepper, 969 So. 2d at 405. Therefore, Allstate has standing to pursue the instant appeal. Id.

II. HOW THE ACCIDENT OCCURRED WAS A QUESTION OF FACT FOR THE JURY.

A. At Most, Alcala's Affidavit Transformed the Presumption Requiring the Jury to Find Negligence into a Permissible Inference Permitting the Jury to Find Negligence.

"[T]here is a rebuttable presumption of negligence that attaches to the rear driver in a rear-end motor vehicle collision case. Unless this presumption is rebutted, the beneficiary of the presumption is entitled to judgment thereon as a matter of law." Birge v. Charron, 107 So. 3d 350, 353 (Fla. 2012) (internal citations omitted). Once the presumption is rebutted, "the legal effect of the presumption is dissipated, and the presumption is reduced to the status of a permissible inference or deduction from which the jury may, but is not required to, find negligence on the part of the rear driver. Id. at 361 (emphasis added).

From the outset, "the burden is on the defendant to come forward with evidence that 'fairly and reasonably tends to show' that the presumption of negligence is misplaced." Eppler v. Tarmac Am., 752 So. 2d 592, 594 (Fla. 2000). Once a defendant does so, the presumption dissipates such that:

> Whether the ultimate fact has been established must then be decided by the jury from all of the evidence before it without the aid of the presumption. At this point ***the entire matter should be deposited with the trier of facts*** to reconcile the conflicts

> and evaluate the credibility of the witnesses and the weight of the evidence.

Id. (quoting Gulle v. Boggs, 174 So. 2d 26, 28-29 (Fla. 1965)) (emphasis added).

Even if Alcala rebutted the presumption through the affidavit, the jury may still find negligence on her part. Id. The presumption dissipated and became a permissible inference that the jury would be free to apply or not apply. Id; Gulle, 174 So. 2d at 28-29.

In other words, once Alcala attested that another vehicle was involved, the matter goes to the jury "without the aid of the presumption, which has been reduced to the status of a permissible inference or deduction which the jury may or may not draw from the evidence before it." Gulle, 174 So. 2d at 29. The trial court erred in granting judgment for Alcala and Schroeder. Id. The jury was permitted to find Alcala responsible, irrespective of the alleged phantom vehicle. Id.

Alcala and Schroeder provide no authority that evidence rebutting the presumption *ipso facto* entitles them to judgment. See e.g. Citizens Prop. Ins. Corp. v. Zamanillo, 388 So. 3d 912 (Fla. 3d DCA 2024) (relied on by Alcala and Schroeder, which does not concern a rear driver's presumption of negligence). This is likely because Birge and its progeny make plain that once the presumption is rebutted, the issue of the cause of the accident is

one for the jury, which is still permitted to find the rear vehicle negligent. 107 So. 3d at 353.

Whether a phantom vehicle caused the accident here "is a question of fact to be determined by the jury..." Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429, 430 (Fla. 1971); Legion Ins. Co. v. Moore, 846 So. 2d 1183, 1187 (Fla. 4th DCA 2003) (upholding dismissal of a declaratory judgment action brought by the insurance carrier because how the accident occurred and whether it involved a hit-and-run vehicle was a disputed factual issue). Thus, the trial court erred in granting summary judgment for Alcala and Schroeder and in finding that the phantom vehicle was the sole cause of the accident. Birge, 107 So. 3d at 353.

B. Plaintiffs, and by Extension Allstate, were not Required to Present Evidence of Alcala's Negligence to Survive Summary Judgment.

Plaintiffs and Allstate were under no obligation to demonstrate how Alcala was negligent to defeat Alcala's motion for summary judgment. Such obligation would violate the spirit of the rear-end presumption, which "arises out of necessity in cases where the lead driver sues the rear driver." Eppler, 752 So. 2d at 594.

> 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.

Id. (quoting Jefferies v. Amery Leasing, Inc., 698 So. 2d 368, 370-371 (Fla. 5th DCA 1997)) (emphasis added).

The trial court's conclusion that Plaintiffs and/or Allstate did not present any evidence of Alcala's negligence ignored the presumption and the purpose behind it. See id. Plaintiffs were not required to present evidence of Alcala's negligence, because due to the circumstances of a rear-end collision, the law appreciates that the front driver simply "does not know why" Alcala rear-ended the vehicle in front of her. Id.

C. Circumstantial Evidence of no Phantom Vehicle Created a Question of Fact for the Jury.

Lack of personal knowledge of what occurred 2 or 3 cars back of Plaintiffs' car is irrelevant because "[c]ircumstantial evidence as to proximate cause is sufficient to allow a case to go to the jury where a prima facie case of negligence exists." Mut. Life Ins. Co. v. Cedar Creek, 694 So. 2d 154, 156 (Fla. 4th DCA 1997). Plaintiffs established a prima facie case of negligence through the rear driver presumption of negligence. See Birge, 107 So. 3d at 353.

The Cedar Creek Court ultimately rejected the same argument Alcala and Schroeder make here. 694 So. 2d 154. There, the plaintiff brought a negligence action after slipping and falling on a pool of water in a mall owned and managed by Mutual Life. Id. at 155. Mutual Life filed a third-party complaint against Cedar Creek, a waterbed company that leased space in the mall. Id. Mutual Life alleged that Cedar Creek was negligent in allowing water from either its store showroom or its storage area to leak onto the floor of the store and common areas of the mall. Id. Cedar Creek moved for summary judgment, claiming there was no record evidence of its negligence. Id.

Cedar Creek provided an affidavit affirming that only its storage area (and not the store showroom) was in the corridor where the fall occurred; the storage area did not contain waterbeds filled with water; and there had never been a leak in the storage area prior. Id. An eyewitness observed water on the floor that was "'a good foot and a half at least in circumference,'" coming from the edge of the furniture store and extending out at least three floor tiles. Id. The appellate court found circumstantial evidence as to the proximate cause suggested the water came from Cedar Creek's storage area notwithstanding the Cedar Creek's uncontradicted affidavit. Id. at 156.

Similarly, here, all witnesses aside from Alcala testified that they did not see another vehicle involved in the accident. Poplawski testified that he viewed the back of Alcala's vehicle and there was no visible damage. And the circumstances of heavy traffic suggest, when viewed in the light most favorable to Allstate/Plaintiffs, that a phantom vehicle would be unable to flee without detection given the limited space in bumper-to-bumper traffic.

Furthermore, Alcala's apology—when viewed in the light most favorable to nonmovants Plaintiffs and Allstate—is a statement of fault, admissible under section 90.4026, Florida Statutes (2024). Smith v. Carlisle Indus. Brake & Friction, Inc., 379 So. 3d 11, 15, (Fla. 1st DCA 2023) (all evidence and inferences must be interpreted in favor of nonmovants for summary judgment). Alcala's statement can reasonably be interpreted by a jury to indicate she was "sorry" for causing the accident. See e.g. McSweeney v. State, 286 So. 3d 369, 372, (Fla. 2d DCA 2019) (noting that, "it is the jury that should draw any inferences from a defendant's statements" in the context of a witness commenting on the statement). Alcala's failure to announce the presence of a phantom vehicle when apologizing is also telling and could be considered by the jury to suggest its non-existence.

Like in Cedar Creek, this circumstantial evidence was sufficient to defeat Alcala and Shroeder's summary judgment motion by raising a genuine issue of material fact as to the presence, or lack thereof, of a phantom vehicle. Id. See also Smith, 379 So. 3d at 14-16 (circumstantial evidence was sufficient to overcome summary judgment under new summary judgment standard).

Alcala and Shroeder attempt to distinguish cases where issues of fact prevented summary judgment such as Valle v. Childs, 585 So. 2d 478 (Fla. 3d DCA 1991). The Valle Court reversed summary judgment because the plaintiff had not proven the nonexistence of any material facts as to comparative negligence. Id. at 478-79. Childs struck Valle who was concededly negligent when turning left from the center lane of traffic. Id. at 478. The testimony reflected that Valle turned slowly, that Childs was traveling 20-25 miles per hour to pass Valle, and that Childs did not see Valle before the collision. Id. The trial court erred in granting summary judgment to Childs, despite Valle's concession of negligence, because the circumstances suggested that Childs may have also been negligent in failing to notice and take evasive action. Id. at 478-79.

According to Alcala and Schroeder, "[n]o evidence exists here as to the negligent actions or failure to take evasive action taken by Ms. Alcala."

(AB. 38). This is untrue, as the evidence from every witness in this case indicated that the traffic was stop and go for miles, "very slow moving," essentially "a parking lot. Nobody was going anywhere." (R. 270, 308). The cars would be at a "dead" stop, move ten to fifteen feet and then stop again. (R. 283). Poplawski also described the traffic as "bumper-to-bumper, so everybody was stopped." (R. 160). Like Childs, who was traveling slow speeds such that a jury could find him inattentive in failing to see and stop for Valle, the circumstances of continuous bumper-to-bumper traffic suggest that Acala could have avoided being pushed into the car in front of her (through evasive action) even if a phantom vehicle struck her. Valle, 585 So. 2d at 478-79.

Alcala's affidavit merely dissipated the presumption such that the jury could determine the factual question it raised: was there a phantom fourth vehicle that caused or contributed to the accident? See e.g. Liscio v. Montgomery Ward Ins. Co., 603 So. 2d 76, 78 (Fla. 4th DCA 1992) ("whether the phantom vehicle contributed to the accident" was an issue of fact for the arbitrator and not the court in a coverage dispute); Valle, 585 So. 2d at 478-79 (whether a claim could have avoided a collision or was negligent in some way to cause or contribute to the accident was a question for the jury, inappropriate for summary judgment); Protective Ins.

Co. v. Palma, 507 So. 2d 649, 649 (Fla. 3d DCA 1987) ("whether the negligence of a hit-and-run, so-called 'phantom' driver contributed to the accident of which a UM insured complains is a question for the arbitrators, not the court.").

The jury could reasonably view the evidence to be such that three cars were involved in the accident as opposed to four, meaning Alcala was the rear-most driver who caused the accident.

D. Allstate Preserved Its Contention that the Property Damage Estimate and Photographs were Improperly Considered.

Alcala and Schroeder argue that Allstate's contentions made in its supplemental memorandum in support of rehearing that the photographs and repair estimates were inadmissible hearsay were not preserved because the supplemental memorandum was filed more than 15 days after the final judgment. (AB 45). However, Rule 1.530 permits amendments of timely motions for rehearing, which Allstate did when it filed its supplemental memorandum in support of rehearing. (R. 443-49). Moreover, Allstate maintained in moving to strike these records that they had not been "qualified" and were untimely provided under Rule 1.510. (R. 406-409; Supp. R. 538). The issue was preserved for appellate review. See Sparre v. State, 289 So. 3d 839, 848-49 (Fla. 2019) ("To preserve an

issue for appellate review, a litigant must present the issue to the trial court in a timely, specific manner and obtain a ruling.").

Regardless, they support the inference that no phantom vehicle existed. The photographs reflect no visible damage to the rear of the Alcala vehicle, or at minimum, created a question of fact for the jury. The repair estimate did not indicate whether there were any repairs done on the rear of the Alcala vehicle, and the vehicle was repaired a month following the accident, permitting for intervening causes of any alleged damage.

III. ALCALA AND SCHROEDER FAILED TO SPECIFICALLY ASSERT A PHANTOM VEHICLE AS A FABRE DEFENDANT, AND THEREFORE, THE TRIAL COURT ERRED IN FINDING THAT THE PHANTOM VEHICLE WAS THE SOLE CAUSE OF THE ACCIDENT.

The trial court found that Alcala was "not chargeable with negligence" "based on the negligent acts of a third, unknown party which was the sole, proximate cause of the September 8, 2017, accident as alleged by Defendants' Twelfth Affirmative Defense and established by the undisputed facts in this matter." (R. 417-18). The Twelfth Affirmative Defense alleged: "The Defendant states that Plaintiff's damages were caused or inflated by third parties over whom Defendant has no direction or control." (R. 49).

Alcala and Schroeder contend it was unnecessary to plead and identify a Fabre Defendant in an attempt to convince this Court to affirm

based on an "empty chair" defense. See Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). They are mistaken; this is a classic Fabre defense case necessitating identification of the Fabre Defendant, which never occurred. See Nash v. Wells Fargo Guard Servs., 678 So. 2d 1262, 1264 (Fla. 1996). See also e.g., Bogosian v. State Farm Mut. Auto. Ins. Co., 817 So. 2d 968 (Fla. 3d DCA 2002) (reversing and remanding for new trial after UM carrier failed to properly allege Fabre defendant agency and phantom vehicle in auto negligence case); Thomas v. Daniel, 736 So. 2d 100, 101, (Fla. 1st DCA 1999) (affirming trial court's striking of a Fabre affirmative defense in auto negligence case where defendant failed to specifically identify the nonparty).

The "empty chair" cases relied upon by Alcala and Schroeder are inapposite. Neither Vila nor Clement involved automobile accidents or phantom vehicles. Vila v. Philip Morris USA Inc., 215 So. 3d 82 (Fla. 3d DCA 2016); Clement v. Rousselle Corp., 372 So. 2d 1156 (Fla. 1st DCA 1979). They concerned manufacturers of products. In Vila, a cigarette manufacturer merely blamed the plaintiff's cancer on another manufacturer who was responsible for the cigarettes he smoked prior to smoking the ones from the defendant manufacturer. 215 So. 3d at 87. In Clement, a manufacturer of a punch press machine blamed the plaintiff's injuries on

the plaintiff's employer who owned and operated the machine, contending that it was not a manufacturing defect that caused the injuries but it was the employer's failure to outfit the machine with a guard device. 372 So. 2d at 1157. In those cases, the third party was not on the verdict form and was a way for the defendant to argue that the plaintiff had not proven causation.

The key distinction between Fabre defendants and "empty chair" defendants is the verdict form. See Phillips v. Guarneri, 785 So. 2d 705, 707 n.4 (Fla. 4th DCA 2001). "'Fabre defendants are non-parties which are alleged by a party defendant to be wholly or partially negligent and should be placed on the verdict form so there can be an apportionment of fault against them for non-economic damages'" Vucinich v. Ross, 893 So. 2d 690, 694 (Fla. 5th DCA 2005). Empty chair defendants "refers to the argument that some non-party is the sole legal cause of the harm alleged but, unlike a Fabre defendant, this non-party is not placed on the verdict form and there is no apportionment of fault." Guarneri, 785 So. 2d 705, 707 n.4.

Thus, in order for the court or the jury to find a non-party responsible for the accident to any degree, the non-party must be on the verdict form. Id. In its order granting final judgment to Alcala and Shroeder, the trial court announced that the phantom vehicle "was the sole, proximate cause

of the September 8, 2017, accident as alleged by Defendants' Twelfth Affirmative Defense[.]" (R. 417-18). By so ruling, the trial court necessarily decided that the phantom vehicle was a Fabre defendant because it apportioned fault to it. See Vucinich, 893 So. 2d at 694 (a Fabre defendant must be on the verdict form in order to attribute fault to that non-party whereas an empty chair defense is an argument that a non-party caused the harm without any finding in that regard). This ruling was erroneous.

"[I]n order to include a nonparty on the verdict form pursuant to *Fabre*, the defendant must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty." Nash, 678 So. 2d at 1264; Bogosian, 817 So. 2d 968; Thomas, 736 So. 2d at 101. Alcala and Schroeder did not do so. Their failure to plead prohibited the trial court from adjudicating summary judgment on these grounds. Goldberger v. Regency Highland Condo. Ass'n, 452 So. 2d 583, 585 (Fla. 4th DCA 1984) ("Failure to plead an affirmative defense waives that defense, and an appellate court will not consider it in reviewing a summary judgment for a plaintiff.").

In any event, whether the phantom vehicle was a Fabre or an empty chair, the cause of the accident was a question of fact for the jury to resolve

and not the trial court. See Liscio, 603 So. 2d at 78; Valle, 585 So. 2d at 478-79; Palma, 507 So. 2d at 649.

WHEREFORE, Appellant, ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, respectfully requests this Court reverse the Order Granting Defendants Schroeder and Alcala's Motion for Final Summary Judgment and Incorporated Order of Final Judgment, and remand to the trial court for further proceedings.

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CERTIFICATE OF COMPLIANCE

In accordance with Florida Rule of Appellate Procedure Rule 9.210(a)(2)(B), the undersigned counsel hereby certifies that this brief complies with the font and word requirements of the Rule: Arial 14-point font and does not exceed 4,000 words.

/s/ Jennifer L. Aybar
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