O/a 5-8-86

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, an agency of the State of Florida,

Petitioner,

vs.

CLEOPATRA GAYLE ANGLIN and THOMAS P. ANGLIN, her husband,

Respondents.

CASE NO. 67,599
APPEAL NO. AT-276

CLERK, SUPREME COURT
By Chief Deputy Clerk

SEABOARD COAST LINE RAILROAD COMPANY, now known as SEABOARD SYSTEM RAILROAD, INC.,

Petitioner,

vs.

CLEOPATRA GAYLE ANGLIN and THOMAS P. ANGLIN, her husband,

Respondents.

CASE NO. 67,600
APPEAL NO. AT-277

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

PETITIONER DOT'S REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Respondents have failed to demonstrate the existence of any genuine dispute as to a material issue of fact. The injuries sustained by Plaintiffs did not flow in a natural, direct, and continuous sequence from the alleged negligence of the Defendants. Indeed, the trial court properly found that such injuries, as a matter of law, resulted from efficient, independent intervening actions of EDWARD DUBOSE and the ANGLINS, either jointly or singly.

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED PETITIONER'S SUMMARY JUDGMENT BECAUSE IT CORRECTLY FOUND THE ACTIONS OF THE ANGLINS AND OF EDWARD DUBOSE TO BE EFFICIENT, INDEPENDENT INTERVENING CAUSES OF THE ACCIDENT AS A MATTER OF LAW.

Rule 1.510(c), Fla.R.Civ.P., requires that a Summary Judgment shall be rendered forthwith, upon motion and hearing, if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Where the facts established in Defendant's Motion for Summary Judgment clearly show there is no genuine issue as to any material fact, the court may pierce the paper issues made by the pleadings and render judgment for the defendant. Colen v. Lara, 389 So.2d 1070

(Fla. 3d DCA 1980); Waring v. Winn-Dixie Stores, 105 So.2d 915 (Fla. 3d DCA 1958). It is not sufficient for the opposing party merely to assert that an issue does exist. Harvey Building, Inc. v. Haley, 175 So.2d 780 (Fla. 1965). The existence of a dispute as to matters not material to the disposition of a case will not preclude the entry of a summary judgment. Enes v. Baker, 58 So.2d 551 (Fla. 1952); Armstrong v. Southern Bell Tel. & Tel. Co., 366 So.2d 88 (Fla. 1st DCA 1979). The term genuine issue means a real as distinguished from a false or colorable issue. Harrison v. Consumers Mortgage Co., 154 So.2d 194 (Fla. 1st DCA 1963). Material issues are those relevant to the issues made by the pleadings. Holl v. Talcott, 191 So.2d 40 (Fla. 1966). In a summary judgment proceeding, a material fact is one essential to the result that is placed in controversy by the pleadings and affidavits. Thus, to preclude the entry of summary judgment, there must be some fact essential to a resolution of the legal issues raised by the case which is genuinely controverted. Wells v. Wilkerson, 391 So.2d 266, 267 (Fla. 4th DCA 1980).

In their Answer Brief, Respondents attempt to demonstrate the existence of disputed issues of fact; however, the disputes are colorable and not genuine. To the extent any facts are in dispute, they relate to issues not essential to resolution of the controversy. Respondents

suggest there is a dispute as to the exact point of collision. (Respondents' Answer Brief -- p. 2). Although the parties did give differing estimates of the distance from the puddle of water encountered at the railroad track to the point of collision, only one witness, Florida Highway Patrol Trooper, Allen Cavinez, actually measured the distance. According to Officer Cavinez, the point of impact was one-tenth (1/10) of a mile north of Hughes Road or three-tenths (3/10) of a mile south of the railroad crossing. (R -- 376). The railroad crossing itself is actually four-tenths (4/10) of a mile north of Hughes Road, and, in his initial accident report, Officer Cavinez, through an oversight, had marked the point of impact as also being four-tenths (4/10) of a mile north of Hughes Road. On revisiting the scene, Officer Cavinez noted and corrected the error. (R -- 393).

Irrespective of the precise point of impact, it is clear and undisputed that the Plaintiffs were not injured when their vehicle struck the puddle of water located at the railroad crossing. It is also undisputed that Plaintiffs' vehicle was brought safely to a stop without ensuing injury to anyone. After the ANGLINS' vehicle had been wholly or partially removed from the roadway, in compliance with Sec. 316.071, Fla. Stat. (1979), the ANGLINS elected to push it back onto the roadway in an attempt to jumpstart the

vehicle. (R -- 238--240, 279, 330, 331, 398, and 399). Here, unlike the situation presented by Stahl v. Metropolitan Dade County, 438 So.2d 14 (Fla. 3d DCA 1983), Respondents had no problem with momentum. Instead, as in Pope v. Cruise Boat Co., 380 So.2d 1151 (Fla. 3d DCA 1980), Plaintiffs voluntarily chose to leave their place of safety and to venture onto the travel lanes of the highway.

Respondents attempt to excuse their intentional violation of Sec. 316.071, Fla. Stat. (1979), which requires that disabled vehicles be removed from the highway forthwith, by asserting that the road shoulder was muddy. (Respondents Brief, p.9). The record is void of any reference to mud; however, Respondent, THOMAS ANGLIN, did testify that the road shoulder was sandy. (R -- 331). Although the roadway shoulder may have been of generally sandy composition, it is also clear that the shoulder was grassed. (R -- 548). Likewise, it is also undisputed that several vehicles at the accident scene parked on the roadway shoulder and thereafter pulled safely away. (R -- 505).

Respondents' efforts to show that the Summary Judgment rendered by the trial court should not be sustained are unpersuasive. Braden v. Florida Power And Light Co., 413 So.2d 1291 (Fla. 5th DCA 1982), relied upon by Respondents, is easily distinguishable upon its facts. Electric utilities are held to a high degree of care and must do all

that human care, vigilance, and foresight can reasonably do, consistent with the practical operation of its plant to protect those who use its electricity. Padgett v. West Florida Elec. Co-op, Inc., 417 So.2d 764, 766 (Fla. 1st DCA 1982). Because it is reasonably foreseeable that harm may result from downed power lines, electric companies utilize automated safety equipment, which should immediately de-energize the transmission line upon breakage. In Braden v. Florida Power And Light Co., supra, as in Padgett v. West Florida Elec. Co-op, serious injuries resulted from the failure of such safety equipment to operate. In both cases, the reviewing courts found that the jury could find that it was reasonably foreseeable that injuries would result from the downed "live" power line. In Braden, unlike the instant case, there was no chance for the Plaintiff to avoid exposure to injury after discovery of the Defendant's alleged negligence.

At page eight of their Answer Brief, Respondents argue:

> If the conduct of the criminal is not an independent intervening cause, a non-criminal act should be held not intervening.

In so arguing, Respondent misses the point. A defendant should be held liable for the consequences of an intervening criminal act like any other action if it was reasonably foreseeable. See Gibson v. Avis Rent-a-Car System, Inc.,

386 So.2d 520, 522 (Fla. 1980).

Respondents' reliance upon Salas v. Palm Beach County Board of County Commissioners, 11 FLW 602 (Fla. 4th DCA March 5, 1986), is also misplaced. In Salas, for purpose of the Summary Judgment motion, the court presumed that the County was negligent in failing to warn motorists that a lefthand turn was prohibited. The sequence of the events between that negligent failure to warn and plaintiff's accident, unlike the instant case, occurred in a direct, natural, and continuous sequence.

In McCarthy v. Danny's West, Inc., 421 So.2d 756 (Fla. 4th DCA 1982), the defendant lounge negligently allowed plaintiff's minor son to become intoxicated. Thereafter, some three and one-half hours later, while still intoxicated, the minor was involved in a fatal one car accident. In McCarthy v. Danny's West, as in Salas v. Palm Beach County Board of County Commissioners, supra, the results of the defendant's negligence continued in direct, natural, and unbroken sequence to cause plaintiff's injuries.

Respondents are ineffective in their attempt to distinguish the cases relied upon by Petitioners. In attempting to distinguish Metropolitan Dade County v. Colina, 456 So.2d 1233 (Fla. 3d DCA 1984), cert. denied, 464 So.2d 554 (Fla. 1985), Respondents assert that the ANGLINS

were not trying to foolishly cross in front of traffic but were merely attempting to push their vehicle. (Respondents' Answer Brief at p. 9). Again, Respondents miss the mark. In the instant case, as in Colina, after being in a place of safety, the Plaintiffs intentionally exposed themselves to a risk of danger. In so doing, their actions constituted an efficient, independent intervening cause of the subsequent accident. Respondents feebly attempt to distinguish McClain v. McDermott, 232 So.2d 161 (Fla. 1970). In that case, the trial court granted a Summary Judgment in favor of the defendant, whose passenger was struck and killed while pouring gasoline into the tank of defendant's vehicle by a second negligently operated vehicle. Under the circumstances of that case, this Court agreed with the trial judge that any act of negligence on the part of the defendant was not a proximate cause of plaintiff's injuries. The circumstances of the instant case, as those in McClain v. McDermott, support the trial judge's finding that any negligence on the part of the Defendants was not a proximate cause of Plaintiffs' injuries.

Respondents attempt to distinguish Banat v. Armando, 430 So.2d 503 (Fla. 3d DCA 1983) cert. denied, 446 So.2d 99 (Fla. 1984), by simply stating that Banat, unlike the instant case, involved a mechanical brake failure. Although Respondents are correct in their assertions that Banat

involved a mechanical brake failure, their analysis stops short. As the Third District Court of Appeal observed:

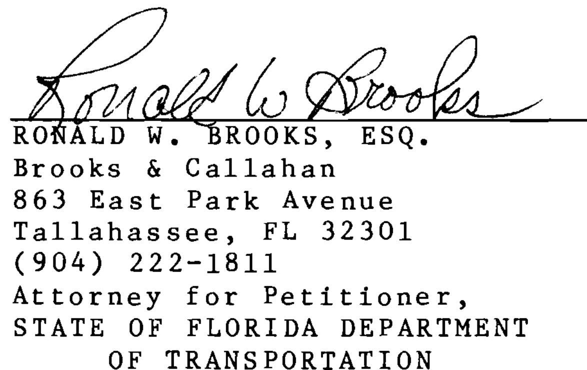
> A critical fact in all the cited brake failure cases, and also a factor here, is that the plaintiffs were able to see the dangerous conditions well before the collisions but were unable to avoid the collision only because of the mechanical brake failure. Banat, at 505.

In the instant case, EDWARD DUBOSE had observed Respondents in their vehicle as he passed and turned around approximately 500 feet down the road, intending to return and render assistance. (R -- 525). The roar of the engine of the DUBOSE vehicle could be heard as it sped back toward the ANGLINS. (R -- 334). As DUBOSE neared the ANGLIN vehicle, he slammed on his brakes, burning rubber and skidding along the highway. (R -- 491). In Banat v. Armando, supra, the driver detected the vehicle with which it collided in sufficient time to have stopped, except for an intervening cause, i.e., mechanical brake failure. In the instant case, MR. DUBOSE was aware of Respondents' vehicle and would easily have been able to avoid collision except for his own negligence in returning at such a high rate of speed that he was unable to stop.

CONCLUSION

While summary judgments are not normally favored in negligence cases, the trial court was correct in concluding that under the circumstances of this case, Defendants were entitled to a judgment in their favors as a matter of law. Plaintiffs' injuries did not flow in a direct, natural, and continuous sequence from the alleged negligence of DOT and SCL. Instead, the independent actions of the ANGLINS and EDWARD DUBOSE either singly or jointly constituted efficient, independent intervening causes of the injuries sustained by Plaintiffs, and the Summary Judgment entered by the trial court should be upheld.

RESPECTFULLY SUBMITTED this 21st day of April, 1986.



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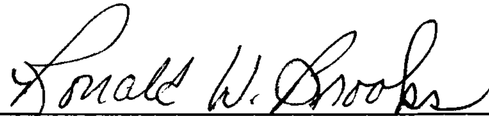
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, has been furnished by regular U.S. Mail on this 21st day of April, 1986, to BILL WHITAKER, ESQ., KARL O. KOEPKE, ESQ., and HURLEY P. WHITAKER, ESQ., Whitaker and Koepke, Chartered, Attorneys for Respondents, 45 West Washington Street, Orlando, FL 32801, and to DuBOSE AUSLEY, ESQ., WILLIAM M. SMITH, ESQ., and STEPHEN C. EMMANUEL, ESQ., Ausley, McMullen, McGehee, Carothers & Proctor, Attorneys for Petitioner, SEABOARD COAST LINE RAILROAD COMPANY, now known as SEABOARD SYSTEM RAILROAD, INC., P. O. Box 391, Tallahassee, FL 32302.



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