IN THE SUPREME COURT OF FLORIDA

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

Petitioner/Appellee,

vs.

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

Respondent/Appellants.

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

SEABOARD COAST LINE RAILROAD COMPANY,

Petitioner/Appellee,

vs.

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

Respondent/Appellants.

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

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

JURISDICTIONAL BRIEF OF PETITIONER/APPELLEE, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION

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SUMMARY OF ARGUMENT

This Court should review the decision by the First District Court of Appeal as the rules of law it announces expressly and directly conflict with rules previously announced by this Court. For one, the First District Court of Appeal has announced that the mere possibility of injury occurring to a person will suffice to impose liability upon a tortfeasor, contrary to specific holdings by this Court and numerous decisions by the other courts of appeal that there must at least be a "probability" of injury before liability wll be imposed.

Secondly, the First District Court of Appeal, although claiming to apply the principle of proximate cause as defined in Florida Standard Jury Instruction 5.1, has failed to recognize the significance of that part of proximate cause defined as a "direct, natural and continuous sequence." By ignoring this critical facet of proximate cause, the First District Court of Appeal has applied a principle of law which conflicts with that principle adopted by In re: Standard Jury Instructions, 198 So.2d 319 (Fla. 1967).

These factors demonstrate that this Court should exercise its jurisdictional power granted to it in Article III(b)(3) of the Florida Constitution to accept review of this case in order to resolve this conflict and once again make case law on this subject uniform throughout the state.

ISSUE ON APPEAL

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS IN EXPRESS AND DIRECT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT ON THE SAME QUESTION OF LAW.

ARGUMENT

1(a). The decision by the First District Court of Appeal announces a rule of law that conflicts with a rule previously announced by the Supreme Court.

In the last sentence of the majority decision, the First District Court of Appeal, citing Crislip v. Holland, 401 So.2d 1115, 1118 (Fla. 4th DCA 1981) stated:

> ". . . [T]he defendants need not have notice of the particular manner in which an injury would occur; it is enough that the possibility of some accidental injury was foreseeable to the ordinarily prudent person." (emphasis added).

The announcement of the above rule expressly and directly conflicts with decisions of the Florida Supreme Court and district courts of appeal regarding the identical issue of when an independent intervening cause will relieve a tortfeasor from liability. The Florida Supreme Court has held and several of the district courts of appeal have adopted the view that the mere "possibility" of some injury will not suffice to impose

liability on a tortfeasor, rather there must at least be a "probability" of injury.

In the leading Florida Supreme Court decision of Cone v. Inter County Telephone & Telegraph Co., 40 So.2d 148, 149 (Fla. 1949), this Court announced the following rule of law regarding intervening causation:

> "It is only when injury to a person who himself is without contributing fault has resulted directly and in ordinary natural sequence from a negligent act without the intervention of any independent efficient cause, or is such as ordinarily and naturally should have been regarded as a probable, not a mere possible, result of the negligent act, that such injured person is entitled to recover damages. . . . Conversely, when the loss is not a direct result of the negligent act complained of. . . but is merely a possible, as distinguished from a natural and probable, result of the negligence, recovery will not be allowed. . . . 'Possible' consequences are those which happen so infrequently from the commission of a particular act, that in the field of human experience they are not expected as likely to happen again from the commission of the same act."

The principle of law stated in Cone, supra, has been adopted either expressly or impliedly by all the district courts of appeal. The Second District Court of Appeal in Greene v. Flewelling, 366 So.2d 777, 781 (Fla. 2d DCA 1978), cert. den. 374 So.2d 99 (Fla. 1979), quoting from Prosser, The Law of Torts, 241 (4th ed. 1971) stated:

> "A mere possibility of causation is not enough; and when the matter remains one

> of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant."

The Third District Court of Appeal has also adopted the principle of law announced in Cone as evidenced by its decision in Stahl v. Metropolitan Dade County, 438 So.2d 14, 19 (Fla. 3d DCA 1985). The court stated:

> "Florida courts, in accord with courts throughout the country, have for good reason been most reluctant to attach tort liability for results which, although caused-in-fact by the defendant's negligent act or omission, seem to the judicial mind highly unusual, extraordinary, bizarre, or, stated differently, seem beyond the scope of any fair assessment of the danger created by the defendant's negligence."

The Third District Court of Appeal then went on to quote the exact language from Cone, supra, distinguishing between probable consequences, for which liability will lie, and merely possible consequences, for which no liability will attach. (Id at 20).

The principle of law announced by the First District Court of Appeal in the case at bar is also in express conflict with the Second District Court of Appeal. The Second District Court of Appeal has adopted the distinction between probable and possible consequences first enunciated in Cone, supra. As recently as last year the Second District Court of Appeal, in Roberts v. James, 447 So.2d 947, 950 (Fla. 2d

DCA 1984), citing to Cone, supra, stated:

> ". . .then because of the intervening act of another. . . there would also have to be evidence that appellee's resulting injury was the natural and probable consequence of appellant's violation of the rule before appellee could prevail." (emphasis in original).

The Fifth District Court of Appeal has also followed the principle of law set forth in Cone, supra, a recent example of which is found in Firestone Tire and Rubber Company v. Lippincott, 383 So.2d 1181 (Fla. 5th DCA 1980) where the court stated:

> "The consequences that a prudent man would anticipate as likely to result from an act are those consequences that happen so frequently that they may be expected to happen again and are, therefore, probable consequences. (Cites omitted). Foreseeable consequences are not 'what might possibly occur'." (Cites omitted)

It should also be noted that the First District Court of Appeal in the case at bar cites Crislip v. Holland, supra, as "authority" for the stated principle that the mere possibility of some accidental injury is sufficient to impose liability upon a tortfeasor. Yet a careful reading of Crislip, supra, fails to demonstrate a foundation for such a principle. Indeed, in Overby v. Wille, 411 So.2d 1331 (Fla. 4th DCA 1982), the Fourth District Court of Appeal cites to its decision in Crislip, supra, and yet no mention is made of the proposition that a mere possibility of accidental injury will impose liability. (Id at 1333). Indeed,

the Fourth District Court of Appeal reaffirmed the principle that:

> ". . . as to a loss or injury which is not a direct result of the negligent act, recovery will not be allowed if the injury was only 'possible' as opposed to 'probable'." (Citing Guice v. Enfinger, 389 So.2d 270 (Fla. 1st DCA 1980)). (emphasis in original).

This court established a general principle of law in Cone, supra, in 1949. Since that time, every district court in the state has adopted and utilized that principle, applying its standards and definitions to distinguish between "probable" and "possible" results on the issue of intervening causation. Without fail, this long history of court decisions has held that the mere "possibility" of accidental injury will not suffice to impose liability on a tortfeasor. By holding that the mere possibility of injury is sufficient to establish foreseeability the First District Court of Appeal has rejected or deviated from a sound and long-established rule of law.

We, therefore, respectfully submit to this Court that the above-stated principle of law expressly conflicts with a general principle of law established by this Court and the other district courts of appeal.

1(b). The decision by the First District Court of Appeal announces a rule of law that conflicts with a rule previously

announced by the Supreme Court.

The First District Court of Appeal announced a new definition of proximate cause, in direct conflict with that adopted by this Court in In re: Standard Jury Instructions, supra. At page 3 of its majority decision, the First District Court of Appeal wrote:

> "The term 'proximate cause' (or 'legal cause', in the language of the standard jury instructions) consists of two essential elements: (1) causation in fact, and (2) foreseeability."

The above rule of law expressly and directly conflicts with this Court's holding in In re: Standard Jury Instructions, supra. There, Florida Standard Jury Instruction 5.1(a) was adopted, which states:

> "Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred." (emphasis added)

The First District Court of Appeal has failed to apply the definition of proximate cause as set forth by this Court. In doing so, the First District Court of Appeal omitted the "directly and in natural and continuous sequence" element of proximate cause, which has long been recognized in Florida.

In Tampa Electric Company v. Jones, 190 So. 26, 27 (Fla. 1939), this Court, speaking through Justice Buford

stated:

> "A proximate cause stands next in causal relation to the effect. . . .A proximate cause produces the result in continuous sequence, and without which the result would not have occurred."

The standard set in Tampa Electric Company, supra, was cited with approval in the landmark case of Pope v. Pinkerton Hays Lumber Company, 120 So.2d 227, 229 (Fla. 1st DCA 1960), cert. den., with opinion, 127 So.2d 441 (Fla. 1961). The Supreme Court approved the Court of Appeal decision in Pope, supra, demonstrating that the First District Court of Appeal has deviated from its own definition of proximate cause in the case at bar. In Pope, that court stated:

> "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." (emphasis added).

This principle is applied almost verbatim in more recent cases. In Sardell v. Malanio, 202 So.2d 746, 747, conformed to 202 So. 2d 872 (Fla. 1967) this Court held that:

> " . . . [t]o constitute proximate cause, there must be such a natural, direct and continuous sequence between the negligent act and the injury that it can reasonably be said but for the act the injury would not have occurred."

This Court's pronouncement in Pope has persevered through time and to this day, persists as the model by which negligence cases are determined in Florida. The

First District Court of Appeal has deviated from this working definition of proximate cause by omitting the "natural and continuous sequence" provision as expressed in Florida Standard Jury Instruction 5.1(a) and relevant case law.

It is precisely this aspect of proximate cause which is lacking in the case at bar. By omitting the required language from its working definition of proximate cause, the First District Court of Appeal has strained to find a way to reverse Summary Judgment and at the same time has stated a principle of law directly in conflict with that stated by the Supreme Court and the other district courts of appeal.

CONCLUSION

For the First District Court of Appeal to hold that the mere possibility of injury will suffice to impose liability upon a tortfeasor is to announce a rule of law expressly and directly in conflict with the rule previously announced by this Court in Cone, supra.

The First District Court of Appeal is also in express and direct conflict with a previous decision by this Court by failing to apply the correct definition of proximate cause, as set out in Florida Standard Jury Instruction 5.1(a) and adopted by In re: Standard Jury Instructions, 198 So.2d 319 (Fla. 1967).

The First District Court of Appeal has created a "real and embarrassing conflict of opinion and authority" as that phrase was used in Ansin v. Thurston, 101 So.2d 808, 811 (Fla. 1958). It was to resolve conflicts in cases such as this that Article III(b)(3) of the Florida Constitution granted to this Court conflict jurisdiction. We respectfully request this Court to accept jurisdiction over this matter.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Petitioner/Appellee, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, has been furnished by U.S. Mail to Bill Whitaker, Esquire, Whitaker and Koepke, Chartered, 45 West Washington Street, Orlando, Florida 32801, Attorney for Respondent/Appellants, and to DuBose Ausley, Esquire and William M. Smith, Esquire, Ausley, McMullen, McGehee, Carothers & Proctor, Post Office Box 391, Tallahasee, Florida 32302, Attorneys for Petitioner/Appellee, Seaboard Coast Line Railroad Company, this 16th day of September, 1985.

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