IN THE SUPREME COURT OF FLORIDA

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

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

Petitioner/Appellee,

vs.

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

Respondents/Appellants.

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

RESPONDENT'S BRIEF ON JURISDICTION

BILL WHITAKER and
KARL O. KOEPKE, of
WHITAKER AND KOEPKE, Chartered
45 West Washington Street
Orlando, Florida 32801
Attorneys for Respondents
Telephone: (305) 843-2222

I N D E X

CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioner/Appellee, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, seeks to invoke this Court's discretionary jurisdiction to review the decision of the First District Court of Appeal (A. 1-10) based upon Petitioner's belief that the decision is in conflict with prior decisions of this Court and other District Courts of Appeal. The decision of the First District Court of Appeal is not in express and direct conflict with the cases cited by Petitioner or any Florida case on the same question of law. Therefore, this Court lacks jurisdiction to review the District Court's decision.

The facts as they pertain to this brief are set forth in the First District Court of Appeal decision as follows:

"On the night of September 3, 1979, Cleopatra Anglin, her husband, and her brother were traveling through drizzling rain in a 1965 Chevrolet pickup truck. Upon crossing a Seaboard Coastline Railroad track on Alternate U.S. 27 in rural Polk County, they unexpectedly hit an accumulation of water that covered both lanes of travel and was approximately six inches deep. The truck motor was doused with water, sputtered for some distance after hitting the pool of water, and then died. The Anglins attempted to start the motor by pushing the truck down the road and then 'popping' the clutch

once the truck reached a moderate speed. Approximately fifteen minutes after their truck hit the water, during which time they attempted in vain to push-start the truck several times, a car driven by Edward DuBose passed the Anglin truck heading in the opposite direction. A short distance after passing the truck, which was still on the road and, according to some witnesses, still being pushed, Mr. DuBose turned his car around and headed back toward the truck to render assistance. Unfortunately, Mr. DuBose failed to timely see the truck, hit his brakes, slid into the rear of the truck, and pinned Mrs. Anglin between the two vehicles, causing injury resulting in amputation of both legs. The distance between the pool of water and the accident scene was estimated by some witnesses as approximately 200 yards, by others up to three-tenths of a mile."

The First District Court of Appeal on July 2, 1985, reversed the trial court's granting of summary judgment. The Petitioner filed a Motion for Rehearing and, in the alternative, Motion for Rehearing En Banc. On August 7, 1985, the First District Court of Appeal denied Petitioner's motion. Notice to invoke discretionary review was filed by Petitioner on September 5, 1985.

A R G U M E N T

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.

The decision of the First District Court of Appeal does not expressly and directly conflict with a decision of another district court of appeal or of the Florida Supreme Court on the same question of law.

The opinion of the First District Court of Appeal is not in express and direct conflict on the same question of law with any of the cases cited. The First District Court of Appeal held:

> ...a tort feasor is liable for all damages proximately caused by his negligence. The term "proximate cause" ... consists of two essential elements: (1) causation in fact, and (2) foreseeability.... Causation in fact is often characterized in terms of a "but for" test, i.e., but for the defendant's negligence, the resulting damages would not have occurred. In the present case, there is no question as to causation in fact because "but for" the defendants' alleged negligence in causing the pooling of water on the highway, there would have been no accidental stopping of plaintiff's truck and resulting injury. (Emphasis added).
>
> The second element of proximate cause, foreseeability, is, unlike causation in fact, a concept established through considerations of public policy and fairness whereby a defendant whose conduct factually 'caused' damages may nevertheless be relieved of liability for those damages. Thus, proximate cause may be found lacking where the type of damage or injury that occurred is not within the scope of danger or risk created by the defendant's negligence and, thus, not a reasonably foreseeable

result thereof.... It is not necessary, however, that the defendants "be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur"; all that is necessary to liability is that "the tort feasor be able to foresee that some injury will likely result in some manner as a consequence of his negligent acts."... In the instant case, it cannot be said as a matter of law that an injury to plaintiff was not within the scope of danger or risk arising out of the alleged negligence. In the field of human experience, one should expect that negligently permitting a pool of water on an open highway would likely pose a substantial hazard to motorists because a vehicle crashing unexpectedly into the water is likely to experience a stalled motor or other difficulty causing the vehicle to stop on the highway, thereby subjecting its occupants to the risk of injury from collision by other cars. Gibson v. Avis Rent-A-Car System, Inc., supra. (Emphasis added).

Proximate cause may be found lacking, however, where an unforeseeable force or action occurring independently of the original negligence causes the injury or damage. This force or action is commonly referred to as an "independent, efficient intervening cause."... For the original negligent actor to be relieved of liability under this doctrine, however, the intervening cause must be "efficient," i.e., truly independent of and not "set in motion" by the original negligence....

...If an intervening cause is reasonably foreseeable, the negligent defendants may be held liable.... Whether an intervening cause is foreseeable is ordinarily for the trier of fact to decide. Id.; Crislip v. Holland, supra. Only if reasonable persons could not differ as to the total absence of evidence to support any inference that the intervening cause was foreseeable may the court determine the issue as a matter of law. Padgett, 417 So.2d at 768; Overby v. Wille, 411 So.2d 1331, 1332 (Fla. 4th DCA 1982).... The plaintiffs' exposure to danger was created by defendants' negligence, and the fact that a collision might occur while plaintiffs were extricating themselves from such danger up to fifteen minutes later presents a jury issue on foreseeability. Gibson v. Avis Rent-A-Car System, Inc., supra; Loftin v.

> McCranie, supra. That is so because the defendant need not have notice of the particular manner in which an injury would occur; it is enough that the possiblity of some accidental injury was foreseeable to the ordinarily prudent person. Crislip v. Holland, 401 So.2d 1118.

This is a correct statement of the Florida law. The First District Court of Appeal held that "but for" the negligence of defendants the accident would not have occurred. There was no question as to causation in fact. The injury was foreseeable to the ordinarily prudent person. One should expect that negligently permitting a pool of water on an open highway would likely pose a substantial hazard to motorists because a vehicle crashing unexpectedly into the water is likely to experience a stalled motor or other difficulty causing the vehicle to stop on the highway, thereby subjecting its occupants to the risk of injury from collision by other cars.

The First District Court of Appeal's opinion upholds the decisions cited by Petitioner and there is no express or direct conflict on the same question of law. The opinion in Anglin covers all the language contained in the cases cited by Petitioner. The opinion does not directly and expressly conflict with the Florida Standard Jury Instructions and does not create a new definition of "proximate cause." The court was not attempting to use every word of the law but points out causation and foreseeability. The 'but for' test meets the "natural and continuous consequence" test.

The Petitioner has taken one word out of the opinion, "possibility", and based on the appearance of that one word says that the decision is in express and direct conflict with a decision of another district court of appeal or the supreme court. This is not true. The use of the word "possibility" does not change the holding of the court. As stated above, the court held that the accident and injuries would not have occurred "but for" the negligence of the defendant and that the the injury was foreseeable to the ordinarily prudent person. Also, the Petitioner argues that because the words "directly and in natural and continuous sequence" do not appear in the opinion that a direct and express conflict exists. This is not true. The court utilized the "but for" test. The court recognizes that a mere possibility is not sufficient based on the "but for" test and found that the instant case met all the requirements for causation and foreseeability. The opinion properly expresses the Florida law and is not in express and direct conflict with the cases cited.

The First District Court of Appeal in its statement that:

> ... [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.

correctly states the law of the State of Florida. Authority for same is Crislip v. Holland, 401 So.2d 1115 (Fla. 4th DCA 1981), rev. den. 411 So.2d 380 (Fla. 1981), wherein they quoted Palsgraff v. Long Island Railway Co., 248 N.Y. 339, 162 N.E. 99 (NY Ct. of App. 1928) at Page 1118:

> ...It was not necessary that the defendant should have notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye.... (emphasis added)

and went on to say:

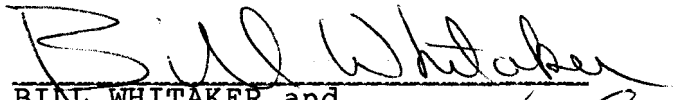
> ...although the City might not have foreseen the precise manner of the plaintiff's injuries, the possibility of an accident occurring in some fashion similar to that which occasioned the plaintiff's injuries was obvious to the 'ordinarily prudent eye'. Hence, we find nothing in the 'Palsgraff test of foreseeability' to be repugnant to the outcome of this case.

Because of the absence of a direct and express conflict with a decision of another district court of appeal or the supreme court, this Court does not have jurisdiction to hear this cause on the merits. Accordingly, the Petition for Discretionary Review should be denied.

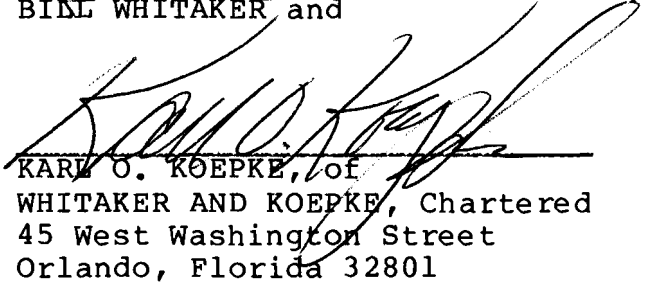
CONCLUSION

The decision of the First District Court of Appeal is not in direct and express conflict with a decision of another district court of appeal or the supreme court. Therefore, this Court does not have jurisdiction to hear this cause on the merits. Accordingly, the Petition for Discretionary Review should be denied.

Respectfully submitted,



BILL WHITAKER and



KARL O. KOEPKE, of
WHITAKER AND KOEPKE, Chartered
45 West Washington Street
Orlando, Florida 32801
Attorneys for Respondents
Telephone: (305) 843-2222

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies hereof have been forwarded by mail delivery to Ronald W. Brooks, Esquire, BROOKS & CALLAHAN, Chtd., 863 E. Park Avenue, Tallahassee, FL 32301; and DuBose Ausley, Esquire, AUSLEY, McMULLEN, McGEHEE, CAROTHERS & PROCTOR, P. O. Box 391, Tallahassee, FL 32302, this 11th day of October, A.D., 1985.

ATTORNEY