IN THE SUPREME COURT OF FLORIDA

SEABOARD COASTLINE RAILROAD COMPANY,
now known as SEABOARD SYSTEMS
RAILROAD, INC.,

Petitioner,

vs.

CURTIS ADDISON,

Respondent.

CASE NO. 68,290

FIRST DISTRICT COURT
OF APPEAL NO. BF-351

RESPONDENT ADDISON'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

Conflict jurisdiction is limited to those cases presenting real and embarrassing conflict. Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958). The written decisions must conflict within their four corners, as this Court cannot review the facts and testimony, White Construction Co., Inc. v. Dupont, 455 So. 2d 1026, 1031 (Fla. 1984), and the decisions must factually be on all fours. Florida Power & Light Co. v. Bell, 113 So. 2d 697, 698 (Fla. 1959). The ultimate test is whether the decision in question would overrule the decisions allegedly in conflict. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962).

The trial court denied two requested jury instructions relating to the operations of vehicles at railroad crossings relying upon Fla.Std.Jury Instr. 4.14(b) and Fla.R.Civ.P. 1.985. There are no conflicts regarding this ruling.

The point of law apparently being contested is the First District's holding that "instructions given must be considered as a whole, with the evidence, and if the law appears to have been fairly presented to the jury and it was not misled, the failure to give requested instructions is not error". (A-3, Petitioner's brief). This determination requires a review of the facts and testimony which this Court cannot perform in this proceeding. Ironically the cases allegedly in conflict support this ruling and the Third and Fourth District Courts have affirmed this holding in other decisions. See, Yacker v. Teitch, 330 So. 2d 828, (Fla. 3rd DCA 1976).

A R G U M E N T

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE FIRST DISTRICT COURT OPINION AND THE OPINIONS OF MENNARD V. O'MALLEY, 327 So. 2d 905, (Fla. 3rd DCA 1976) AND CITY OF TAMARAC V. GARCHAR, 398 So. 2d 889, (Fla. 4th DCA 1981).

JURISDICTIONAL TESTS

Jurisdiction of this Court is limited by Fla. Const., Art.V, §3(b)3 and Fla.App.R. 9.030(a)(2)(iv) such that this matter can be reviewed only if the written decision of the First District Court creates an express and direct conflict. This power is to be used to promote uniformity in case precedent, but was not intended to be used to allow a party "two separate successive appeals at two separate and distinct appellate levels". Seaboard Air Line Railroad Company vs. Branham, 104 So. 2d 356, 358 (Fla. 1958); see, Lake v. Lake, 103 So. 2d 639, 642, (Fla. 1958). The district courts of appeal are not intended to be intermediate courts and their decisions should be final and absolute. Jenkins v. State, 385 So. 2d 1356, 1358 (Fla. 1980).

This Court has consistently recognized the impossibility of absolute consistency with regard to every minor legal principle and factual situation. In describing the types of conflict to be worthy of invoking conflict jurisdiction, it has been held that conflict jurisdiction should be limited to "...cases involving principles, settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between decisions....a limitation of review to deci-

sions in 'direct conflict' clearly evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants." Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958); see, Financial Federal Savings and Loan Association v. Burleigh House, Inc., 336 So. 2d 1145 (Fla. 1976).

Additional threshold requirements for the acceptance of jurisdiction have been established by this court. The first is that express and direct conflict must be found in the written decisions of district courts of appeal and must be determined from the four corners of the decisions, without reference to the record on appeal. White Construction Co., Inc. v. DuPont, 455 So. 2d 1026, 1031 (Fla. 1984); N & L Auto Parts Company v. Doman, 117 So. 2d 410, 412, (Fla. 1960). Such conflicts are required to be obvious and patently reflected in the written decisions of the district courts. Trustees of the Internal Improvement Fund v. LoBean, 127 So. 2d 98, 101 (Fla. 1961). See, Gibson v. Maloney, 231 So. 2d 823, (Fla. 1970).

The second threshold test is whether the allegedly conflicting decisions are "on all fours factually in all material respects", Florida Power & Light Co. v. Bell, 113 So. 2d 697, 698 (Fla. 1959) or that the decisions are based "practically on the same state of facts and announced antagonistic conclusions". Ansin v. Thurston, 101 So. 2d 808, 811, (Fla. 1958). See, Massey v. Seaboard Air Line Railroad Company, 142 So. 2d 296 (Fla. 1962); Trustees of the Internal Improvement Fund v. LoBean, 127 So. 2d 98, 101 (Fla. 1961).

Should the facts of the decisions be on all fours and should

the argument of conflict be based solely upon matters within the four corners of the decisions allegedly conflicting, the ultimate test for jurisdiction in this Court can be applied. This Court clarified such test in Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962):

> "In concluding that we have no jurisdiction to review the instant decision on the 'conflict theory' we repeat what we have written on other occasions. The test of our jurisdiction in such situations is not measured simply by our view regarding the correctness of the Court of Appeal decision. On the contrary, jurisdiction to review because of an alleged conflict requires a preliminary determination as to whether the Court of Appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision of this Court or another Court of Appeal on the same point, thereby generating confusion and instability among the precedents. We have said that conflict must be such that if the later decision and the earlier decision were rendered by the same Court, the former would have the effect of overruling the latter. Ansin v. Thurston, Fla., 101 So. 2d 808. If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise. Florida Power & Light Co. v. Bell, Fla., 113 So. 2d 697; Neilsen v. City of Sarasota, Fla., 117 So. 2d 731."

Applying the above discussed definitions and tests, Petitioner has failed to establish conflict jurisdiction. The nature of the alleged conflict is of importance only to Petitioner and certainly could not be considered to be a "real and embarrassing conflict". Further, the decisions do not, within their four corners, exhibit any obvious or patent conflict. (It should be noted that statements at pages 1 and 3 of Petitioner's brief on jurisdiction contained incorrect and improper statements that the district court opinion stated a whistle had been blown a certain

number of feet from the crossing and that such was "not in dispute". This statement cannot be found in the district court opinion.) Consideration of the decisions allegedly in conflict clearly reveals that such are not factually on all fours in all material respects. Most importantly, it cannot be argued that the decision of the First District Court in this action would overrule the allegedly conflicting decisions if such were rendered by the same court. See, Kyle vs. Kyle, supra.

EXAMINATION OF CASES

Apparently the conflict alleged herein is based upon the rejection by the First District Court of Appeal of Petitioner's argument that Seaboard was entitled to two additional jury instructions on the "right of way" concept, despite Fla. Std. Jury Instr. 4.14(b) which provides:

> "b. Reciprocal duties at railroad crossing (duty to yield right of way to approaching train).
>
> Comment on 4.14b
>
> The committee recommends that no charge be given on the supposed duty of a pedestrian or motorist to 'yield the right of way' to an approaching train.
>
> Simply to instruct the jury that the pedestrian or motorist has a 'duty to yield the right of way' results in an overbalanced charge unless the railroad's 'duties' are also stated. But the train operators' duties vary with the circumstances. Moreover, to introduce the 'right of way' concept would seem to require that the qualifications upon the 'right' to take the 'right of way' be also stated.
>
> If a train has the 'right of way', it is not because of some statute or some privilege emanating from its license as a carrier. Rather, 'it is but a recognition of the physical nature of a railroad.' The supposed 'duty to yield the right of way' is simply a way of saying that a person will likely be killed and will certainly be held to have been negligent if, in the absence of some extenuating circumstance, he walks or drives

into the path of a train bearing down on the crossing." (emphasis added; cites omitted)

The standard jury instruction comment was relied upon in this case pursuant to Fla. R. Civ. P. 1.985 which provides:

STANDARD JURY INSTRUCTIONS

> The forms of Florida Standard Jury Instructions published by the Florida Bar pursuant to authority of the Supreme Court may be used by the trial judges of this state in charging the jury in civil actions to the extent that the forms are applicable...
>
> ...
>
> ...Similarly, in all circumstances in which the notes accompanying the Florida Standard Jury Instructions contain a recommendation that a certain type of instruction not be given, the trial judge may follow the recommendation....

The point of law impliedly alleged to be in conflict is the statement of the First District Court of Appeal that:

> "While a party is entitled to have a jury instructed on its theories when substantial evidence supports them..., the instructions given must be considered as a whole, with the evidence, and if the law appears to have been fairly presented to the jury and it was not misled, the failure to give requested instructions is not error. (Appendix to Petitioner's brief page 3).

This statement of the law requires a review of the facts and evidence and a factual determination that no prejudice has been caused to the party requesting an instruction. Obviously, the factual review and determination made by the First District Court of Appeal cannot be reviewed by this Court, which does not review testimony and evidence in the record on appeal.

The point of law relied upon by the First District Court of Appeal cannot be said to be in conflict with any holding in the two decisions allegedly in conflict. In fact, the Third District Court of Appeal, which decided Mennard, has held:

> "Jury instructions must be viewed in light of

> the evidence before reversible error can be ascertained. If it appears that the jury has not been confused or deceived, the judgment must be affirmed. Stewart v. Drawdy, Fla.App. 1973, 277 So. 2d 803. In determining whether a specific instruction is erroneous, it should be considered with all the other instructions given, and the pleadings and evidence in the case. Staicer v. Hall, Fla.App. 1961, 130 So. 2d 113. The proper test is whether the charge as a whole adequately presents the law upon the issues. Busser v. Sabatasso, Fla.App.1962, 143 So. 2d 532. In passing on a single instruction, it is to be judged in the light of all other instructions given, bearing upon the same subject and if when so judged, the law appears to have been fairly presented to the jury, an assignment of error based on the challenged instruction cannot prevail. Staicer v. Hall, supra." Yacker v. Teitch, 330 So. 2d 828, (Fla. 3rd DCA 1976).

In citing Yacker and holding that prejudice must be established for the failure to give an instruction to justify a reversal, the Third District Court of Appeal in Llompart v. Lavecchia, 374 So. 2d 77, (Fla. 3rd DCA 1979) specifically cited to Mennard v. O'Malley. Id. at 80. (Llompart dealt with the failure to use a standard jury instruction). See, Maistrosky v. Harvey, 133 So. 2d 103, 107 (Fla. 2nd DCA 1961); Crosby v. Stubblebine, 142 So. 2d 358, 359 (Fla. 2nd DCA 1962).

The Fourth District Court of Appeal has also aligned with the First District Court of Appeal, specifically citing to a First District decision, Davis v. Lewis, 331 So. 2d 320 (Fla. 1st DCA 1976) (which was also cited by the First District Court of Appeal in this appeal) as authority for considering the facts and evidence as a whole in conjunction with jury instructions to determine whether the refusal to give a requested instruction constituted error. Davis v. Charter Mortgage Company, 385 So.

2d 1173, 1174 (Fla. 4th DCA 1980).

Despite the uniform position of Florida's courts regarding considering jury instructions as a whole with the evidence, Petitioner attempts to assert, as conflict, a position that any jury instruction regarding a traffic statute must be given. This position is undermined by the decisions which are allegedly in conflict. Mennard v. O'Malley, 327 So. 2d 905, (Fla. 3rd DCA 1976), held the trial court was correct in refusing to instruct the jury on two traffic statutes, but committed error in denying requested instructions on two other traffic statutes. It is important that the court stated that it had reviewed all of the evidence and its holding was based upon "the circumstances presented by the evidence." Id. at 907.

A similar factual determination was made by the Fourth District Court in City of Tamarac v. Garcher, 398 So. 2d 889, (Fla. 4th DCA 1981) which held the trial court was correct in rejecting requested instructions on two traffic statutes but was incorrect in rejecting a third requested instruction. Id. at 894. The court specifically found that the failure to give the third instruction was prejudicial as it found that the jury would not understand the legal point in question and would have to speculate on the effect thereof. In the case at hand, the First District Court of Appeal specifically determined that the jury understood that "driving in front of an oncoming train evidences negligence...."

In addition to there being a lack of demonstrable conflict between the First District Court decision and the cases cited by

Petitioner, a review of the three decisions reveals that they are not "on all fours factually in all material respects". City of Tamarac and Mennard, respectively, dealt with a DWI instruction and a statute relating to the maximum width, in inches, of a vehicle or load upon state highways. The case at hand dealt with two instructions which required that vehicles be operated in a safe manner at railrorad crossings and that such vehicles stop and yield the right of way to an approaching train.

Unquestionably, the most distinguishing factor involved in this case is that the First District Court ruled not only that the jury instructions as a whole were correct, but that Fla.Std.Jury Instr. 4.14(b) (pursuant to Fla.R.Civ.P. 1.985) required the two instructions requested by Seaboard not be given. This ruling does not relate to any matter factually similar in the decisions allegedly in conflict and there can be no conflict on this point. To the contrary, the only existing appellate decision, on all fours, reached the same conclusion. Florida East Coast Railway Co. v. McKinney, 227 So. 2d 99 (Fla. 1st DCA 1969). In McKinney, the court approved the trial judge's decision to refuse to give two instructions similar to those in this case based upon the same reasoning.

Finally, Petitioner has attempted to assert that Section 316.1575, Florida Statutes, was not envisioned by the committee as a railroad instruction in the comments to Fla.Std.Jury Instr. 4.14(b). (It should be noted that this is an argument on the merits and there is no conflict identified regarding such matters). The First District Court has previously commented on

this statute and has indicated that it is a specific example of the sort of statute which should not be given as a jury instruction pursuant to Fla.Std.Jury Instr. 4.14(b). St. Louis-San Francisco Railway Company v. White, 369 So. 2d 1007, 1015, n.2 (Fla. 1st DCA 1979).

CONCLUSION

This court must deny jurisdiction unless the decision of the First District Court and the decisions allegedly in conflict are on all fours factually in all material respects, present a real and embarrassing conflict, and the conflict is set forth in the four corners of the decisions. Further, to take jurisdiction in this specific case, the holdings of the First District Court that (1) "instructions given must be considered as a whole, with the evidence, and if the law appears to have been fairly presented to the jury, and it was not misled, the failure to give requested instructions is not error" and (2) that Fla.Std.Jury Instr. 4.14(b) applies to the instructions at issue, must be found to be in direct and express conflict with the decisions in Mennard and City of Tamarac.

Finally, as required by Kyle v. Kyle, 139 So. 2d 885, 887, (Fla. 1962), Petitioner has not established that the decision of the First District Court in this action would overrule Mennard and City of Tamarac if the First District Court had also issued those decisions. Jurisdiction should be denied.

Respectfully submitted,

W. Roderick Bowdoin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing Respondent Addison's Brief on Jurisdiction has been furnished, by U. S. Mail, to DuBOSE AUSLEY and WILLIAM M. SMITH, Post Office Box 391, Tallahassee, Florida, 32302, and WILLIAM R. SWAIN, ESQUIRE, 630 American Heritage Life Building, Jacksonville, Florida, 32201, this 4 day of March, 1986.

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