OA 10-25-86 dt

IN THE SUPREME COURT OF FLORIDA

SEABOARD COASTLINE RAILROAD COMPANY, now known as SEABOARD SYSTEM RAILROAD, INC.,	:	
Petitioner,	:	CASE NO. 68,290
vs.	:	
CURTIS ADDISON,	:	
Respondent.	:	

PETITIONER SEABOARD'S REPLY BRIEF

An Appeal From a Decision of the District Court of Appeal, First District, State of Florida

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SUMMARY OF THE ARGUMENT

In the Answer Brief, Addison argues that the trial court properly denied Seaboard's requested jury charge based on the comment contained in Florida Standard Jury Instruction 4.14(b) which recommends no charge be given on the "supposed duty of a pedestrian or motorist 'to yield the right of way' to an approaching train." In the instant case, however, Seaboard did not request a special "railroad instruction" as envisioned by the Committee on Standard Jury Instructions in 4.14(b). Rather, Seaboard requested a jury instruction on Addison's violation of a specific traffic statute. Such an instruction is specifically authorized by Florida Standard Jury Instruction 4.11 which is entitled "Violation of Traffic Regulation Evidence of Negligence." The trial court's refusal to give this requested instruction is reversible error.

Seaboard was also prejudiced by several improper "golden rule" arguments made by Addison's counsel during closing arguments. These improper arguments resulted in a $4,010,196 verdict which the First District Court of Appeal stated was "perilously close to being so inordinately large as to exceed the maximum limit within which the jury could properly operate."

Because of the trial court's failure to instruct the jury on the requirements of Section 316.1575(1)(c), Florida Statutes, and the prejudicial "golden rule" arguments made by Addison's counsel, a new trial on all issues must be ordered.

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO GIVE SEABOARD'S REQUESTED INSTRUCTION REGARDING ADDISON'S VIOLATION OF SECTION 316.1575(1)(c), FLORIDA STATUTES (1983).

In the Answer Brief, Addison ironically argues that the "actual issue to be determined by this Court...is whether attorneys and trial judges in this state can rely upon Fla. R. Civ. P. 1.985 and the Florida Standard Jury Instructions approved by this Court." Addison's Answer Brief at 15. We agree. However, by framing the issue in this manner Addison implies that it is Seaboard who is attacking the Florida Standard Jury Instructions. In truth, Seaboard is the party relying on the Standard Jury Instructions and Addison the party seeking to curtail them.

At trial, Seaboard requested the court to instruct the jury on the requirements of a traffic regulation, specifically Section 316.1575(1)(c), Florida Statutes. Seaboard's request was consistent with both the evidence presented by Seaboard at trial and Florida Standard Jury Instruction 4.11 entitled "Violation of Traffic Regulation Evidence of Negligence." Although the trial court instructed the jury on the requirements of other applicable traffic regulations, it refused this requested instruction. The trial court's refusal to give this instruction is clearly reversible error.

Despite the overwhelming evidence presented at trial of Addison's violation of Section 316.1575(1)(c), Florida Statutes, Addison argues the trial court was correct in

refusing to instruct the jury on the requirements of this statute. Addison bases his argument on the comment contained in Florida Standard Jury Instruction 4.14(b) which recommends no charge be given on the "supposed duty of a pedestrian or motorist 'to yield the right of way' to an approaching train." The "duty" referred to in this comment is an all-encompassing one which would apply to all motorists and pedestrians approaching any railroad crossing. Section 316.1575(1), Florida Statutes, on the other hand, imposes a specific statutory duty on motorists under certain circumstances. For example, had Seaboard's train in the instant case not emitted an audible warning of its approach within approximately 1,500 feet of the highway crossing, the statutory duty to stop imposed by Section 316.1575(1)(c), Florida Statutes, on Addison would not have been applicable. Hence, interpreted properly, there is no conflict between Standard Jury Instruction 4.11 and the comment to 4.14(b).

In support of his position, Addison relies on Florida East Coast Railway Co. v. McKinney, 227 So.2d 99 (Fla. 1st DCA 1969), and on a footnote contained in a concurring opinion by Judge Robert P. Smith in St. Louis-San Francisco Railway Co. v. White, 369 So.2d 1007 (Fla. 1st DCA 1979), cert. denied, 378 So.2d 349 (Fla. 1979). In McKinney, the First District Court of Appeal sustained a ruling by a trial court refusing a general instruction regarding the duty of a motorist or pedestrian when crossing railroad tracks.

This decision is inapposite to the facts of the instant case for the simple reason that the instruction requested in McKinney was not based on a specific statutory violation but was a general instruction which would have been applicable to any motorist or pedestrian approaching any railroad crossing. As such, the instruction requested in McKinney was the type of instruction that the comment to Standard Jury Instruction 4.14(b) recommends not be given.

When read in the context of the entire opinion, the footnote from White, which Addison cites, similarly does not support Addison's position.[1] In White, the appellant argued a jury award should be reversed because the trial court instructed the jury that it could consider the appellant's violation of an industry standard as evidence of negligence. The court, however, ruled no reversible error had been committed and affirmed the award.

In the main opinion, Judges Melvin and Booth concluded that the trial court properly instructed the jury that it could consider the appellant's violation of an industry standard as evidence of negligence. In his concurring opinion, Judge Smith took issue with this holding, arguing that instructions to the jury should not be expanded in this

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[1]Even if this footnote is interpreted as supporting Addison's position, it is well-established that concurring opinions have no precedential value. Greene v. Massey, 384 So.2d 24 (Fla. 1980), cert. denied, 464 U.S. 1046, 104 S.Ct. 718, 79 L.Ed.2d 1980 (1984); Mouzon v. Mouzon, 458 So.2d 381 (Fla. 5th DCA 1984).

fashion. In support of his position, Judge Smith noted that instructions based on Standard Jury Instruction 4.11 occupy a middle ground between instructions based Standard Jury Instruction 4.9 (which pertains to violations of nontraffic penal statutes) and other evidence of negligence for which no jury charge is given. Judge Smith, however, found even limited charges based on Standard Jury Instruction 4.11 to be "problematic" because they give "judicial emphasis to non-exclusive standards of reasonable care which the jury is not obligated to apply...." Id. at 1015. In a footnote to this comment, Judge Smith gave as an example charges incorporating Section 316.1575, Florida Statutes.

Read in the proper context, Judge Smith's concurring opinion is not support for Addison's position that the comment to Standard Jury Instruction 4.14(b) controls over Standard Jury Instruction 4.11. To the contrary, Judge Smith wrote his concurring opinion to express his minority view that Standard Jury Instruction 4.11 should not be expanded to encompass violations of industry standards because, in Judge Smith's opinion, it already goes too far.

In his Answer Brief, Addison also attempts to distinguish the cases cited by Seaboard on two additional grounds. First, Addison argues that while the courts have always "required certain instructions regarding statutes which provided for specific conduct to be given", they do not always require instructions relating to statutes which relate "to

general matters within the common sense of jurors." Addison's Answer Brief at 28. This distinction is simply not valid.[2] For example, in City of Tamarac v. Garchar, 398 So.2d 889 (Fla. 4th DCA 1981), the Fourth District Court of Appeal ruled it was reversible error for a trial court to fail to give a requested instruction on Section 316.028, Florida Statutes (1973), which dealt with driving while intoxicated. In its decision, the Fourth District noted that while the average person is probably aware that driving a vehicle under the influence of alcohol is prohibited by law, the jury "was left to speculate about the effect of this law on their deliberations." Id. at 895. Similarly, the jury in the instant case was left to speculate about the effect of Section 316.1575(1)(c), Florida Statutes, on their deliberations.

Second, Addison argues some of the cases cited by Seaboard may have dealt with statutes imposing a stricter negligence per se standard. The cases cited by Addison in this regard, however, dealt with violations of Chapter 316, Florida Statutes, entitled "State Uniform Traffic Control". City of Tamarac v. Garchar, 398 So.2d 889 (Fla. 4th DCA 1981); Smith v. Lumbermen's Mutual Casualty Co., 360 So.2d 1098 (Fla. 1st DCA 1978).

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[2]Even if this distinction is valid, Seaboard would submit that Section 316.1575(1), Florida Statutes, is clearly a statute providing for specific conduct and not matters generally within the common knowledge of jurors.

Clearly, Standard Jury Instruction 4.11, entitled "Violation of Traffic Regulation Evidence of Negligence", was the proper charge to be given in these cases and not Standard Jury Instruction 4.9 which is entitled "Violation of Nontraffic Penal Statute Or Ordinance As Negligence." See comment to 4.9 ("It is 'negligence per se' to violate a penal statute or ordinance, not regulating traffic, which was enacted to protect a particular class of persons from a particular injury or type of injury.") (Emphasis added.)

In its Initial Brief, Seaboard specifically relied on cases involving a trial court's failure to instruct a jury on the weight to be given a violation of a traffic regulation. Seaboard relies on these cases for the simple reason that the instruction refused below dealt with Addison's violation of a traffic statute. Cases involving a trial court's failure to instruct a jury on a negligence per se statute or regulation are not, however, inappropriate. In both types of cases the trial court has committed the same type of error (failure to give an instruction on the weight to be given to a party's violation of a statute), the only difference being that in one type of case the instruction which should have been given would have been based on Standard Jury Instruction 4.11 and in the other type case on Standard Jury Instruction 4.9. See LaTorre v. First Baptist Church of Ojus, Inc., 11 FLW 1695 (Fla. 3d DCA August 5, 1986); Wilson v. Florida Airlines, Inc., 449 So.2d 881 (Fla. 2d DCA 1984), petition for rev.

denied, 456 So.2d 1181 (Fla. 1984).

In a recent case, Seaboard Coast Line Railroad Co. v. Clark, 491 So.2d 1196 (Fla. 4th DCA 1986), the Fourth District Court of Appeal held it was error not to give a 4.11 charge on the railroad's alleged violation of an industry standard. It held:

> All parties are entitled to jury instructions on their theory of the case, even when the defendant offers evidence controverting that theory, where the evidence substantially supports the plaintiffs' theory. (Citations omitted.)

Id. at 1198. If it is error for a trial court to refuse to give a 4.11 charge based on evidence which indicates a party may have violated an industry standard, clearly it is error for a trial court to refuse a 4.11 instruction regarding a party's violation of an applicable traffic statute.

Finally, Addison argues that even if the trial court erred in failing to instruct the jury on the requirements of Section 316.1575(1)(c), Florida Statutes, such error was harmless because the jury found Addison to be twenty percent at fault. Clearly this argument is without merit. Addison recognizes in his brief that one of the two "main issues" was "whether Mr. Addison should have operated his vehicle in a manner such that he could have stopped to avoid the collision." Addison's Answer Brief at 1. Surely his alleged failure to abide by a specific statute requiring him to stop under certain conditions goes to that main issue. Conceivably, a proper charge to the jury could have resulted in a finding of

no liability on the part of Seaboard. Even if Seaboard was found liable to some degree, the jury, properly instructed, would almost certainly have attributed a greater degree of fault to Addison. Given the $4,010,196 verdict, it must be remembered that even a small change in the percentage of fault attributed to each party would have a significant impact on the amount of the final judgment. Accordingly, the trial court's failure to give the requested jury instruction on Section 316.1575(1)(c), Florida Statutes, cannot be considered harmless error. See Roby v. Kingsley, 11 FLW 1723 (Fla. 1st DCA August 7, 1986).

II. THE VERDICT BELOW WAS CLEARLY EXCESSIVE AND THE RESULT OF PASSION, PREJUDICE OR OTHER IMPROPER INFLUENCE.

In his Answer Brief, Addison discusses at great length the comment made by Seaboard that the $4,010,196 verdict below "in and of itself suggests improper influence, passion or prejudice on the part of the jury." Seaboard's Initial Brief at 11. Indeed, in discussing this statement, Addison first contends that Seaboard has somehow taken a position different from that taken before the First District Court of Appeal. In fact, Seaboard has always contended that the size of the verdict was one of many factors which indicated improper influence, passion or prejudice. For example, in Seaboard's Initial Brief before the First District Court of Appeal at page 19 Seaboard stated:

> Further, the verdict of $4,010,196.00 is twice the amount of $2,005,984.00 suggested by plaintiff's

> counsel during closing argument (T :1012). Such a verdict is clearly suggestive of passion and prejudice on the part of the jury.

In the instant case, the First District found the verdict to be "perilously close to being so inordinately large as to exceed the maximum limit within which the jury could properly operate." Seaboard Coastline Railroad Co. v. Addison, 481 So.2d 3, 6 (Fla. 1st DCA 1986). While the verdict may not exceed this limit, the fact that it is "perilously close" to "the maximum limit" is evidence that the improper "golden rule" arguments made by Addison's counsel during closing arguments did indeed influence the jury. See Harbor Insurance Co. v. Miller, 487 So.2d 46, 47 (Fla. 3d DCA 1986).

With regard to these improper arguments, Addison incorrectly states that the first argument "was separated by several minutes" from the second. Addison's Answer Brief at 40. The record clearly shows this was not the case, with the first golden rule argument appearing on page 1003 of the transcript and the second on page 1004.

Addison next argues that Seaboard did not properly object to the comments made by Addison's counsel. However, Seaboard did clearly object and Addison's counsel was admonished to "quit making those golden rule arguments." (T 1005) (Emphasis added.)

Finally, Addison argues that the cases cited by Seaboard are distinguishable. For example, Addison states the jury

award in Klein v. Herring, 347 So.2d 681 (Fla. 3d DCA 1977), was overturned in part because the plaintiff's attorney had informed the jury that an insurance policy would cover the amount of the damages in issue. Addison's Answer Brief at 45. However, the Court of Appeals for the Third District in that case clearly stated the golden rule arguments alone "mandate[d] a new trial." Id. at 682. Similarly, in National Car Rental Systems, Inc. v. Bostic, 423 So.2d 915 (Fla. 3d DCA 1982), a single golden rule comment was ruled reversible error. In that case, the Third District specifically stated the other golden rule comments at issue "may or may not" have constituted reversible error but the final comment definitely "constituted reversible error." Id. at 917.

CONCLUSION

In the instant case, Seaboard did not request a jury charge "on the supposed duty of a pedestrian or motorist to 'yield the right of way' to an approaching train." Rather, Seaboard requested a jury instruction on Addison's violation of a traffic statute, specifically Section 316.1575(1)(c), Florida Statutes. As Seaboard's request was consistent with both the evidence presented by Seaboard at trial and Florida Standard Jury Instruction 4.11, the trial court's failure to give this instruction is clearly reversible error.

Additionally, Seaboard was prejudiced by several improper "golden rule" arguments made by Addison's counsel during

closing arguments. These arguments resulted in a $4,010,196 verdict which is clearly excessive and must be overturned.

For these reasons, a new trial on all the issues must be ordered.

Respectfully submitted this 15th day of September, 1986.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Mr. W. Roderick Bowdoin, Darby, Peele, Bowdoin, Manasco & Payne, 327 North Hernando Street, Post Office Drawer 1707, Lake City, Florida 32056-1707, this 15th day of September, 1986.

Attorney