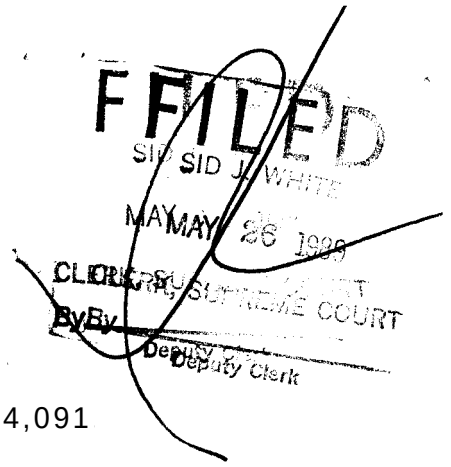

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PAYNE H. MIDYETTE,

Appellant,

vs. CASE NO. 74,091

LARRY DONNELL MADISON and LINDA MADISON, his wife; DWIGHT YELTON and PATRICIA YELTON, his wife; and JOHN JAMES PENN,

Appellees.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF THE STATE OF FLORIDA

CASE NO. 87-1947

AMICUS CURIAE BRIEF OF FLORIDA FORESTRY ASSOCIATION AND STATE OF FLORIDA DIVISION OF FORESTRY

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STATEMENT OF THE FACTS AND CASE

Amicus Curiae, Florida Forestry Association and Division of Forestry, agree with Appellant's statement of the facts and case.

SUMMARY OF ARGUMENT

The clearing of land by fire is not an inherently dangerous activity. The District Court painted with too broad of a brush. The fire, per se, did not contribute to the subject accident. The fire was contained to a limited area.

The District Court announced the correct legal standard. However, that standard was misapplied in that after stating that the standard required probability, and not mere possibility of causing injury, the court announced a holding based upon mere possibility of a hazard.

The existence of smoke does not make harm "'probable.'' If clearing land by fire is inherently dangerous, the cases indicate that it is so because of a propensity of fire to escape. The mere possibility of harm from smoke does not make smoke inherently dangerous.

ARGUMENT

IS THE CLEARING OF LAND BY FIRE, AND ITS RESULTING NATURAL CONSEQUENCE, SMOKE, AN INHERENTLY DANGEROUS ACTIVITY WHICH MAY CAUSE LIABILITY TO BE FASTENED UPON THE EMPLOYER OF AN INDEPENDENT CONTRACTOR FOR PERSONAL INJURIES SUFFERED BY THIRD PERSONS OUTSIDE THE PREMISES OF THE PROPERTY CLEARED?

That certified question can be readily broken down into two questions. Stripped to their bare essence the questions become:

IS THE CLEARING OF LAND BY FIRE AN INHERENTLY DANGEROUS ACTIVITY...?

and:

IS THE GENERATION OF SMOKE AN INHERENTLY DANGEROUS ACTIVITY...?

The answers to both of those questions axe negative. The District Court of Appeal, First District erred when it held that the answers were affirmative. We will address the questions in the above order.

THE CLEARING OF LAND BY FIRE IS NOT AN INHERENTLY DANGEROUS ACTIVITY. The District Court painted with too broad of a brush. While one who "torches the land" may be engaging in an inherently dangerous activity, there was no such burning in the instant case. The facts of the instant case are undisputed, The fire, per se, did not contribute to the subject accident. The fire was contained to a limited area.

In announcing a blanket rule that "the clearing of land by fire is inherently dangerous" the District Court unreasonably expanded the holding of Cobb v. Twitchell, 91 Fla. 539, **108** So. 186 (1926). In Cobb the Land was cleared by burning, in the instant case the land was cleared by "pushing raking, [and) piling" before piles of waste material were burned. The only similarity between the facts of Cobb and those of the instant case is that a fire was used. On the other hand, the spreading characteristic of fire that concerned the Court in Cobb is not present here. The holding of Cobb should not be spread to the instant facts.

If this Court is inclined to depart from the facts of the instant case and consider whether clearing of land by burning is inherently dangerous, it should hold that it is not. Clearing land by burning is essential to the health of the land. Like any other aspect of silviculture, it can be done safely.

The petitioning parties have advocated controlled burning as prudent silviculture and as a wildfire prevention practice for many years and the ruling of the District Court would emasculate what is considered good forestry practice in controlled burning and preparation for new planting. The severity of the catastrophic wildfire in Yellowstone National Park, last year could have been reduced if controlled burning had been utilized in previous years when weather conditions were less severe. The 100+ homes that burned in the Palm Coast, Florida, area in 1985

would have been less likely to occur if controlled burning on nearby woodlands had been practiced on a periodic basis. Like almost any other worthwhile or prudent task, controlled burning could possibly cause harm, but it is not inherently hazardous.

A holding that clearing land by burning is inherently dangerous places a landowner on the horns of a dilemma. The landowner may hire a trained experienced professional to clear his land, but the landowner would retain liability. Alternatively, the landowner may attempt to clear the land without the help of professionals.

The District Court's reliance upon the Annotation, Liability for Spread of Fire Purposely and Lawfully Kindled, 24 A.L.R.2d 241, 290 (1952) was misplaced. The Annotation's Table of Contents shows that the section relied upon by the District Court is entitled:

> "VI. Liability where fire set by third person:
>
> * * *
>
> b. By independent contractor:
>
> §31. Where employer is subject to nondelegable duty,
>
> * * *
>
> 533. Where work is inherently dangerous, 290.

When asking "What color is the old gray mare?" the expected response is "'Gray.'' In selecting Section 33 for its authority, the District Court disregarded Section 28 of the same Annotation. There under the heading "In general" the authors set forth an extensive collection of cases wherein "[t]he liability

of an employer for damages due to a fire kindled by an independent contractor for the purpose of clearing land has been denied..."

The standard set forth by this Court in Florida Power and Light Co. v. Price, 170 So.2d 293 (Fla. 1964) as quoted by the District Court is not questioned. The court said:

> "[I]f the 'work was of such a nature that in the ordinary course of events its performance would probably, and not merely possibly, cause injury if proper precautions were not taken[,] ... an owner is liable for injuries caused by the failure of an independent contractor to exercise due care in respect of the performance of the work.'" (citation omitted. Emphasis court's)

However, that standard was misapplied by the District Court. After setting forth the rule, the court's next sentence is:

> "One may reasonably anticipate that large piles of burned debris, if left unattended and smoldering during the night, can cause a large accumulation of smoke within the immediate area, including a nearby interstate highway, thereby causing a hazard to passing motorists."

Thus after stating that the standard required probability, and not mere possibility of causing injury, the court imposes a holding based upon mere possibility of a hazard.

THE GENERATION OF SMOKE IS NOT *AN* INHERENTLY DANGEROUS ACTIVITY. Assuming, en arguendo, that clearing land by fire is

inherently dangerous, the District Court made a quantum leap from the propensities of fire to its smoke. Fire is not Smoke. Smoke is not fire. The existence of smoke does not make harm "probable."

If clearing land by fire is inherently dangerous, the cases indicate that it is so because of a propensity of fire to escape. Obviously we will concede that examples of smoke causing harm, or even death, may be hypothesized. But, the mere possibility of harm from smoke does not make smoke inherently dangerous.

Categorizing smoke as the natural consequence of fire does not render the smoke inherently dangerous. It is well settled that use of a crane is inherently dangerous. The propensity of it to touch high voltage lines or to drop things causes a probability of harm if the crane is improperly used. However, if the shear bulk of a crane caused a transporting barge to sink, the sinking would not be because the crane is inherently dangerous. So too with smoke.

CONCLUSION

The District Court erred when it held that under the facts of this case that the clearing of land by fire is an inherently dangerous activity. Accordingly, the decision of the District Court should be reversed with instructions to reinstate the judgment of the trial court.