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IN THE SUPREME COURT OF THE
STATE OF FLORIDA

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Deputy Clerk

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

APPELLEES' ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE FACTS

Appellant's statement of the facts is incomplete and inadequate in two areas which bear on the certified question now before the Court.

Mr. Midyette's description of the land upon which Dorsey Reaves set his fires as a "rural area" should not produce images of pastoral, unpopulated expanses untouched and uninfluenced by humanity. Mr. Midyette's twenty-eight (28) acre tract was located in greater Tallahassee within one quarter mile of heavily traveled Interstate Highway 10 (R-232). The land sat adjacent to parcels containing single family residences (R-272). Indeed, it was the testimony of adjacent homeowner Carol Peele which revealed the nature, timing, and quantity of the smoke that Reaves' burning activities produced (R-276-277).

The size of the burning assignment given to Reaves is illustrated by the equipment (two bulldozers) necessary to create the three separate burn piles which Reaves ignited. Each burn pile was 5 feet wide and 20-30 feet long, and was sprayed with diesel fuel to get the fires started (R-38). Reaves tried to burn two of the three burn piles simultaneously, but had difficulty keeping the two piles burning because of the vegetation, dirt, and wet pine straw in the piles (R-44).

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative. An inherently dangerous activity is one that in the ordinary course of events would probably cause injury if proper precautions were not taken. The use of fire to clear debris from land is the use of an agency long declared by the Florida Supreme Court to be a **dangerous** agency.

A majority of jurisdictions other than Florida have characterized the clearing of land by fire as an inherently dangerous activity. The First District's opinion aligns Florida with the majority view, and comports with the modern realities of dangers inherent in land burning operations in proximity to heavily traveled interstate highways.

The fact that smoke, the natural and inevitable by-product of fire, was the ultimate agent by which the injuries were caused is immaterial. The injuries flowed in natural and proximate sequence from the setting of fires to the land.

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?

The First District has now included the clearing of land by fire as among those inherently dangerous activities for which the duty of reasonable care is non-delegable by a landowner. The First District's analysis is logical and cogent, and need not be repeated. The First District's opinion aligns Florida with the majority of other states which have considered this issue.

Appellant clings to the argument that is a case about smoke, and that the Court should cleave the law by analyzing the propensities of fire and smoke as though they were unrelated. Appellant's attempt to bifurcate the inseparable is compelled by the opinion of Cobb v. Twitchell, 108 So. 186 (1926), wherein this Court declared fire to be a dangerous agency.

Appellant's argument that "fire is not smoke, and smoke is not fire" fails for the reasons expressed in the First District's opinion. It defies logic and common sense to suggest that smoke is anything other than the natural

consequence and inevitable by-product of fire. Moreover, it is the act (clearing land by fire), and not the precise mechanics by which the act causes harm (smoke), on which the inherently dangerous activity analysis is properly focused.

A common theme of Appellant's Initial Brief is the argument that Dorsey Reaves, the landowner's independent contractor, used reasonable care in the conduct of the burning activity for which he was hired. This argument is absolutely irrelevant to this appeal, for the question of Reaves' negligence was not the issue decided by summary judgment, nor was it treated by the First District. The issue of Reaves' negligence remains to be determined at trial. The question before this Court is whether the work or activity of Reaves (the clearing of land by fire) is properly characterized as inherently or intrinsically dangerous, such that the duty to perform the work in a reasonably safe and careful manner is non-delegable by Reaves' employer.

The First District properly cited Florida Power and Light Co. v. Price, 170 So.2d 293 (Fla. 1964) for a description of the test to be applied in analysis of the inherently dangerous work doctrine. The test is whether "danger **inheres in the performance of the work.**" The Price opinion described the danger as sufficient "if there is a recognizable and substantial danger inherent in the work, even though a major hazard is not involved."

The Supreme Court's analysis in Price of "inherently dangerous" is, in turn, consistent with the explanation provided in Prosser, Law of Torts, (4th Ed.). Prosser states that inherently dangerous work is work which, in its nature, will create some peculiar risk of injury to others unless special precautions are taken. Among the work examples cited by Prosser as inherently dangerous is "the clearing of land by fire." Prosser, Law of Torts (4th Ed. p.472-473)

In describing fire as a dangerous agency, this Court has observed that "one setting out a fire must use care to prevent it from damaging his neighbor in proportion to the risk reasonably and ordinarily to be anticipated by a prudent person under the circumstances." Cobb, *supra*. In the absence of special precautions, land set afire is certainly an activity which creates a substantial risk of harm or injury to third persons.

A substantial portion of Appellant's brief is taken up with argument and analysis directed to the issue of **abnormally dangerous activities**, or **ultra hazardous activities**, for which strict liability obtains under the rule first announced in Rvlands v. Fletcher, L.R. 3 H.L. 330 (1868). *See generally*, Prosser, Law of Torts (4th Ed.), § 78.

Appellant's reference to § 520 of the Restatement (Second) of Torts is entirely misplaced, for this Court is **not** asked to declare the clearing of land by fire to be an abnormally dangerous activity. Abnormally dangerous activity

and inherently dangerous activity are two separate legal concepts with altogether different consequences. An activity declared to be abnormally dangerous (e.g., dynamite blasting) carries with it the burden of strict liability for its consequences. An inherently dangerous activity (e.g., operating a crane) merely renders non-delegable the duty to use reasonable care, but negligence remains an issue in the lawsuit.

The Restatement (Second) of Torts addresses the inherently dangerous activity doctrine in §§ 416 and 427, as follows:

§ 416. Work Dangerous in Absence of Special Precautions

"One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise."

§ 427. Negligence as to Danger Inherent in the Work

"One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger."

The clearing of land by fire is an activity which fits §§ 416 and 427 with perfection. Comment c. to § 427 even states that "the rule stated applies where the work involves the use of instrumentalities, such as **fire** (e.s.) or high explosives, which require constant attention and skillful management in order that they may not be harmful to others."

The fact that danger inheres in the clearing of land by fire, and the fact that in the ordinary course of events a fire will probably cause injury if proper precautions are not taken, is the very reason that the clearing of land by fire is extensively and comprehensively regulated by the Florida Division of Forestry. Section 590.12, Florida Statutes (1987), makes it a **crime** for a person to conduct a land clearing operation using fire without first obtaining authorization from the Division of Forestry. Pursuant to legislative authority, the Florida Department of Agriculture and Consumer Services, Division of Forestry, has promulgated administrative rules regulating the open burning of materials outdoors. Fla. Admin. Code Rule 51-2.001, et seq. Open burning of wooden material or vegetation generated by a land clearing operation is regulated as to times, proximity to occupied buildings or public highways, atmospheric and meteorological conditions, and the size and composition of the pile materials. Fla. Admin. Code Rule 51-2.007. The imposition of criminal sanctions, and the comprehensive regulatory environment within which the clearing of land by fire

is conducted is compelling testimony to the danger inherent in the activity. The inherent danger provides the very basis upon which regulatory oversight exists.

The dangers to third persons presented by smoke bellowing from land clearing fires is neither infrequent nor illusory. The potential smoke hazard which accompanies every agricultural burn is reflected in the separate consideration given to a fire's location by the Division of Forestry. Mr. Bill Wheeler, Forestry Area Supervisor for the Florida Division of Forestry, was deposed in this case (R-191-263). The following question and answer transpired concerning burn authorizations:

Q: All right. **As** to a burn that is going to occur in some proximity to a major highway such as Interstate 10, does the proximity to a highway like that have any influence on whether your dispatcher is going to issue the permit, not issue the permit?

A: Yes. We have what we consider smoke - sensitive areas, and entire I-10, Thomasville Highway, around hospitals, health care facilities and so forth, we -- we designate as smoke - sensitive areas, and any burn within a half a mile of those smoke - sensitive areas are required -- requires greater scrutiny, and in some cases on-site inspection, and in some cases, just absolute denial because we do not allow any burning at all within those areas. (R-209-210.)

The case of Wright v. Fla. Dept. of Agriculture, 13 FLW 2646 (Fla. 1st DCA 1988) is yet another case produced by a catastrophic traffic accident caused by the accumulation of smoke on an interstate highway. Although the

Wriaht ase resolved issues of overeign immunity, the factual pattern of Wriaht is evidence that harm to third persons caused by smoke produced from a land fire adjacent to a highway is an increasingly frequent and tragic occurrence in Florida.

The Florida Division of Forestry, in association with the Florida Forestry Association, has filed an Amicus Brief taking the curious position that the First District's ruling somehow "emasculates" the beneficial forestry practice of controlled burning. With all due respect, the Division of Forestry and the Florida Forestry Association are on the wrong side of this issue. Nothing within the First District's opinion suggests that agricultural burning be curtailed or restricted. Rather, in categorizing the clearing of land by fire as an inherently dangerous activity, the First District has affirmed and provided judicial imprimatur to the Division of Forestry's efforts to ensure that the practice is conducted safely, prudently, and with due care.

The Amicus Brief also suggests that answering the certified question in the affirmative will somehow work a hardship on landowners who propose to use controlled burns as part of the ownership and cultivation of their land. To the contrary, the First District's opinion merely places the ultimate responsibility for this activity where it belongs - in the hands of the landowners who derive the environmental and economic benefits of the burning. If this Court were to hold that the clearing of land by fire is **not** inherently dangerous, landowners

large and small would be absolved of any duty to make **any** effort to insure that burning was conducted with reasonable care, as long as the landowners make sure to hire an "independent contractor" to set the fires. Questions about permits, adequate training and experience, adequate manpower, adherence to fire safety standards, et al., would be of no concern whatsoever to the landowner, shielded as he were by the independent contractor doctrine. Appellees respectfully suggest that enlightened public policy requires that in Florida the substantial risk of harm presented to innocent third persons by negligently conducted agricultural burns should be borne by the landowner, and not delegated to the "independent contractor" riding the bulldozer.

As pointed out in the First District's opinion, the majority of other states to consider the issue have held that the clearing of land by fire is inherently dangerous, and that the duty of reasonable care is non-delegable by the landowner to an independent contractor. See cases collected in Annotation, Liability for Spread of Fire Purposely and Lawfully Kindled, 24 A.L.R.2d 241,290 (1952).

Appellants have cited virtually every case representing the minority view (11), and of those cited, a majority (6) were decided in the nineteenth century. Nineteenth century America did not include automobiles, interstate highways, and the densities of population which characterize the 1989 setting within which the Court must answer the certified question.

Appellant cites the Texas case of Givens v. Terrell, 461 S.W.2d 201 (Tex. Civ. App. 1970) as the "most recent" case among those few holding that the burning of land is not inherently dangerous. Even the Givens case is almost 20 years old, and arises out of a state with an enormous land mass, characterized in west Texas by large, unpopulated, semi-arid parcels. The geography and demography of Florida is in stark contrast to the Texas of 20 years ago. Florida is now the fourth most populous state in the nation, and one is hard pressed to find areas of Florida where negligently conducted land burning would not implicate heavily traveled highways and densely populated areas.

The most recent judicial treatment of this issue appears to be Koos v. Roth, 652 P.2d 1255 (Or. 1982), where the Oregon Supreme Court dealt with the issue of a landowner's liability for damages caused by field burning. Oregon, like Florida, is a state with a comprehensive regulatory scheme on the subject of land clearing with the use of fire. The Oregon court began by describing the use of fire as "the aboriginal dangerous activity," and proceeded to declare the clearing of land by fire to be an **abnormally dangerous activity**, for which a landowner would be strictly liable!

While "abnormally dangerous activity" and "strict liability" represent the extreme position as to land fires, the Koos opinion reflects current judicial

attitudes toward a modern problem - the interaction of highways and motorists with the dangers inherent in a negligently conducted land burning operation.

In summary, the question certified by the First District should be answered in the affirmative. If the clearing of land by fire, to include the natural by-product of smoke, does **not** constitute an inherently dangerous activity, then why does the State of Florida clothe the activity with a comprehensive regulatory scheme, and why has the legislature **criminalized** the act of using fire to clear land without authorization from the Division of Forestry. The First District's decision reaffirms this Court's holding in Cobb that fire is a dangerous agency. Moreover, this opinion aligns Florida with the majority view, and places the responsibility for the exercise of reasonable care in the burning of land in the hands of the party most able and appropriate to bear the burden - the landowner for whose economic benefit the burning occurs.

CONCLUSION

The certified question should be answered in the affirmative.

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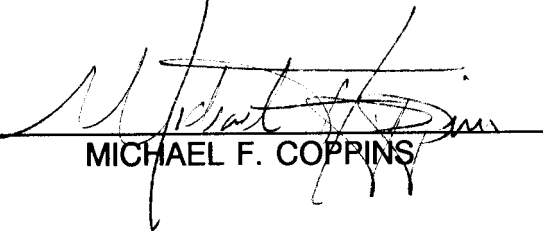
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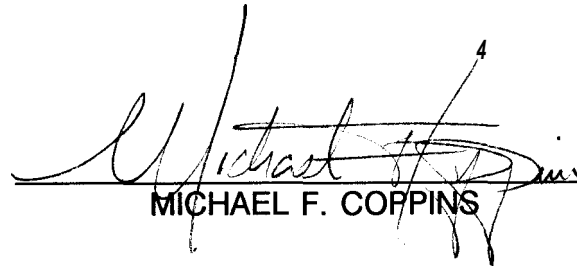
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CERTIFICATE OF SERVICE

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