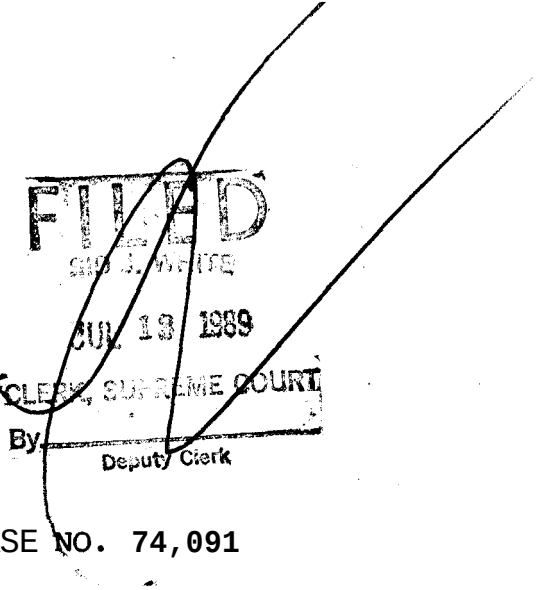
IN THE SUPREME COURT OF THE
STATE OF FLORIDA



PAYNE H. MIDYETTE,

Petitioner,

vs.

CASE NO. **74,091**

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

Respondents.

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

CASE NO. **87-1947**

PETITIONER'S REPLY BRIEF

R. WILLIAM ROLAND
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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?

As suggested in Respondents' Answer Brief at pages 6-7, the concept of ultrahazardous or abnormally dangerous activities is legally distinct from the concept of inherently dangerous activities. Nevertheless, the test of whether an activity should be considered inherently dangerous is vague at best. In Florida Power & Light Co. V. Price, 170 So.2d 293, 295 (Fla. 1964), quoting Price V. Florida Power & Light Co., 159 So.2d 654, 660 (Fla. 2d DCA 1963), the Florida Supreme Court simply stated that the test is whether the "danger inheres in the performance of the work." In contrast, the Restatement (Second) of Torts, section 520 (1977), provides a more structured analysis to determine whether an activity should be considered abnormally dangerous by utilizing several factors which allow for the consideration of circumstances surrounding the activity. These factors should be equally applicable to the determination of whether an activity is to be considered inherently dangerous and, to the extent practicable, should be utilized by this Court.

The approach taken by the First District, in effect, imposes strict liability on the employer of an independent contractor by subjecting the employer to liability for acts of the contractor when those acts are not, ipso facto and in every case, inherently

dangerous and nondelegable. If smoke is indeed an inherently dangerous, inevitable, natural and resulting consequence of fire, as held by the First District, then there will be virtually nothing an independent contractor can ever do to prevent "unreasonable" amounts of smoke from occurring when fire is utilized to clear land. This position flies in the face of the Restatement (Second) of Torts, section **427 (1977),** which states that an independent contractor's employer is liable when the contractor fails to take reasonable precautions against the inherent danger. The Restatement does not impose automatic responsibility upon the employer because a third party is injured. Rather, the Restatement would impose responsibility on the employer when a third party is injured <u>because</u> the contractor fails to take reasonable precautions. Reasonable precautions can be taken in each and every case if the contractor chooses to do so. Arguably, there are cases where precautions may never be reasonable enough under the circumstances but logic compels a case by case analysis rather than the strict rule adopted by the First District which wholly ignores the surrounding circumstances.

Respondents also argue that the extensive regulatory scheme contained in Florida Administrative Code Rules 51-2.001 - 2.007, compels the conclusion that fire is inherently dangerous. Instead, the employer of an independent contractor who complies with the statutory and administrative mandates of obtaining a permit before burning and who then conducts the burn in a less obtrusive fashion (e.g., by burning debris piles rather than an entire field) should not be automatically penalized for hiring a

contractor who complies with safety rules and regulations promulgated by the Division of Forestry. This is why it is imperative that the decision of whether fire is inherently dangerous should be decided on a case by case basis rather than by adopting the blanket rule formulated by the First District.

Moreover, one of the reasons that a landowner may hire an independent contractor who conducts a burn is because the contractor has particular expertise in the clearing of land and presumably would perform the task with greater skill than that possessed by the landowner. Such a prudent landowner should not be subjected to automatic liability without due regard to the surrounding circumstances. The rule adopted by the First District appears to be contrary to sound public policy which should reward rather than penalize the prudent landowner.

Respondents further argue that the majority of states to consider this issue have held that the clearing of land by fire is inherently dangerous and refer this Court to the cases collected in Annotation, Liability for Spread of Fire Purposely and Lawfully Kindled, 24 A.L.R.2d 241 (1952). However, a careful reading of that Annotation instead shows that there are only six (6) state courts which have found an employer liable for the injuries caused by an independent contractor's failure to exercise due care when setting fire to land, while the liability of an employer of an independent contractor for the negligent spread of fire has been rejected by the courts of eight (8) states. This annotation lends further support to the proposition that the issue of whether fire is inherently dangerous is far from settled and is best decided on a case by case basis.

Respondents contend that the harm to third persons from smoke produced by a land fire adjacent to a highway is "an increasingly frequent and tragic occurrence.'' However, Respondents' brief is virtually devoid of any case citations which support either this proposition or the contention that fire is inherently dangerous. Arguments that are not supported by the law or the facts should be disregarded by this Court. The one case cited by Respondents which did hold fire to be inherently dangerous, Koos v. Roth, 293 Or. 670, 652 P.2d 1255 (1982), did not involve the work of an independent contractor and involved damages which occurred as the result of burning and not of smoke accumulation.

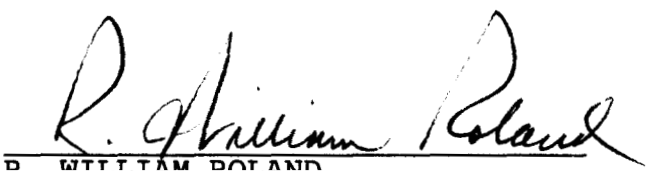
Curiously, Respondents are unable to cite a single case which holds the employer of an independent contractor liable for injuries caused by smoke emitting from the employer's land. This is *so* because the only two decisions that are directly on point with the present case fully support Petitioner's position. See Givens v. Terrell, 461 S.W.2d 201 (Tex. Civ. App. 1970); Becker v. Northland Transp. Co., 200 Minn. 272, 274 N.W. 180, aff'd on rehearing, 200 Minn. 278, 275 N.W. 510 (1937).

Even were this Court to hold that clearing land by fire is an inherently dangerous activity, the injuries which occurred in this case allegedly resulted from smoke rather than fire and, therefore, are not within the risk of harm associated with fire. Accordingly, the employer of an independent contractor should not be held liable for injuries which are not a part of the danger normally associated with an outdoor fire.

CONCLUSION

The certified question should be answered in the negative. The opinion of the First District Court of Appeal should be reversed and the summary judgment granted in favor of Midyette should be reinstated.

KARL, McCONNAUGHHAY, ROLAND & MAIDA, P.A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY th t a true and correct copy of the foregoing has been furnished to DAVID A. BARRETT, ESQ., Post Office Box 1501, Tallahassee, Florida 32302; MICHAEL F. COPPINS, ESQ., Post Office Box 1674, Tallahassee, Florida 32302; STEPHEN W. CARTER, ESQ., 17 East Pine Street, Orlando, Florida 32801; DAVID P. HEATH, ESQ., Post Office Box 14129, Tallahassee, Florida 32317; DOMINIC M. CAPARELLO, ESQ., Post Office Box 1876, Tallahassee, Florida 32302; FRANCIS J. MILON, ESQ., 1500 American Heritage Life Building, Jacksonville, Florida 32202; and RICHARD SMOAK, ESQ., Post Office Box 1579, Panama City, Florida 32402, by U.S. Mail, this 13th day of July, 1989.

R. WILLIAM ROLAND

Attorney for Petitioner