IN THE SUPREME COURT OF FLORIDA

JONATHAN T. FISHER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 92,502

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHELLE A. LUCAS
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COUNSEL FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

JONATHAN T. FISHER	)	
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STATE OF FLORIDA,	)	
	)	
Appellee/Respondent.	)	
	)	

STATEMENT OF THE CASE AND FACTS

Petitioner was found guilty by a jury in Count III of carrying a concealed firearm in violation of Section 790.01, Florida Statutes and in Count IV of possession of a firearm by a convicted felon in violation of Section 790.23, Florida Statutes. (R 37-40, T 397)

The trial court overruled defense counsel's objection to the inclusion of eighteen additional points on Petitioner's sentencing guidelines scoresheet for use of a firearm where Petitioner was found guilty of possession of a firearm by a convicted felon and carrying a concealed firearm. (R 127-131) Petitioner appealed to the Fifth District Court of Appeal. On appeal to the Fifth District Court of Appeal, Petitioner argued that the trial court erred in assessing 18 points for possession of a firearm pursuant to Florida Rule of Criminal Procedure 3.702(d)(12). On January 23,1998, the Fifth District issued its opinion affirming Petitioner's sentence. See Fisher v. State, 23 Fla. L. Weekly D303 (Fla. 5th DCA January 23, 1997). (Appendix A) In rejecting Petitioner's argument that the assessment of the 18 points was improper, the District Court cited to two of its earlier decisions, one of which is currently

pending review in this Court. See State v. Scott, 692 So. 2d 234 (Fla. 5th DCA), rev. granted, 698 So. 2d 840 (Fla. 1997) The District Court also cited to the Second District Court of Appeal's case of White v. State, 689 So. 2d 371 (Fla. 2d DCA), rev. granted, 696 So. 2d 343 (Fla. 1997)(Appendix B). In White, the Second District Court of appeal certified direct conflict with the Fourth District Court of Appeal's decision in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996)(Appendix C) and is currently pending review in the Supreme Court of Florida in Case Number 89,998.

A timely notice to invoke this Court's discretionary jurisdiction is being filed contemporaneously with this jurisdictional brief on this date of February 20, 1998.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal below is in direct and express conflict with the decision of the Fourth District Court of Appeal in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996) on the same question of law. Furthermore, the Second District Court of Appeal in White v. State, 689 So. 2d 371 (Fla. 2d DCA), rev. granted, 696 So. 2d 343 (Fla. 1997) certified a direct conflict with the Galloway decision and is currently pending review with this Court in Case Number 89,998. Thus, this Court has discretionary jurisdiction to accept the instant case for review and resolve the conflict.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL BELOW IS IN DIRECT CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN GALLOWAY V. STATE, 680 SO.2D 616 (FLA. 4TH DCA 1996).

Petitioner, Appellant below argued that it was improper to assess 18 points for possession of a firearm pursuant to Florida Rule of Criminal Procedure 3.702(d)(12) where his offenses at sentencing were possession of a firearm by a convicted felon and carrying a concealed firearm. The Fifth District rejected this argument citing to their earlier decision in State v. Scott, 692 So. 2d 234 (Fla. 5th DCA), rev. granted, 698 So. 2d 840 (Fla. 1997) where they had noted that the Fourth District Court of Appeal in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996) had reached the direct opposite conclusion The Fourth District Court of Appeal held that Florida Rule of Criminal Procedure 3.702(d)(12) does not apply to convictions for possession of a firearm by a convicted felon and carrying a concealed firearm when unrelated to the commission of any additional substantive offense. The Second District Court of Appeal has aligned itself with the Fifth District Court of Appeal on this same issue in White v. State, 689 So. 2d 371 (Fla. 2d DCA) rev. granted, 696 So 2d 343 (Fla. 1997). In White, the Second District Court of Appeal, however, certified direct conflict with the Galloway decision and that decision is currently pending review before this Court in Case Number 89,998. Therefore, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(iv) and Jollie v. State, 405 So.2d 418 (Fla. 1981) this Court has discretionary jurisdiction to accept the instant case for review for the purpose of resolving the express and direct conflict between the District Courts of Appeal on this question of law.

CONCLUSION

Petitioner respectfully requests this Honorable Court to exercise its discretionary jurisdiction and accept the instant case for review.

Respectfully submitted,

JAMES B. GIBSON
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal and mailed to: Jonathan T. Fisher, Inmate #463116, Martin Work Camp, 1150 S.W. Allapattah Rd., Indiantown, FL 34956, this 20th day of February, 1998.

M. A. LUCAS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JONATHAN T. FISHER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO.
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	

APPENDICES

Appendix A -- Fisher v. State, 23 Fla. L. Weekly D303 (Fla. 5th DCA January 23, 1997)

Appendix B -- White v. State, 689 So 2d 371 (Fla. 2d DCA) rev. granted, 696 So. 2d 343 (Fla. 1997)

Appendix C -- Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996)

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COUNSEL FOR PETITIONER

(DAUKSCH, J.) This is an appeal from a final judgment in an eminent domain case.

For two reasons we must reverse the judgment and remand the case for a new trial. The first reason is that the person the county called as a witness as to the value of the property was unable or unwilling to provide the court and jury with proper documentation and support for his opinion as to the value of the property being taken. Although he said that he "used market data, interviews with [persons] and other materials . . . to come up with these adjustments," on cross-examination he would not or could not produce any of the market data or names of persons to support his statements. His testimony was inherently incredible.

The second reason is that this same witness, a county employee, was permitted, over objection, to tell the jury that the notice of taking was not accurate; that the county was not really going to take all of the land it would be entitled to, under the ultimate judgment, so the appellant was not going to lose as much as had been originally proposed. Thus, he suggested that the jury award a lesser amount than what appellant would get under the entire taking. Although the appellant sought a mistrial for this behavior, the trial judge allowed the county to "amend" its notice of taking midtrial. Once that skunk was tossed into the jury box, the trial needed aborting.

REVERSED and REMANDED. (HARRIS and ANTOON, JJ., concur.)

* * *

SALEM VILLAGES MRDD, INC. v. E.C. KENYON CONSTRUCTION COMPANY, INC. 5th District. #97-635. January 23, 1998. Appeal from the Circuit Court for Orange County. Affirmed. *See Prosperi v. Code, Inc., 626 So.* 2d 1360 (Fla. 1993); *Moritz v. Hoyt Enterprises, 604 So.* 2d 807 (Fla. 1992).

BLOWE v. STATE. 5th District. #97-3309. January 23, 1998. 3.800 Appeal from the Circuit Court for Orange County. AFFIRMED. See *State v. Mattress,* 6[illegible] 2d 740 (Fla. 5th DCA 1997).

HUMBERT v. STATE. 5th District. #97-3469. January 23, 1998. 3.850 Appeal from the Circuit Court for Marion County. AFFIRMED. See *State v. McCloud, 577 So.* 2d 939 (Fla. 1991): *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).

McGEE v. STATE. 5th District. #97-1960. January 23, 1998. Appeal from the Circuit Court for Osceola County. AFFIRMED. See Fla. R. App. P. 9.140(b)(2)(B); *Robinson v. State, 373 So,* 2d 898 (Fla. 1979).

FISHER v. STATE. 5th District. #96-2593. January 23, 1998. Appeal from the Circuit Court for Orange County. AFFIRMED. See *Smith v. State, 683 So.* 2d 577 (Fla. 5th DCA 1996); *State* v. *Scott*, 692 So. 2d 234 (Fla. 5th DCA), *rev. granted, 698 So.* 2d 840 (Fla. 1997); *White v. State, 689 So.* 2d 371 (Fla. 2d DCA), *rev, granted, 696 So.* 2d 343 (Fla. 1997).

* * *

Dissolution of marriage-Child custody-Visitation-LXdence-Hearsay-Establishment of visitation arrangements on basis of testimony of child's treating psychologist relating child's statements regarding mother's inappropriate conduct-Reversal required where trial court did not make necessary statutory findings relating to reliability of statements of child

ERIC A. COBERLY. Appellant, v. KAREN COBERLY, Appellee. 1st District. Case No. 97-493. Opinion filed January 21, 1998. An appeal and cross-appeal from the Circuit Court for Duval County. Frederick B. Tygart, Judge. Counsel: Ada A. Hammond and Glenn K. Allen of Johnston &-Hammond, Jacksonville, for Appellant. Joy A. Lordahl, Jacksonville, for Appellee/Cross-Appellant. Michael-M. Naughton, Jacksonville, for Maternal Grandparents.

(PER CURIAM.) In this appeal and cross-appeal, both Eric A. Coberly (the former husband) and Karen Coberly (the former wife) challenge the lower court's order which, among other things, grants primary residential custody to the former husband, supervised visitation to the former wife, and visitation to the maternal grandparents. The record is clear that the trial court established these visitation arrangements primarily to protect the parties' minor child in view of the court's finding that the former wife "more likely than not did act inappropriately in the presence of and with the minor child of the parties." This finding was based primarily upon testimony of the child's treating psychologist "that the minor child had expressed the fact that her mother [the former wife] . . . had engaged in certain conduct which is highly inappropriate [including] . . . inappropriate sexually related kissing, lifting up of dresses and looking a [sic] women's underwear, tying the child up, and improper touching of the child's genitalia." The former wife has consistently and vigorously denied engaging in any such inappropriate actions and objected to the introduction of this hearsay testimony of the child on the grounds that the requirements of section 90.803(23), Florida Statutes (1995), had not been met. Because the trial court failed to make the necessary findings under section 90.803(23) relating to the reliability of the statements of the child, we reverse. *See M. W. v. Department of Health and Rehabilitative Serv., 651 So.* 2d 754 (Fla. 1st DCA 1995); *Weatherford v. State,* 561 So. 2d 629, *633* (Fla. 1st DCA 1990); *Salter v. State,* 500 So. 2d 184,185 (Fla. 1st DCA 1986).

In view of our holding here, we find it unnecessary to address the other issues raised on appeal. On remand, the trial court, upon the appropriate motion, may again consider the findings and determinations required by section 90.803(23) and, in its discretion, may take additional testimony and hear additional argument concerning the visitation issues, including issues relating to grandparent visitation. See *Beagle v. Beagle, 678 So.* 2d 1271 (Fla. 1996); *Sketo* v. *Brown*, 559 So. 2d 381 (Fla. 1st DCA 1990); *Von Eiff v. Von Eiff*, 22 Fla. L. Weekly D2176 (Fla. 3d DCA September 16, 1997); *Fitts v. Poe, 22* Fla. L. Weekly D2265 (Fla. 5th DCA September 26, 1997).

REVERSED and REMANDED for proceedings consistent with this opinion. (BOOTH, JOANOS AND VAN NORTWICK, JJ., CONCUR.)

* * *

Criminal law-Manslaughter by culpable negligence-proximate cause-Evidence that defendant consumed beer to the point of intoxication while driving vehicle, that defendant then insisted that minor passenger who had no driver's license drive vehicle, and that minor unlicensed driver fell asleep while driving vehicle, with result that vehicle crossed center lane and killed victim, sufficient to establish prima facie case of manslaughter by culpable negligence-The harm that occurred was foreseeable and within the scope of the danger created by defendant's negligent conduct-Error to dismiss information

STATE OF FLORIDA, Appellant, v. GREGORY ALAN MORRIS, Appellee. 1st District. Case No, 97-1108. Opinion filed January 21, 1998. An appeal from the Circuit Court for Santa Rosa County. Paul A. Rasmussen, Judge. Counsel: Robert A. Butterworth, Attorney General; L. Michael Billmeir, Assistant Attorney General, Tallahassee, for Appellant. Spiro T. Kypreos. Pensacola, for Appellee.

(LAWRENCE, J.) The State appeals the dismissal of an amended information charging Gregory Alan Morris (Morris) with manslaughter. The charge arose from an auto collision on January 12, 1996, in Santa Rosa County. We reverse.

Morris filed a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). Morris, in order to prevail on such a motion, must allege undisputed material facts, and show that the undisputed facts do not establish a prima facie case. *State v. Parrish,* 567 So. 2d 461 (Fla. 1st DCA 1990). We are required to review the trial court's ruling resolving inferences from all facts in the light most favorable to the State. *Boler v. Stale, 678* So. 2d 319 (Fla. *1996); Parrish.* We moreover must determine, not whether a jury *would* find a defendant guilty of the charged crime but, rather, whether the facts *could* be sufficient for a jury to convict adefendant. *Stare v. Knight,* 622 So. 2d 188, 190 (Fla. 1st DCA 1993) ("Whether or not a jury would ultimately find or would be justified in finding [the defendant] guilty is not now our concern.").

The facts of the instant case establish a prima facie case of manslaughter by culpable negligence. The trial court thus erred in ruling, as a matter of law, that the facts do not establish aprima facie case. The court reached this ruling by concluding that no

Judgment affirmed; sentence remanded with directions for correction.

SCHOONOVER, A.C.J., and LAZZARA and QUINCE, JJ., concur.

1

Ozell McNABB, Appellant,

v.

STATE of Florida, Appellee.

No. 95-865.

District Court of Appeal of Florida, First District.

Feb. 20, 1997.

Rehearing Denied March 31, 1997.

An appeal from Circuit Court, Walton County; Thomas Remington, Judge.

Nancy A. Daniels, Public Defender, and Jean Wilson, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Having considered the various arguments presented by the appellant in this direct Criminal appeal, we affirm his convictions. We reject his argument pursuant to Coney v. *State*, 653 So.2d 1009 (Fla.), cert. denied — U.S. —, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), because the record is insufficient to show that peremptory challenges were exercised. See *Ganyard* v. *State*, *686* So.2d 1361 (Fla. 1st DCA 1996).

MINER, ALLEN and LAWRENCE, JJ., concur.

2

Anthony D. WHITE, Appellant,

v.

STATE of Florida, Appellee.

No. 95–03598.

District Court of Appeal of Florida, Second District.

Feb. 21, 1997.

Appeal from the Circuit Court for Collier County; Franklin G. Baker, Judge.

James Marion Moorman, Public Defender, and Austin H. Maslanik, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butter-worth, Attorney General, Tallahassee, and Tonja R. Vickers, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Anthony D. White appeals an order denying his dispositive motion to suppress and an order denying his motion to amend the scoresheet. We affirm both orders, but certify conflict in regard to the latter.

White specifically challenges the addition of eighteen points to his scoresheet calculation. These points were applied pursuant to Florida Rule of Criminal Procedure 3.702(d)(12). In affirming the trial court on this point, we certify that our decision in this case is in direct conflict with the decision of the Fourth District Court of Appeal in *Gallo-*

way v. State, 680 So.2d 616 (Fla. 4th DCA 1996).

THREADGILL, C.J., and FULMER and WHATLEY, JJ., concur.

Paleno ESTRADA, Appellant,

v.

STATE of Florida, Appellee.

No. 95-02660.

District Court of Appeal of Florida, Second District.

Feb. 21, 1997.

Appeal from the Circuit Court for Pasco County; Lynn Tepper, Judge.

James Marion Moorman, Public Defender, and Brad Permar, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Robert J. Krauss, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

The defendant, Paleno Estrada, challenges his judgment and sentence for aggravated battery. After a review of the record in accordance with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), we affirm the defendant's conviction. We strike, however, that portion of probation condition 9 requiring Mr. Estrada to pay for random drug and alcohol testing because it is a special condition that was not orally announced at sentencing. *Luby v. State*, 648 So.2d 308 (Fla. 2d DCA 1995). We affirm the sentence in all other respects.

CAMPBELL, A.C.J., and LAZZARA and WHATLEY, JJ., concur.

2

Ervin Alphonso BARTLEY, Appellant,

v.

STATE of Florida, Appellee.

No. 963394.

District Court of Appeal of Florida, First District.

Feb. 25, 1997.

Following conviction, defendant moved for postconviction relief on basis of ineffective assistance of counsel. The Circuit Court, Duval County, William A. Wilkes, J., denied relief. Defendant appealed. The District Court of Appeal held that allegation that trial counsel was ineffective because he refused to investigate and consider availability of voluntary intoxication as defense to aggravated assault charge was legally sufficient to state claim for relief.

Reversed and remanded with directions.

1. Criminal Law ⇐998(15)

Allegation that trial counsel was ineffective because he refused to investigate and consider availability of voluntary intoxication as defense to aggravated assault was legally sufficient to state claim for postconviction relief; it was not necessary, as trial court presumed, that defendant point to record evidence of intoxication at time of alleged offense in order to state legally sufficient claim. U.S.C.A. Const.Amend. 6.

2. Assault and Battery ⇐49

Aggravated assault is specific intent crime.

Robert A. Butterworth, Attorney General and Cynthia A. Greenfield, Assistant Attorney General, for appellee.

Before LEVY, GODERICH and SHEVIN, JJ.

PER CURIAM.

Affirmed. *Cannady v. State*, 620 So.2d 165, 169 (Fla.1993); *Chestnut v. State*, 538 So.2d 820 (Fla.1989); *Zeigler v. State*, 402 So.2d 365, 373 (Fla.1981).

Debra GALLOWAY, Appellant,

v.

STATE of Florida, Appellee.

No. 95-3395.

District Court of Appeal of Florida, Fourth District.

Oct. 9, 1996.

Defendant was convicted in the Nineteenth Judicial Circuit Court, St. Lucie County, Joe Wild, J., of carrying concealed firearm and possession of firearm by convicted felon. Defendant appealed. The District Court of Appeal held that: (1) convictions did not violate double jeopardy principles, but (2) assessment of additional scoresheet points for possession of firearm was reversible error.

Conviction affirmed; sentence reversed and remanded.

1. Double Jeopardy ⇐140

Defendant's convictions for carrying concealed firearm and possession of firearm by convicted felon did not violate double jeopardy principles. U.S.C.A. Const.Amend. 5.

2. Double Jeopardy ⇐30

Rule permitting assessment of additional scoresheet points where defendant is convicted of committing felony other than enumerated felonies while possessing firearm does not offend double jeopardy principles. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.702(d)(12).

3. Weapons ⇐17(8)

Rule permitting assessment of additional scoresheet points where defendant is convicted of committing felony other than enumerated felonies while possessing firearm was inapplicable to convictions for carrying concealed firearm and possession of firearm by convicted felon when unrelated to commission of any additional substantive offense. West's F.S.A. RCrP Rule 3.702(d)(12).

Richard L. Jorandby, Public Defender, and Margaret Good-Earnest, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joan Fowler, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

[1] We affirm Appellant's convictions for carrying a concealed firearm and for possession of a firearm by a convicted felon. See *Skeens v.* State, 556 So.2d 1113 (Fla.1990); *Washington v. State*, 661 So.2d 1294 (Fla. 4th DCA 1995), *cause dismissed*, 669 So.2d 252 (Fla.1996); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). We have considered *State v. Stearns*, 645 So.2d 417 (Fla.1994), in which the supreme court reversed a dual conviction, on double jeopardy grounds, for armed burglary and carrying a concealed weapon, but do not deem it applicable here. We do not read *Stearns* as proclaiming a general exception to *Blockburger*, or to the application of section 775.021(4), Florida Statutes, in all circumstances in which a firearm is *an* element of companion offenses, each otherwise containing an element or elements not contained in the other. We note conflict on this point with Bell v. *State*, 673 So.2d 556 (Fla. 1st DCA 1996), and *Maxwell v. State*, 666 So.2d 951 (Fla. 1st DCA), *rev. granted*, No. 87,290, 673 So.2d 30 (Fla. Apr. 11, 1996).

"C"

We also affirm as to an evidentiary issue raised, regarding whether certain testimony falls under the hearsay rule, without addressing it, as its admission, if error, in any event would be harmless. *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

[2, 3] We reverse Appellant's sentence and remand for resentencing due to scoresheet error in assessing 18 additional points for possession of a firearm. Florida Rule of Criminal Procedure 3.702(d)(12) permits assessment of these additional points where the defendant is convicted of committing a felony, other than those enumerated in subsection 775.087(2), Florida Statutes, "*while* having in his or her possession a firearm." (Emphasis added) We recognize that two districts appear to have decided this issue *otherwise. See State v. Davidson, 666* So.2d 941 (Fla. 2d DCA 1995); *Gardner v. State*, 661 So.2d 1274, 1275 (Fla. 5th DCA 1995). We do not disagree with the conclusion in *Davidson* and *Gardner* that assessing the additional scoresheet points does not offend principles of double jeopardy. But we construe rule 3.702(d)(12) as inapplicable to convictions of these two offenses when unrelated to the commission of any additional substantive offense.

We remand for resentencing under an amended scoresheet.

GUNTHER, C.J., and STONE and PARIENTE, JJ., concur.

Edward PERIERA, Appellant,

v.

FLORIDA POWER & LIGHT COMPANY, Appellee.

No. 95-2390.

District Court of Appeal of Florida, Fourth District.

Oct. 9, 1996.

Motorcyclist who was injured when he struck guy wire to utility pole owned by power company while he was riding on bike path at night brought action against power company. Company moved for summary judgment, and the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, James R. Stewart, Jr., J., granted motion based on lack of duty. Motorcyclist appealed, and the District Court of Appeal, Klein, J., held that: (1) motorcyclist's request for continuance was properly denied; (2) motorcyclist's violation of statute prohibiting use of motor vehicle on bike path was only evidence of negligence and did not relieve power company of duty; and (3) whether duty existed was fact issue precluding summary judgment.

Reversed, and conflict certified.

1. Judgment ⇐186

Plaintiffs request for continuance in order to complete discovery was properly denied, and consideration of motion for summary judgment was proper, where outstanding discovery about which plaintiff complained was not initiated until three days before summary judgment hearing and over three years after filing of action. West's F.S.A. RCP Rule 1.150(f).

2. Judgment ⇐185.3(21)

Fact issue as to whether power company owed duty to motorcyclist who was injured when he struck guy wire of pole owned by company while he was riding at night on bike path precluded summary judgment; fact that operation of motorcycle on bike path violated statute was prima facie evidence of negligence, but did not relieve power company of duty as matter of law. West's F.S.A. § 316.1995.

3. Automobiles ⇐147

Violation of provision of traffic code which prohibits operation of motorized vehicles on bike paths or sidewalks is prima facie evidence of negligence, and not negligence per se. West's F.S.A. § 316.1995.

Scott A. Mager and Carl F. Schoeppl of Mager & Associates, P.A., Fort Lauderdale, for appellant.