

IN THE FLORIDA SUPREME COURT

CASE NO: SC08-1017

APPELLATE CONSOLIDATED CASE
NOS: 3D06-2211 & 06-2213
L.T. CASE NO:99-23458

EAST COAST ELECTRIC,

Petitioner,

vs.

ALLEN DUNN and BARBARA DUNN,
his wife, and CLIFFORD STEWART and
CELESTINE STEWART, his wife, and
GENERAL ELECTRIC COMPANY,

Respondents.

PETITIONER EAST COAST ELECTRIC'S
AMENDED JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

In light of the fact that this is a Jurisdictional Brief and that, as the Petitioner, we must demonstrate “express and direct” conflict between this case and others from different district courts of appeal, the following is an abbreviated Statement of the Case and Facts limited to only those facts set forth in the Third District’s opinion.

This is an appeal from two summary judgments rendered in favor of GE and against EAST COAST ELECTRIC (“EAST COAST”) on GE’S Motions for Final Summary Judgment in the consolidated cases brought against it by DUNN and STEWART, two employees of subcontractors on a construction job. East Coast Electric v. Dunn, et al., 979 So. 2d 1018 (Fla. 3rd DCA 2008)(attached hereto as Exhibit “A” of the Appendix). ALLEN DUNN and CLIFFORD STEWART were allegedly injured on the jobsite when they were electrocuted while performing electrical work for their employer FPL. Id.

EAST COAST asserted that GE was negligent, and at least partially at fault for the accident, because it negligently failed to provide proper end caps for the electrical bus bar, and, as a result, the Plaintiffs’ were electrocuted, which would not have happened if the proper end caps had been supplied by GE. Id. GE acknowledged that it failed to provide the proper end caps, but moved for summary

judgment on the grounds that, as a matter of law, its negligence was not the proximate cause of the Plaintiffs' injuries because EAST COAST knew that the end caps were missing and chose to energize the busway despite that fact. Id. EAST COAST argued that its alleged negligence would not operate to entirely relieve GE of liability in light of the fact that GE knew that EAST COAST was under time constraints and therefore, it was foreseeable that it might power up the busway without them. Id. The summary judgments were granted on the trial court's finding that GE'S failure to provide the appropriate end-caps for its electrical bus way¹ did not proximately cause of DUNN and STEWART'S injuries because EAST COAST'S act of energizing the busway before receiving the end-caps was an intervening, superseding cause relieving GE of liability for its admitted failure to provide the appropriate component parts to EAST COAST. Id.

The summary judgments were appealed to the Third District Court of Appeal and the appellate court affirmed in a detailed written opinion. Id. After

¹ A busway system was described in Square D Co. v. Hayson, 621 So. 2d 1373, 1374 (Fla. 1st DCA 1993) as follows. "The busway system, properly installed, is designed to distribute electricity throughout the building. In operation, the end tap box takes electricity from a source and conveys it to the busway. The busway in turn makes electricity available on each floor of the building. Access to the electricity conveyed by the busway is available by mounting one or more fusible disconnect switches to the busway on each floor. A transformer is wire to the disconnect switch, making usable electricity available on each floor." We include this explanation for the purpose of explaining the purpose of the busway systems and how it works.

setting forth the facts set forth supra, the Court discussed the prevailing law that in order for an alleged intervening, superseding cause to relieve the originally negligent actor of liability, the evidence must demonstrate that the second tortfeasor's negligence was unforeseeable to the initially negligent tortfeasor and "completely independent of, and not in any way set in motion by, the [initial] tortfeasor's negligence". Id. The Third District further observed that the issue was only appropriate for summary disposition where the subsequent negligence was "highly unusual, extraordinary, bizarre, or, stated differently, seem beyond the scope of any fair assessment of the danger created by the defendant's negligence." Id. In this case and on this record, the Third District opined, "[c]ontrary to East Coast's assertion, it was not reasonably foreseeable that East Coast would act in such a reckless manner, [in energizing the busway before it received the appropriate end caps] and therefore, General Electric was relieved from liability". Id.

EAST COAST moved for clarification and/or certification arguing that in its opinion, the appellate court did not address two cases out of the First District Court of Appeal, which EAST COAST had raised in its Brief and on oral argument, and which EAST COAST contended contained similar facts, addressed the identical issue presented on appeal, and which reversed summary judgments granted by the

trial court on the grounds that the question of whether a subsequent tortfeasor's conduct was a superseding, intervening cause was an issue of fact for the jury. EAST COAST requested that the appellate court address the two conflicting cases, Pamperin v. The Interlake Co., Inc., 634 So. 2d 1137 (Fla. 1st DCA 1994) and Square D Co. v. Hayson, 621 So. 2d 1373 (Fla. 1st DCA 1993, and explicitly acknowledge that its decision was either in conflict with these two cases or distinguishable from those cases, in order to facilitate review by this Court. In the alternative, EAST COAST requested that the Third District certify the conflict to this Court for resolution.

The Third District denied the motions without explanation. EAST COAST timely filed its Notice to Invoke this Court's jurisdiction to address the conflict between the Third District's decision in this case and the First District's opinions in Pamperin and Square D and this jurisdictional brief follows.

SUMMARY OF THE ARGUMENT

The Third District's opinion in this case expressly and directly conflicts with both the Pamperin and Square D opinions even though the appellate court in this case declined to address either of these two opinions, which were raised in the briefs, at oral argument and on motion for clarification and certification. If an analysis of the opinions reveals that the cases from different courts address a

common legal principle applied to similar facts, and those different courts reach diametrically opposed conclusions, this Court may find the requisite “express and direct” conflict to warrant resolution. Put another way, if otherwise similar cases result in irreconcilable opinions, the cases may be deemed in conflict even if the cases do not themselves address or acknowledge that conflict within the body of the opinion.

Here, the facts in this case are similar to those in the two referenced First District cases and the same law was applied in all three cases but the Third District’s opinion in this case is directly inapposite to the First District’s opinions. The conflict is therefore “express and direct” so as to vest this court with jurisdiction, should it determine that resolution is warranted. This Court should accept the case for review, because the issue of whether and when it is appropriate for a court to determine, as a matter of law, that subsequent tortfeasor’s negligence was a superseding, intervening cause of the Plaintiff’s injuries, is an issue that will undoubtedly and repeatedly arise in the future. These cases are irreconcilable and will likely cause significant confusion in the appellate courts until the obvious conflict between the decisions has been addressed and resolved by this Court.

ARGUMENT

The Third District's opinion in this case expressly and directly conflicts with the First District's opinions in both Pamperin and Square D, such the the opinions may not be reconciled and in light of the fact that the issue will undoubtedly arise in many other cases, this conflict warrants resolution by this Court.

The specific issue addressed in this case, as well as in Pamperin v. The Interlake Co., Inc., 634 So. 2d 1137 (Fla. 1st DCA 1994) and Square D Co. v. Hayson, 621 So. 2d 1373 (Fla. 1st DCA 1993), is whether and under what circumstances a subsequent tortfeasor's superseding and intervening negligent and/or reckless conduct may relieve an initial tortfeasor of all liability, as a matter of law.

In this case, as the opinion reflects, EAST COAST argued that assuming that it was negligent in energizing the busway without the missing end caps, that negligence (or recklessness as the appellate court characterized it) was nevertheless reasonably foreseeable to GE, who knew that EAST COAST was under time constraints to energize the busway and needed to energize the busway at the earliest possible time. The Third District found that EAST COAST'S "recklessness" in prematurely doing so was legally unforeseeable as a matter of law because it was reckless.

This decision is expressly and directly in conflict with both Pamperin and Square D. In those cases, the First District acknowledged that absent evidence demonstrating that the manufacturer could not possibly have foreseen the possibility of a subsequent act of negligence on the part of a co-defendant, summary judgment, or directed verdict, would be inappropriately granted as a matter of law. The First District's opinions applied the same legal standard and precedent as did the Third District in this case, and the cases are factually and legally similar such that the Third District's decision can not be reconciled with the First District's decision in Pamperin and Square D. Both Courts recognized that the issue of whether there has been a superseding, intervening cause sufficient to relieve the initial tortfeasor of all liability is only appropriate for summary disposition when the subsequent negligence is "highly unusual, extraordinary, bizarre, or, stated differently, seem beyond of the scope of any fair assessment of the danger created by the defendant's negligence." East Coast, p. 2.

Square D, 621 So. 2d 1373, in particular, demonstrates that the opinions are literally inapposite, primarily because the facts in that case are so similar to ours. In that case, Hayson, an employee of the electrical contractor on the job, was injured when a defective busway, which was installed incorrectly by Hayson's employer, malfunctioned. As in the present case, the manufacturer argued that the

contractor's negligent installation or misuse of its product relieved it of all liability for Hayson's injury. The Court held that whether an intervening act of negligence is foreseeable to the initial tortfeasor is a question of fact for the jury and that the trial court correctly denied the manufacturer's directed verdict motion at trial.

Square D is virtually indistinguishable for the present case. As in this case, the electrical contractor was aware of the defect in the busway before Hayson was injured. Nevertheless, in contrast to the Third District's opinion, the First District determined that the defendant's comparative negligence presented a question of fact for the jury and not an issue of law to be resolved by the trial court.

Similarly, in Pamperin, 634 So. 2d 1137, the First District addressed the same issue, i.e., whether a contractor's subsequent negligence would relieve a manufacturer of a defective product of all liability on the grounds that the contractor's negligence in misassembling a defective storage rack was a superseding, intervening cause of the plaintiff's injuries. As in Square D, but in contrast to the present case, the First District held that the contractor's negligence was not so unforeseeable as to relieve the manufacturer of liability for the accident as a matter of law.

Although the apparent conflict was raised throughout the appellate process and on motion for clarification or certification, the Third District declined to

address either of the First District cases and did not distinguish or reconcile them in its opinion. However, the absence of any reference to these cases does not preclude this Court from determining that the cases “expressly and directly” conflict because, in determining whether decisions actually conflict, one test is whether the decisions themselves are legally irreconcilable. Aravena v. Miami-Dade County, 928 So. 2d 1163 (Fla. 2006). See also, Crossley v. State, 596 So. 2d 447, 449 (Fla. 1992) (determining that because the appellate court “reached the opposite result on controlling facts which, if not virtually identical, more strongly dictated” the result reached in the opinion asserted to be in conflict with the subject opinion). In rendering this determination, this Court may review the appellate court’s discussion of the legal principles applied in light of the facts and, if the facts are sufficiently similar so as to appear to compel similar or identical conclusions in the cases, the absence of an appellate court’s formal acknowledgment of the conflict, or even an acknowledgment of the existence of case law to the contrary, will not preclude this Court from finding an express and direct conflict between decisions that do not reference one another. See, Ford Motor Company v. Kikis, 401 So. 2d 1341 (Fla. 1981). In this case, such a review reveals the requisite “express and direct” conflict because the Third District’s

decision in this case simply cannot be reconciled with the First District's opinions in Square D and Pamperin.

CONCLUSION

For the foregoing reasons, the Petitioner EAST COAST ELECTRIC respectfully requests that this Court exercise its discretionary jurisdiction to resolve the express and direct conflict between the Third District's decision in this case and the First District's opinions in Pamperin and Square and permit briefing on the merits for the purpose of resolving this conflict.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that this brief was typed in 14-point Times New Roman font.

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