

IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION

Defendant/Petitioner,

Case No. 95-122

v.

5th DCA CASE NO. 97-2039

WILLIAM WEBSTER

Plaintiff/Respondent.

---

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL  
OF THE STATE OF FLORIDA, FIFTH DISTRICT  
CASE NO. 97-2039

---

**PETITIONER'S REPLY BRIEF**

---

DANIEL A. AMAT  
Fla. Bar # 320463  
Hart & Gray  
125 N.E. 1st Avenue, Suite 1  
Ocala, Florida 34470  
(800) 731-8121  
Attorneys for Defendant/Petitioner

DANIEL J. FLEMING  
Fla. Bar # 871222  
Melkus & Fleming  
410 Ware Blvd., Suite 1101  
Tampa, Florida 33619  
(813) 623-2747  
Attorneys for Defendant/Petitioner

**TABLE OF CONTENTS**

TABLE OF CITATIONS.....	ii
CERTIFICATION OF TYPE SIZE AND STYLE.....	iv
SUMMARY OF THE ARGUMENT .....	1
ARGUMENT.....	1
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	8
APPENDIX.....	10

## TABLE OF CITATIONS

<u>Atlantic Coast Line RR Co. v. Johnston</u> 74 So. 2d 689 (Fla. 1954).....	1
<u>Atlantic Coastline Railroad Co. v. Weir</u>  58 So. 641 (Fla. 1912).....	6
<u>Benjamin v. Atchinson, Topeka &amp; Santa Fe Railroad Co.</u> 588 N.E. 2d 378 (Ill. App. 3 <sup>rd</sup> Dist. 1992).....	4
<u>Brown v. Loftin</u> 18 So. 2d 540 (Fla. 1944).....	1
<u>Casby v. Flint</u> 520 So. 2d 281 (Fla. 1988).....	5
<u>Davis v. Burlington Northern, Inc.</u> 663 F. 2d 1028, 1030 (10 <sup>th</sup> Cir. 1981).....	4
<u>Hurst v. Union Pacific Co.</u> 958 F. 2d 1002 (10 <sup>th</sup> Cir. 1992).....	4
<u>Hutton v. Atlantic Coast Line Railroad Co.</u> 92 So. 2d 528 (Fla. 1957).....	1
<u>Kline v. Powell</u> 192 So. 628, 631-632 (Fla. 1939).....	7
<u>Massey v. Seaboard Air Line Railroad Co.</u> 132 So. 2d 469 (Fla. 2d DCA 1961), cert denied 142 So. 2d 296 (Fla. 1962).....	1
<u>Pate v. Georgia Southern and Florida Railroad</u> 395 S.E. 2d 604, 608 (Ga. App. 1990) .....	4

<u>Schoen v. Gilbert</u>	
436 So. 2d 75 (Fla. 1983).....	5
<u>Webster v. CSX Transportation, Inc.</u>	
725 So. 2d 465 (Fla. 5th DCA 1999).....	1
<u>Weeks v. Atlantic Coastline Railroad Co.</u>	
132 So. 2d 315, 316 (Fla. 1st DCA 1961).....	7
<u>Citations of Statutory Authority</u>	
Florida Statute 351.03 (5)(a).....	6
Florida Statute 316.1575 .....	6

**CERTIFICATE OF TYPE SIZE AND STYLE**

Petitioner certifies that the type size and style used in the brief is 14 point proportionately spaced Times Roman.

## SUMMARY OF THE ARGUMENT

Respondent's Answer Brief illustrates his misapprehension of the "Standing Train Doctrine" and how it precisely applies to the facts in the present case. Unlike the facts in Hutton v. Atlantic Coast Line Railroad Co., 92 So. 2d 528 (Fla. 1957) wherein a **stationary** railcar was blocking the crossing, the facts in Webster v. CSX Transportation, Inc., 725 So. 2d 465 (Fla. 5th DCA 1999) (see Appendix B) involve a moving freight train and thus the "Standing Train Doctrine" principles established in Brown v. Loftin, 18 So. 2d 540 (Fla. 1944) and applied in Massey v. Seaboard Air Line Railroad Co., 132 So. 2d 469 (Fla. 2d DCA 1961), cert. discharged 142 So. 2d 296 (Fla. 1962) were correctly employed by the trial court in granting Florida Power Corporation's Motion for Summary Judgment.

## ARGUMENT

The "Standing Train Doctrine" established by Brown and applied in Massey applies to the precise facts in the present case. Respondent's reliance on Hutton v. Atlantic Coast Line Railroad Co., 92 So. 2d 528 (Fla. 1957) is misplaced since the facts in that action are entirely different from the present case. In Hutton, the motorist was faced with a stationary gondola car blocking the grade crossing for

several minutes. Under these circumstances, the Hutton court applied the rationale of the factually similar case of Atlantic Coast Line Railroad Company v. Johnston, 74 So. 2d 689 (Fla. 1954) (Johnston also involved an automobile colliding with a stationary railcar blocking the grade crossing for a brief period of time during nighttime hours). Considering the particular facts in Johnston, this Court stated:

"Under such circumstances, if a highway is to be blocked, ordinary prudence would require that a flagman be placed so as to guard the crossing while it is blocked. If not possible to do this much, certainly flares or lights of some kind should have been placed to warn travelers. Such was the factual situation that confronted the jury and we are not prepared to say that the verdict was erroneous."

Johnston at 691. Given the factual similarities between Hutton and Johnston, i.e. automobiles colliding against railcars standing on the crossing blocking their path, the Hutton court applied the Johnston criteria in reversing the trial court's granting of defendant's motion for judgment notwithstanding the verdict.

In so doing, the Hutton court held that:

"it is clear that the jury could have believed testimony and could have accepted evidence tending to prove that, **under the facts of this case**, the mere presence of the gondola car on the railroad crossing was not warning enough for these plaintiffs."

Hutton at 531 (emphasis added).

However, the conclusion in Hutton does not represent a repudiation of the "Standing Train Doctrine". Instead, Hutton only established a conditional exception, in cases where the facts involve railcars standing on the crossing,

requiring other factors to be considered to determine **whether** the doctrine should be applied. The **consideration** of these factors, however, would not necessarily preclude application of the “Standing Train Doctrine”. More importantly, the consideration of these factors only occurs in a factual situation that include railcars standing on the crossing; a factual scenario not present in the instant case. This modification to the “Standing Train Doctrine” was fully recognized by the Second District in Massey when it considered a case involving a vehicle colliding with a moving freight train. In Massey, however, the Second District realized that the facts of the case were not like that in Hutton and Johnston.

“namely a running train and plaintiff striking same at a point indicating that the train had been running across a given point for three or four minutes.”

Massey at 471. In concluding that the facts fell squarely within the rule of Brown, the court stated:

"in such a case **the moving train is a more obvious warning** to vehicles on the highway than a train standing across the road."

Id. at 471 (emphasis added). A careful reading of the Second District's opinion in Massey plainly reveals that it correctly distinguished Hutton and rightfully applied the “Standing Train Doctrine” as set forth in Brown.

In his Answer Brief, Respondent completely fails to address the factual distinction made by the Massey court. Consequently, Respondent misapprehends

when courts should look into circumstances surrounding the accident applying the Hutton exception to the “Standing Train Doctrine”. The trial court, however, correctly appreciated this distinction as reflected in its Order granting Petitioner’s Motion for Summary Judgment (see Appendix A). Moreover, Respondent’s Brief is equally silent on this Court’s recognition of this factual distinction as discussed in Massey v. Seaboard Air Line Railroad Co., 142 So. 2d 296 (Fla. 1962).

Additionally, the flaw in Respondent’s argument is also evident in the last paragraph of his Answer Brief wherein he states “In the alternative, Plaintiff believes that the “Standing Train Doctrine” should be further modified to allow facts similar to those in this case to go to the jury.” (page 10 of Respondent’s Answer Brief). By requesting that the “Standing Train Doctrine” be further modified to allow facts similar to this case to go to the jury Respondent himself illustrates that the facts in Webster are not like that in Hutton, but rather like Massey. Essentially, Respondent urges this Court to ignore the reasoning established in Brown and upheld in Massey and create a duty on the part of the railroad in circumstances where this Court and courts of other jurisdictions have declared doesn’t exist. See, Pate v. Georgia Southern and Florida Railroad, 395 S.E. 2d 604, 608 (Ga. App. 1990)(Darkness and wet pavement were not sufficient to create duty to warn plaintiff “of something as starkly obvious as a train.”); Davis v. Burlington Northern, Inc., 663 F. 2d 1028, 1030 (10<sup>th</sup> Cir. 1981)(“Darkness and inclement

weather, such as mist, rain and fog, are not ‘unusual circumstances’ within the meaning of the rule but are hazards to those who travel upon the highways.”); Hurst v. Union Pacific Co., 958 F. 2d 1002 (10<sup>th</sup> Cir. 1992); Benjamin v. Atchinson, Topeka & Santa Fe Railroad Co., 588 N.E. 2d 378 (Ill. App. 3<sup>rd</sup> Dist. 1992) (darkness, non-reflective cars, and non-functional gate insufficient to avoid application of doctrine). Petitioner respectfully submits that the Fifth District erred in failing to follow the principles set forth by this Court in applying the “Standing Train Doctrine” as well as the reasoning underlying the same.

The “Standing Train Doctrine” is based on the sound policy that there is no duty to warn motorists of the presence of a train moving through and fully occupying a crossing when the train consists of thirty (30) or more cars because under these circumstances the moving aspect of such a large train provides adequate warning of its presence upon the crossing. Brown at 541. The reasoning that someone should not have to be warned against the hazards imposed by something that is obvious and commonplace is not an esoteric concept but, rather a basic precept of Florida tort law. Casby v. Flint, 520 So. 2d 281 (Fla. 1988) (Multiple floor level in dimly lit overcrowded room was not an inherently dangerous condition, as multiple levels are so commonplace that possibility of their existence is known to all; thus, social host had no duty to warn guests of difference in floor levels.); Schoen v. Gilbert, 436 So. 2d 75 (Fla. 1983). The “Standing Train

Doctrine” is analogous to the rule that excuses a landowner from having to warn of an obvious danger. In this respect, however, a moving freight train is certainly much more obvious than mere differences in floor levels.

Moreover, the concern which prompted the Hutton and Johnston courts to engraft certain qualifying criteria upon this doctrine when presented with facts of trains actually standing on and blocking crossings during periods of darkness has been made moot by our legislature. Section 351.03 (5)(a), Florida Statute now requires crews of railroad trains to place a lighted fusee or other visual warning device in both directions from the railroad train upon or at the edge of the highway pavement whenever a train engages in a switching operation or stops so as to block a public highway at anytime from one-half hour after sunset to one-half hour before sunrise. Consequently, the “Standing Train Doctrine” has been statutorily modified so that its application no longer applies to trains that are, in fact, standing on the crossing during periods of darkness. However, with respect to moving trains fully occupying the crossing the duty to observe the same and exercise due care still remains upon motorists. See §316.1575, Florida Statutes.

Lastly, where a train fully occupies a railroad crossing, a motorist’s duty to have his car under control so as to avert collision is clear. Atlantic Coastline Railroad Company v. Weir, 58 So. 2d 641, 642 (Fla. 1912).

The drivers of vehicles on public highways are required by law to exercise due care and should have the vehicles in control on approaching a railroad grade crossing and to use reasonable ordinary care to discover approaching trains.

Id.

This duty continues even where railroad crossing warning devices are not present or operational at the time of an accident.

The mere non-operation or the mere presence of automatic signals, including gates, at a railroad crossing cannot and should not under ordinary circumstances relieve a motorist of the duty and responsibility to use due care and to look and listen.

Weeks v. Atlantic Coastline Railroad Co., 132 So. 2d 315, 316 (Fla. 1<sup>st</sup> DCA 1961).

Moreover, existing circumstances, including darkness or unfavorable weather conditions, require motorists to proceed reasonably so as to stop in time to avoid collisions with trains. Certainly a train is so obvious and may be seen in time to avoid accidents even at night by the use of lights required by law to be used on [motor vehicles]. If a sudden obstruction to view appears, the vehicle should be stopped or driven off the travel lanes, or the driver should do the needful to avoid an accident as possible. The driver of a motor vehicle is by law required to proceed at a reasonable speed according to the existing circumstances and to keep the vehicle in complete control so as to stop in time or to do the needful to avoid accidents, if possible, particularly on unfamiliar roads or at night or in unfavorable weather or other conditions that are likely to make traveling risky or more dangerous to anyone.

Kline v. Powell, 192 So. 628, 631-632 (Fla. 1939). Based upon the “Standing Train Doctrine” Florida Power owes no duty to warn Respondent of such a large moving train fully occupying a railroad crossing.

## **CONCLUSION**

The facts in the present case are like that found in Massey v. Seaboard Air Line Railroad Co., 132 So. 2d 469 (Fla. 2d DCA 1961), cert. discharged 142 So. 2d 296 (Fla. 1962) and Brown v. Loftin, 18 So. 2d 540 (Fla. 1944) such that the trial court below was correct in granting Petitioner's Motion for Summary Judgment. In reversing the trial court's order, the Fifth District failed to recognize the factual distinction between this case and Hutton v. Atlantic Coast Line Railroad Co., 92 So. 2d 528 (Fla. 1957) and thus misapplied the "Standing Train Doctrine". Petitioner respectfully requests that this Court reverse the Fifth District's Decision in Webster v. CSX Transportation, Inc., 725 So. 2d 465 (Fla. 5th DCA 1999) and affirm the trial court's order granting summary judgment to Florida Power Corporation.

DANIEL J. FLEMING  
Fla. Bar # 871222  
JOSE A. GUTIERREZ  
Fla. Bar # 0964042  
Mekus & Fleming  
410 Ware Blvd., Suite 1101  
Tampa, Florida 33619  
(813) 623-2747  
Attorneys for Defendant/Petitioner

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to **Michael Shea, Esq.**, 410 W. Platt Street, Tampa, FL 33606, **Scott Murphy Esq.**, 200 E. Robinson Street, Suite 555, Orlando, FL 23801 and **Daniel A. Amat, Esq.**, 125 NE 1st Avenue, Ocala, Florida 34478-3310, on this \_\_\_\_\_ day of November, 1999.

JOSE A. GUTIERREZ

**APPENDIX**

	<u>Page</u>
Exhibit A - <u>Webster v. CSX Transportation, Inc.</u> (Fla. 5th Cir. Ct., Citrus County - July 11, 1997 Order Granting Summary Judgment).....	3
Exhibit B - <u>Webster v. CSX Transportation, Inc.</u> (Fla. 5th District Court of Appeal - Opinion filed February 12, 1999).....	1