

IN THE SUPREME COURT OF FLORIDA

FILED
CLERK OF THE COURT

JUN 28 1998

EDWARD ARENADO, as Personal
Representative of the Estate
of Susanna Arenado,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

CLERK OF THE COURT

By _____
Deputy Clerk

CASE NO. 72,533

PETITIONER'S BRIEF ON JURISDICTION
On Discretionary Jurisdiction to Review the
Decision of the Fourth District Court of Appeal

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ISSUE PRESENTED

WHETHER THE OPINION OF THE FOURTH DCA
BELOW EXPRESSLY AND DIRECTLY CONFLICTS
WITH THIS COURT'S EARLY OPINIONS IN
MUGGE v TAMPA WATERWORKS CO., INFRA;
AND WOODBURY v TAMPA WATERWORKS CO.,
INFRA?

STATEMENT OF THE CASE AND FACTS

On March 12, 1983, at about 1:00 a.m., Susanna Arenado was driving her car in an easterly direction and approaching a major intersection in Palm Beach County. At the same time, Rene Demers was driving her car in a southerly direction approaching the same intersection. The overhead traffic signal at the intersection was inoperative because, a short time earlier, an electrical transmission line owned and maintained by F.P.&L. (Respondent) fell down and stopped the flow of electricity to the traffic signal. Both vehicles entered the intersection and collided, causing fatal injuries to Susanna Arenado, who was 18 years old and a resident of Palm Beach County.

A wrongful death action was filed against F.P.&L., in which it was alleged that the electrical transmission line went down because it was rendered unreasonably weak and unsafe due to the number of splices in the wire. There were 32 splices over a span of less than 400 feet in the area of the transmission line that went down, which averages to one splice every 12 1/2 feet. It was alleged that this same line had come down numerous times in the past which had caused the same traffic signal to become inoperative.

F.P.&L. moved to dismiss each of the complaints filed for failure to state a cause of action; ultimately leading to the Fourth Amended Complaint. For purposes of these motions the trial judge expressly assumed the truth of the allegations that the transmission line simply fell down because it was in such a poor state of disrepair. It was also alleged that Palm Beach County had a contract with F.P.&L. to furnish electricity for the operation of traffic control devices and that Susanna Arenado was a member of the class of individuals the contract was intended to benefit. Plaintiff also alleged that F.P.&L. breached a common-law and statutory duty of due care in repairing the transmission line that provided service to the traffic signal.

The trial court finally dismissed, with prejudice, the Fourth Amended Complaint on grounds that; "No duty existed between the Defendant and Plaintiff's decedent. There being no duty, as a matter of law, there can be no breach of duty."

Plaintiff timely appealed to the Fourth District Court of Appeal. The Fourth DCA entered an opinion on March 2, 1988, affirming the trial court's dismissal of the case with prejudice, based on the holding that under the facts of this case, a utility company owes no duty to members of the general public who may be injured due to its negligent conduct in allowing an interruption of service to occur, unless the utility company has expressly assumed such a duty by contract. (See Appendix). The Fourth DCA followed a 1928 New York case

written by Justice Cardozo. The Fourth DCA expressly noted this court's prior decisions in Woodbury v Tampa Waterworks Co., 57 Fla. 243, 49 So. 556 (1909) and Mugge v Tampa Waterworks Co., 52 Fla. 371, 42 So. 81 (1906), but found those cases to be distinguishable.

Plaintiff/Appellant's motion for rehearing was timely filed with the Fourth DCA on March 8, 1988, and was denied by the court on May 5, 1988. (See Appendix). A notice to invoke this court's jurisdiction was timely filed on June 2, 1988.

SUMMARY OF ARGUMENT

Although the majority of states follow Justice Cardozo's opinion in the H.R. Moch Co. case from New York, Florida has aligned itself with the minority position (which is now a growing minority) in the country and has been listed in national annotations and cited by other state courts as being aligned with those states that disagree with the Moch case from New York. These Florida Supreme Court cases (the Mugge case and the Woodbury case, *infra*), dating back to the early 1900's, have never been receded from and still constitute the governing law in Florida on this subject. The Fourth DCA has created conflict by misapplying the Mugge case and Woodbury case and by following instead the more restrictive rule embraced by the New York court in H. R. Moch Co.

ARGUMENT

The position that has been followed for the last eighty

years in Florida on the duty owed by a utility company to the general public under these type of facts is not the position embraced by the New York Court of Appeals in H.R. Moch Co. v Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928). In the H.R. Moch Co. case, the plaintiff suffered a total loss of his warehouse by fire because there was insufficient water pressure supplied by the water company to a fire hydrant nearby the building. Although a contract existed between the city and the water company to provide water under sufficient pressure for the fire hydrant system, Justice Cardozo, speaking for the New York Court, found that the water company owed no duty of care to the plaintiff in that case.

However, two early cases from this court; Mugge v Tampa Waterworks Co., 52 Fla. 371, 42 So. 81 (1906) and Woodbury v Tampa Waterworks Co., 57 Fla. 243, 49 So. 556 (1909); are directly contrary to the H.R. Moch Co. case from New York. These two cases have never been retracted by this court.

In Mugge v Tampa Waterworks Co., supra, this court upheld the right of a plaintiff, whose building burned in a fire due to a lack of water pressure in the fire hydrant, to sue the water company for negligently failing to provide proper service to the fire hydrants as the city had contracted to receive on behalf of all property owners in the city. The water company argued that the plaintiff was not in privity of that contract, however this court rejected that argument and stated:

Even if the water company was under no contract obligations to construct waterworks in the city or to supply citizens with water, yet having undertaken to do so, it comes under an implied obligation to use reasonable care; and if, through its negligence, injury results to an individual, it becomes liable to him for the damages resulting therefrom, and the action to recover is for a tort, and not for breach of contract. Id. at 85.

The Fourth DCA below wrote in its opinion that it found Mugge distinguishable because "the contract in Mugge stated that the waterworks company should assume all liabilities to persons arising from constructing or operating the water system." (Appendix, p. 4). That perceived distinction overlooks the language used by this court in Mugge when it said that "even if the water company was under no contract obligations. . . it comes under an implied obligation to use reasonable care, . . . and the action to recover is for a tort, and not for breach of contract." Id. at 85. Moreover, the contract in Mugge mentioned the utility company's liability to persons "arising from constructing or operating" the waterworks system, but the contract said nothing about incurring liability for negligently failing to provide utility service; and that is what that case was all about.

The Fourth DCA mentioned, but did not attempt to distinguish, this court's later opinion in Woodbury, supra, where this court reaffirmed the Mugge case. The Woodbury case involved facts similar to Mugge, supra, except this court found that the plaintiff in Woodbury failed to establish that his damages were proximately caused by the waterworks' negli-

gence. Although that plaintiff could not demonstrate proximate cause, this court went on to expressly reaffirm its position that there is a duty of due care running from the utility company to the general public. This court stated:

The duty to supply water for fire protection is plainly assumed by the contract, and by in fact engaging in the service; and as individual property holders of the city are the real parties in interest, to be benefited by the performance of the duty, any one of them, specially injured by failure to perform the duty, may maintain an action to recover damages for injuries that proximately result to him from the negligence of the company, where the injuries should have been contemplated. . . . Id. at 561.

* * *

These principles are particularly applicable where individuals have reasonably relied upon the rendering of the public service undertaken for their benefit or protection, and have contributed directly or indirectly to the compensation for the public service. Id. at 562.

* * *

If the public service is in good faith assumed to be performed by the use of public franchises and for compensation paid by individuals through the taxing power of the city, such undertaking by implication of law imposes upon the water company duties to individuals for whose benefit the service is rendered, and the company is liable for injuries proximately caused by negligence, whether of omission or commission, in performing the duties, . . . [e.s.] Id. at 564-565.

The H.R. Moch Co. case from New York is not the law in Florida and never has been. After the Mugge case and the Woodbury case from this court early in this century, Florida has been recognized in legal treatises and by courts around

the country as being one of the states that does not follow Justice Cardozo's opinion in H.R. Moch Co., supra. See eg. 62 ALR 1205 (1929), in particular the discussion of Woodbury and Mugge under the heading of "The Minority Rule" at pp. 1218-1220, and 1226-1227.

Most recently, the New Jersey Supreme Court noted that Florida has adopted the minority position which disagrees with Justice Cardozo's opinion in the H.R. Moch Co. case, and the New Jersey court decided to join Florida and the other minority states which it considered to be more enlightened on this issue. Weinberg v Dinger, 106 N.J. 469, 524 A.2d 366, 372 (1987). As the New Jersey court noted; "Although only a minority of states have pursued this course, it is the overwhelming recommendation of the scholarship on the subject." (Citing Prosser, Corbin and other venerable authorities on tort and contract law). See Weinberg, supra, at 379. The Weinberg opinion makes New Jersey the ninth state to join the growing minority position on this issue.

Plaintiff in this case has never suggested that F.P.&L. should be held liable as an insurer regardless of the cause of the interruption of electrical service to the traffic signal. If a bolt of lightning knocked out the power there would be no liability even to persons who suffer a special injury. Even if F.P.&L. is negligent in causing a power outage, persons who merely suffer the same damage in common with others who depend on electricity would not have a cause

of action. Woodbury, supra. But if F.P.&L.'s negligence causes a traffic signal to become inoperative which in turn proximately causes a special injury or death to a motorist, as in this case, F.P.&L. is liable in damages under both a tort basis and a contract basis. Woodbury, supra.

The purpose of the county's contract for F.P.&L. to provide electricity to its traffic control devices is for the protection of its residents and visitors who drive on the highways. The money paid to F.P.&L. to provide that service is ultimately paid for by the residents of Palm Beach County (such as Susanna Arenado and her family) who pay taxes to the county to enjoy the benefit of such services.

Certainly an intersection collision resulting from an inoperative traffic signal is just as foreseeable as the burning of a house resulting from an inoperative fire hydrant. Neither of the lower courts in this case found an absence of proximate cause, but only the absence of a "duty" owed to the deceased.

Under Florida law F.P.&L. is just as liable in a case of this nature as it would be in a case where a negligently maintained transmission line falls and electrocutes an individual or sets his house on fire. There are numerous Florida cases in which power companies have been held liable to third persons, not in privity of contract, who have been burned or electrocuted due to the power company's negligence. The fact that a special injury may result from a negligent interruption of electrical service, rather than from an

electrocution, does not change the duty of care owed to the general public. F.P.&L. has engaged in a course of activity (undertaking to supply electricity to traffic control signals) on which motorists greatly rely and its nonperformance is the analytical equivalent of causing harm by affirmative conduct.

The Fourth DCA's holding in this case has the potential to eliminate many claims in the future and creates uncertainty, confusion and instability in the law in Florida on this issue. Its effect is to immunize utility companies from liability to the public regardless of the degree of negligence involved. F.P.&L.'s negligence in this case could easily be found by a jury to exhibit a reckless disregard for human safety. When this same transmission wire fell down numerous times in the past (causing the same traffic signal to become inoperative), instead of replacing the wire F.P.&L. just kept splicing it and putting it back up. Unfortunately, the Fourth DCA's opinion leaves the plaintiff with no remedy and forces her to bear the risk of F.P.&L.'s negligence or even reckless conduct.

A misapplication of prior Florida Supreme Court precedent creates an express and direct conflict justifying this court's exercise of discretionary jurisdiction. Wale v Barnes, 278 So.2d 601 (Fla. 1973). The Fourth DCA has misapplied this court's prior holdings in Mugge, supra, and Woodbury, supra. This court has not had the opportunity to review this issue since its early opinions eighty years ago, but it should now reaffirm the continuing vitality of Mugge and Woodbury in

order to resolve this conflict and restore certainty to this area of the law.


CONCLUSION

The Fourth DCA has created express and direct conflict by holding that a utility company that contracts with a county to provide continuous services owes no common-law duty to members of the general public relying on such services to avoid a negligent interruption. This court should exercise its discretion to resolve the conflict and should direct the parties to submit briefs on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, this 9th day of June, 1988, to: MARJORIE GADARIAN GRAHAM, ESQ., Northbridge Center, Suite 1704, 515 North Flagler Drive, West Palm Beach, FL 33401; and MARC POSTELNEK, ESQ., Suite 10-B, 407 Lincoln Road, Miami Beach, FL 33139.

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