IN THE SUPREME COURT OF FLORIDA

EDWARD ARENADO, as Personal Representative of the Estate of Susanna Arenado,	CASE NO. 72,533
Petitioner,	
v.	
FLORIDA POWER & LIGHT COMPANY,	
Respondent.	

PETITIONER'S BRIEF ON THE MERITS

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. (R. 26, 433). At the same time Rene Demers was driving her car in a southernly direction approaching the same intersection. (R. 26, 433). 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. (R. 26, 76, 436). 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. (R. 23, 24, 26, 434, 544). Her estate is being probated in the Circuit Court in and for Palm Beach County. (R. 24).

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 1 splice every 12½ feet. (R. 206, 436, 369, 441, 474, 557). 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. (R. 129, 210, 436, 441, 436).

F.P.&L. moved to dismiss each of the multiple complaints filed by the Plaintiff for failure to state a cause of action; ultimately leading to the Fourth Amended Complaint. For purposes of these motions the trial judge stated he was assuming the truth of the allegations that the transmission line simply fell down because it was in such a poor state of disrepair. (R. 384). 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. (R. 485, 470, 546). 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. (R. 434 - 435, 438 - 440, 29, 130, 547 - 549).

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." (R. 558). The trial court stated it would view the question of "duty" differently if the fallen line had touched the decedent and electrocuted her, rather than having allegedly caused her death by disrupting the flow of

electricity to the traffic signal. (R. 385).

Plaintiff timely appealed and presented the following issue to the Fourth District Court of Appeal:

> Whether there can be liability on the part of an electrical utility company for the negligent interruption of electrical service to a traffic control device, when the County contracted for such electrical service on behalf of its residents and one of its residents is killed on the highway as a proximate result of the negligent interruption of service?

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 which was described as "the leading case deciding the duty of a public utility." 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. A notice to invoke this

court's jurisdiction was timely filed on June 2, 1988. On September 28, 1988, this court issued an Order accepting jurisdiction, dispensing with oral argument, and directing the parties to file briefs on the merits.

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 80 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 was 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 any 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' negligence. (Although the fire hydrant nearest to where the fire originated was not functioning, the one nearest to Plaintiff's building was properly functioning). Although that Plaintiff could not demonstrate proximate cause, this court went on to expressly reaffirm its position (as earlier expressed in Mugge, supra) 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.
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> For breaches of the contract that affect individuals only in common with each other, ... the remedy may be through the proper public officials; but for breaches that directly and specially injure an individual, private actions may be brought. Id. at 561.
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> 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.
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> * * *
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> 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.

The Fourth DCA's opinion in the present case even conflicts with that court's own prior opinion in Vendola v. Southern Bell Telephone and Telegraph Company, 474 So.2d 275 (4th DCA 1985) where the court cited and relied on Woodbury, supra, and held that Southern Bell had a common-law duty of care and liability to the general public for its

negligent failure to provide emergency "911" telephone tracing service, even though it contracted not to be liable for such negligence. The Fourth DCA properly applied the Woodbury case in Vendola, supra, but another panel of the same court has misapplied Woodbury in this case.

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.

As Justice Cardozo wrote in what was probably his most celebrated case of all; if the harm that occurs is within the scope of the danger created by defendant's negligent conduct, then it is deemed to be a reasonably foreseeable consequence of such negligence regardless of whether the precise chain of circumstances could have been foreseen. Palsgraff v. Long Island Railway Co., 248 N.Y. 339, 162 N.E. 99 (N.Y. Ct. App. 1928). See also Stevens v. Jefferson, 436 So.2d 33 (Fla. 1983); Crislip v. Holland, 401 So.2d 1115 (Fla. 4th DCA 1981).

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. Eg. Escambia County Electric Light & Power Co. v. Southerland, 61 Fla. 167, 55 So. 83 (1911); F.P.&L v. Bridgeman, 133 Fla. 195, 182 So. 911 (1938); Teddleton v. F.P.&L. Co., 145 Fla. 671, 200 So. 546 (1941); Braden

v. F.P.&L., 413 So.2d 1291 (Fla. 5th DCA 1982). Those plaintiffs, like the one in this case, suffered a special injury different from that suffered by the public at large. 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. Thus, the case is based in tort and not just in contract.

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. Such negligent conduct by a utility company will only be encouraged by the Fourth DCA's opinion, since there will be no accountability for it. 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. Her estate cannot sue the governmental entity in charge of the intersection because it was not at fault. This accident was F.P.&L.'s fault.

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. Although this court has not had the opportunity to review this issue since its early opinions eighty years ago, 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. The Fourth DCA's opinion should be quashed and this court should re-affirm the continuing vitality of its own prior opinion in Mugge, supra, and Woodbury, supra.

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 4th day of October, 1988, to: MARJORIE GADARIAN GRAHAM, ESQUIRE, Northbridge Center, Suite 1704, 515 North Flagler Drive, West Palm Beach, Florida 33401; and MARC POSTELNEK, ESQUIRE, Suite 10-B, 407 Lincoln Road, Miami Beach, Florida 33139.

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