

IN THE SUPREME COURT OF FLORIDA

C

THOMAS McCain, individually,)
and f/u/b/o LIBERTY MUTUAL)
INSURANCE COMPANY,)
)
) Petitioners)

ph

-vs-)
)
FLORIDA POWER CORPORATION,)
a Corporation doing)
business in the State of)
Florida)
)
) Respondent)

SUPREME COURT #: 75,637
SECOND DCA #: 88-03046

PETITIONER'S JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT
OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

The petitioner was the prevailing party in a negligence action against respondent for injuries resulting from an electrical shock suffered by petitioner when the trenching machine he was operating came in contact with a partially severed and underground power cable owned and maintained by respondent, Florida Power.

After the respondent located and marked it's underground cable in the area, petitioner was to dig a trench for telephone cable. Petitioner began digging his trench 6 - 8 feet away from the markings and struck the underground cable, which had been mismarked by respondent's employee. Petitioner was shocked by the cable and suffered injury.

At trial, the respondent moved for a Directed Verdict at the close of petitioner's case in chief alleging, among other things, that petitioner failed to offer proof that petitioner's injury was a foreseeable consequence of respondent's negligent acts. The motion for directed verdict was denied. The defendant then called several witnesses during it's case in chief, including a supervisor by the name of Tom Byrd.

After the respondent rested, petitioner called Dr. Paris Wiley, an expert electrical engineer and a Professor from the University of South Florida, who gave valuable rebuttal testimony. At the close of all testimony, the respondent renewed it's Motion For Directed Verdict, which was again denied.

The respondent appealed to the Second District Court of Appeal and argued that the trial Court erred in denying it's initial Motion for a Directed Verdict because petitioner failed to prove the breach of any duty, i.e. that the injury was foreseeable.

On December 22, 1989, the Second District Court of Appeal reversed and vacated the jury's verdict for petitioner and remanded with instructions to the trial Court to direct a verdict for the respondent upon it's initial motion for a directed verdict. Judge Parker wrote the Court's opinion, with Judge Campbell concurring. Judge Threadgill dissented with opinion.

In the District Court the petitioner argued that even if the Court found that he had not proven the element of foreseeability in his case in chief, there was evidence of foreseeability elicited in respondent's case in chief during petitioner's cross-examination of respondent's employee and witness, Tom Byrd, and through the rebuttal testimony of Dr. Paris Wiley. However, the District Court held that the petitioner, in his case in chief, produced no evidence that Florida Power could foresee an injury from a trencher severing this underground cable. The District Court reasoned that it could not consider the testimony of Tom Byrd or Dr. Paris Wiley on the issue of foreseeability because this testimony was received after Florida Power's Motion for directed verdict should have been granted.

A 2-1 decision was also rendered on January 31, 1990 denying petitioner's Motion For Rehearing. The petitioner's Motion to Invoke the Discretionary Jurisdiction of the Court was timely filed on March 1, 1990.

SUMMARY OF ARGUMENT

In this case, the Second District Court of Appeal held that it could not consider testimony adduced during respondent's case in chief, nor could it consider testimony of petitioner's rebuttal witness, but could only consider evidence presented during petitioner's case in chief, in deciding whether to reverse the trial court's denial of respondent's initial Motion for a Directed Verdict. The decision of the District Court cannot be reconciled with the previous decision of this Court in Gulf Heating and Refrigeration Co. v. Iowa Mutual Insurance Co., 193 So.2d 4 (Fla. 1966), and with the decision of the Fourth District Court of Appeal in Barnett First National Bank of Cocoa v. Shelton, 253 So.2d 480 (Fla. 4th DCA 1971). These cases held that a respondent, by proceeding with the presentation of his evidence, waives any error in denial of his initial motion for a directed verdict, and that any error in denying the Motion For Directed Verdict on petitioner's evidence may be cured by subsequent testimony. The Court must then consider all of the evidence of the entire trial, not just the evidence introduced during petitioner's case in chief. The Second District Court of Appeal expressly refused to consider crucial testimony which came in after petitioner's case in chief, in direct conflict with the cases cited above.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art V § 3(b) (3) Fla.Const. (1980); Fla.R.App.P. 9.030(2) (A) (iv).

ARGUMENT

The Decision of the Second District Court of Appeal in this case expressly and directly conflicts with the decision of this Court in Gulf Heating & Refrigeration Co. v. Iowa Mutual Insurance Co., 193 So.2d 4 (Fla. 1966), and with the decision of the Fourth District Court of Appeal in Barnett First National Bank of Cocoa v. Shelton, (Fla. 4th DCA 1971).

The Second District Court of Appeal reversed the trial court's denial of Florida Power's motion for a directed verdict made at the close of petitioner's case in chief. In so doing, the district court held that it could not consider evidence of foreseeability elicited during cross-examination of Tommy Byrd, a supervisor with Florida Power, who was called as a witness by Florida Power during it's case. The District Court also held that it could not consider the testimony of petitioner's rebuttal witness Dr. Paris Wiley, as a basis for establishing the foreseeability element of petitioner's claim. In refusing to consider the testimony of Tommy Byrd and Dr. Paris Wiley, the District Court held, on page 3 of it's Opinion,

"...we cannot consider it since this testimony was received after Florida Power's motion for a directed verdict should have been granted."

Thus the District Court has "expressly" held that the appellate courts cannot consider testimony and evidence coming in after respondent's initial motion for a directed verdict in order to decide whether trial courts should be reversed

and the jury's verdict set aside, even if evidence does come in after petitioner's case in chief which would otherwise defeat the motion for a directed verdict.

The District Court decision is in direct conflict with the decision of this Court in Gulf Heating & Refrigeration Co. v. Iowa Mutual Insurance Co., 193 So.2d 4 (Fla. 1966), wherein this Court expressly held, on page 4,

"Certiorari in this Court is based on conflict between this decision, reversing a judgment entered on a jury verdict and directing that defendant's motion for directed verdict be granted upon appellate consideration of plaintiff's evidence alone..."

This Court then held, at page 5,

"...a defendant, by proceeding with the presentation of his evidence, waives any error in denial of his initial motion, and that the court's ruling on the renewed motion required at the close of the case must be, as above stated, 'based on a consideration of all the evidence adduced in the cause."

"The appellate issue must accordingly be resolved by review of the defendant's as well as plaintiff's evidence. This disposition of the point is in accord with earlier decisions indicating that error in denying directed verdict on plaintiff's evidence may be cured by subsequent testimony."

The District Court's opinion also directly conflicts with the decision of the Fourth District Court of Appeal in Barnett First National Bank of Cocoa v. Shelton, (Fla. 4th DCA 1971), where the Court held, at page 481,

"The question of whether the Court erred in denying appellant's motion for directed verdict made at the close of the plaintiff's case is not properly presented for appellant review. The record discloses that after the motion was made and denied, defendant presented evidence. This in and of itself is a waiver of any error in denying defendant's motion for directed verdict made at the close of the plaintiff's case."

While it is clear that the Second District Court of Appeal's decision in this case expressly and directly conflicts with the decision of this Court and the Fourth District Court of Appeal, this Court has also held in The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988), at page 288,

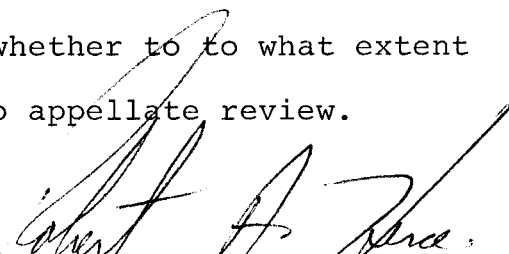
"Thus, it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result."

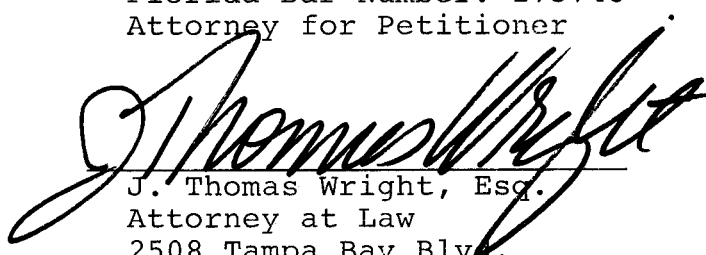
CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument and quash the contrary decision of the District Court below.

Motions for directed verdicts are common place at trial. This Court and the Fourth District Court has held that the defendant, subsequent to a denial of a motion at the conclusion of the plaintiff's case, must chose to present it's evidence (and

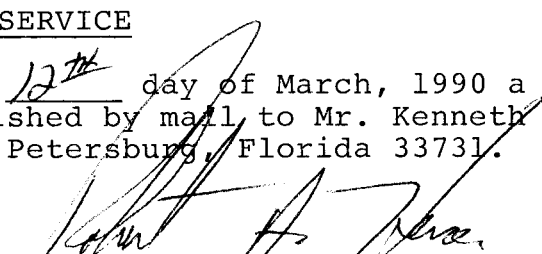
thereby waive appellate review of the initial denial) or accept a judgment and seek appellate review. The effect of the Second District Court's decision in this case is to undermine that policy statement. This Court should exercise its discretionary jurisdiction to resolve the issue of whether to what extent denials of such motions are subject to appellate review.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of March, 1990 a copy of the foregoing has been furnished by mail to Mr. Kenneth Deacon, Esq., P.O. Drawer 1441, St. Petersburg, Florida 33731.


Robert A. Herce, Esq.