

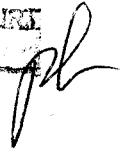
IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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THOMAS McCAIN, individually, and
f/u/b/o LIBERTY MUTUAL INSURANCE
COMPANY,

Petitioners,

vs.

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

FLORIDA POWER CORPORATION, a
corporation doing business in
the State of Florida

Respondent.

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

ON PETITION FOR DISCRETIONARY JURISDICTION
TO REVIEW AN OPINION OF
THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

HARRIS, BARRETT, MANN & DEW

By: KENNETH C. DEACON, JR., ESQ.

and

By: MARIAN B. RUSH, ESQ.
P. O. Drawer 1441
St. Petersburg, FL 33731
(813) 892-3100

Attorneys for Respondent

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JURISDICTIONAL ISSUE PRESENTED FOR REVIEW

WHETHER THIS HONORABLE COURT SHOULD INVOKE ITS DISCRETIONARY JURISDICTION TO DETERMINE WHETHER THE HOLDING OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS IN GULF HEATING & REFRIGERATION COMPANY V. IOWA MUTUAL INSURANCE COMPANY, 193 So.2d 4 (Fla. 1966), AND BARNETT FIRST NATIONAL BANK OF COCOA V. SHELTON, 253 So.2d 480 (Fla. 4th DCA 1971), WHEN THE PETITIONERS NEVER RAISED THE ISSUE APPEALED TO THIS COURT BEFORE THE SECOND DISTRICT COURT OF APPEAL.

INTRODUCTION

FLORIDA POWER CORPORATION, the Defendant in the trial court, Appellant in the Second District Court of Appeal, and Respondent before this Honorable Court, shall be referred to herein as "Respondent."

THOMAS McCAIN, the Plaintiff in the trial court, Appellee in the Second District Court of Appeal, and Petitioner before this Honorable Court, shall be referred to herein as "Petitioner."

"A" followed by a number will refer to the page cite in the Appendix to Respondent's Brief.

"PIB" followed by a number will refer to the page cite in Petitioner's Initial Brief.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent accepts the Statement of the Case and of the Facts contained in the Initial Brief of Petitioner, but wishes to invite the Court's attention to the following additional facts:

1. The Answer Brief of Petitioner does not contain any allegation or argument that Respondent waived its right to appeal the denial of its Motion For Directed Verdict after the Plaintiff's case in chief. (A. 1-26)

2. On January 8, 1990, Petitioner served a Motion For Rehearing, and on January 11, 1990, Petitioner served an Amendment to the Motion For Rehearing which states:

6. The opinion reveals that the majority of the court overlooked the proposition of law that the appellant, in presenting evidence in its case in chief subsequent to the denial of its motion for a directed verdict, waived any error by the trial court in the denial of its motion, thus precluding appellate review. (Citations omitted.)

(A. 37-40; 41-43).

3. On January 23, 1990, Respondent served its response to the Petitioner's Motion For Rehearing and Amendment to Motion For Rehearing. (A. 44-47) The Second District Court of Appeal denied Petitioner's Motion For Rehearing on January 31, 1990.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal was never afforded an opportunity to review and dispose of the Petitioner's allegation that the Second District Court of Appeal erred in rendering its opinion in this case. The Petitioner had two opportunities in which to present this argument to the Second District. Petitioner filed both a Motion For Rehearing and an Amendment to his Motion For Rehearing. Thus, Petitioner has waived his right to have this Court review this case since it never allowed the Second District Court of Appeal an opportunity to review and dispose of the issue now being presented to this Court for the first time.

Assuming arguendo the Petitioner had not waived his right to request this Court review this appeal, the decision of the Second District Court of Appeal does not directly conflict with the cases cited by Petitioner. It is readily apparent from a review of the Second District Court of Appeal's opinion that it reviewed the entire record from the trial court including the testimony complained of by the Petitioner. Even if the Second District had considered the testimony, it opined it might only give limited support to the Petitioner's position on the issue of foreseeability.

LEGAL ARGUMENT

THIS HONORABLE COURT SHOULD NOT INVOKE ITS DISCRETIONARY JURISDICTION TO DETERMINE WHETHER THE HOLDING OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS IN GULF HEATING & REFRIGERATION COMPANY V. IOWA MUTUAL INSURANCE COMPANY, 193 So.2d 4 (Fla. 1966), AND BARNETT FIRST NATIONAL BANK OF COCOA V. SHELTON, 253 So.2d 480 (Fla. 4th DCA 1971), BECAUSE THE PETITIONERS NEVER RAISED THE ISSUE APPEALED TO THIS COURT BEFORE THE SECOND DISTRICT COURT OF APPEAL.

The purpose of an appellate court is to review the issues properly preserved and presented to the lower court. In determining whether to invoke its discretionary jurisdiction and grant a Petition for Certiorari, the Florida Supreme Court should, likewise, only consider issues which have been first presented to the District Court of Appeal for its determination. The logical rationale for this requirement is that a reviewing court should not consider matters urged for reversal unless the lower court was afforded a full and complete opportunity to consider those matters. Walker v. Hampton, 235 So.2d 325 (Fla. 1st DCA 1970).

At the trial in this cause, as admitted by Petitioner in his Statement of the Case and of the Facts, Respondent moved for a directed verdict at the close of the Petitioner's case in chief. Respondent's motion was based, in part, on Petitioner's failure to offer proof that the Petitioner's injury was a foreseeable consequence of the Respondent's alleged negligent act. (PIB-1) Respondent properly set forth in its Motion For Directed Verdict, both at trial and on appeal, the specific grounds for its motion

to properly preserve the appellate court's review of its position that the evidence presented by the Petitioner was insufficient to establish his claim. Wagner v. Nottingham Associates, 464 So.2d 166 (Fla. 3d DCA 1985). The issue of foreseeability is the precise ground on which the Second District Court of Appeal reversed the trial court. The Second District found that the Petitioner had not established all of the essential elements of his cause of action because he failed to establish the element of foreseeability in his negligence action. (A. 30) In reaching this conclusion, the Second District Court of Appeal followed a long line of Florida case law which holds that when there is no competent or substantial evidence to sustain a jury's verdict, that verdict must be reversed. Miami Transit Co. v. Dalton, 23 So.2d 572 (Fla. 1945); Bell v. Jefferson, 414 So.2d 273 (Fla. 5th DCA 1982).

In the Answer Brief submitted by Petitioner to the Second District Court of Appeal, Petitioner failed to assert any argument that Respondent waived its right to appeal the trial court's denial of its Motion For Directed Verdict after the Petitioner's presentation of his case in chief. (A. 1-26) The first time Petitioner ever alleged any waiver argument was in the Amendment to Motion For Rehearing. (A. 41-43) It is axiomatic that when an issue is raised for the first time in a motion for rehearing before an appellate court, it will not be considered by that court. Price Wise Buying Group, et al. v. Nuzum, 343 So.2d 115 (Fla. 1st DCA 1977); Florida National Bank at Key West v. Fryd Construction

Corp., 245 So.2d 883 (Fla. 3d DCA 1970). Thus, the Second District Court of Appeal correctly denied Petitioner's Motion for Rehearing.

Petitioner now alleges for the first time in the appellate process that the Second District Court of Appeal erred because it did not consider all the evidence presented before the trial court in reaching its conclusion. Petitioner filed both a Motion For Rehearing and an Amendment to its Motion For Rehearing after the Second District issued its written opinion and never presented this supposition in either of those motions. (A. 37-40; 41-43) Petitioner's complaint before this Court should have been raised in its Motion For Rehearing or Amendment to its motion in order to allow that Court an opportunity to correct any alleged error. Petitioner failed to do so. It is the Petitioner who has waived his right to request this Court to invoke its discretionary jurisdiction since the Petitioner never allowed the Second District Court of Appeal an opportunity to review and dispose of the issue now being presented to this Court in spite of the fact that Petitioner had ample opportunity to do so.

The Petitioner's contention that the Second District Court of Appeal's ruling is in direct conflict with the cases it cites is also without factual support. First, Respondent properly preserved its objection of the trial court's denial of its Motion For Directed Verdict by renewing its Motion For Directed Verdict at the conclusion of the trial. (A. 48-49) This was not the situation in the Barnett First National Bank of Cocoa v. Shelton, 253 So.2d 480 (Fla. 4th DCA 1971), cited by Petitioner, where the record

failed to disclose whether the defendant had renewed its motion for directed verdict at the close of all the evidence in order to preserve the question for appellate review. Second, it is evident from the written opinion of the Second District Court of Appeal that it did, indeed, review the record of the entire lower court proceeding. The Second District alluded that even if it considered the testimony of Mr. Byrd, it might only provide limited support for Petitioner's position on the issue of foreseeability. (A. 29) Accordingly, Petitioner's protestations have no factual basis since the Second District was cognizant of the testimony given by Mr. Byrd and Dr. Parish, but did not find it compelling in reaching its conclusion. Accordingly, the court should not invoke its discretionary jurisdiction in this case.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the Florida Supreme Court should not invoke its discretionary jurisdiction because the issue presented to this Court was not properly preserved for appeal and there is no direct conflict with the opinions cited by the Petitioner.

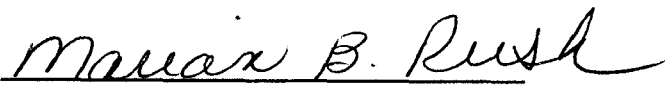
Respectfully submitted,

HARRIS, BARRETT, MANN & DEW

By:


KENNETH C. DEACON, JR., ESQ.
Florida Bar No. 0094202

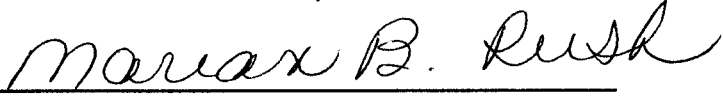
By:


MARIAN B. RUSH, ESQ.
Florida Bar No. 0373583
P. O. Drawer 1441
St. Petersburg, FL 33731
(813) 892-3100

Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail to ROBERT A. HERCE, ESQ., Herce & Herce, P. O. Box 4646, Tampa, Florida 33677; and J. THOMAS WRIGHT, ESQ., 2508 Tampa Bay Boulevard, Tampa, Florida 33607, this 6th day of April, 1990.



MARIAN B. RUSH, ESQ.

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