IN THE SUPREME COURT OF FLORIDA

THOMAS McCAIN,

Petitioner,

-vs-

FLORIDA POWER CORPORATION,

Respondent.

CASE NO: 75,637
DISTRICT COURT OF APPEAL,
2nd DISTRICT - NO: 88-03047

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, 2ND DISTRICT

PETITIONER'S BRIEF ON THE MERITS

Robert A. Herce, Esq.
Herce & Herce, Attorneys
P.O.Box 4646
Tampa,Florida 33677
(813) 877-3715
Florida Bar No: 275743
Attorney for Petitioner

J.Thomas Wright, Esq.
2508 Tampa Bay Blvd.,
Tampa,Florida 33607
(813) 870-0376
Florida Bar No: 135108
Attorney for Petitioner

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STATEMENT OF THE CASE

On June 1, 1987, the Petitioner filed a Complaint in the Circuit Court of Pasco County alleging negligence by the Respondent in erroneously marking the location of an underground power line which was struck by the Petitioner while he was operating a trenching machine, resulting in an electrical shock and personal injury on September 4, 1986 (T-1054-1056).

The Respondent filed its Answer and Affirmative Defenses, generally denying the allegations of negligence and asserting the affirmative defense of comparative negligence. (R-1064).

Jury Trial commenced on July 18, 1988 and concluded on July 22, 1988 with a verdict finding of negligence by the Respondent as a "legal cause of damage" to the Petitioner, awarding damages of $250,000, and reducing that amount by 30% for comparative negligence of the Petitioner. (T-1049, R-1387-1388).

Respondent then served its Motion for Entry of Judgment in Accordance with Motions for Directed Verdict, or in the Alternative, Motion for New Trial or, in the alternative Motion for Remittitur (R-1395-1397). The Motion was subsequently denied by the trial court. (R-1423-1426).

A Final Judgment was entered by the trial court, on August 4, 1988, in favor of the Petitioner and against the Respondent in the amount of $175,000.00. (R-1398).

Thereafter a Notice of Appeal was filed by the Respondent. (R-1427).

On December 22, 1989, the District Court of Appeal, Second District, issued its decision and opinion reversing the jury verdict and final Judgment on the grounds that the trial court erred in not granting the Respondent's oral Motion for a Directed Verdict at the conclusion of the Petitioner's case. Florida Power Corporation v. McCain, 555 So.2d 1269 (Fla. App. 2d 1989). A rehearing was denied on January 31, 1990.

A timely Petition for a Writ of Certiorari was filed in this Court and the Order Accepting Jurisdiction has been entered.

STATEMENT OF THE FACTS

The Petitioner, THOMAS McCAIN, was 32 years old at the time of this incident in 1986 (T-475), employed by Henkels & McCoy as a foreman laying underground telephone cable. (T-479, 378-9)

Edward Lawlor was a journeyman-lineman for Respondent, FLORIDA POWER CORPORATION, whose job was to locate underground electric power cable in construction areas (T-264, 266), where contractors, plumbers, landscapers and installers of telephone and TV cables might be digging. (T-741). The reason was obvious: electric underground cable carries 7,200 volts (T-272, 339, 735, 738, 765) and cuts in the line could cause injury or death (T-755-6, 765-766) and a disruption of service to customers (T-248, 262, 266, 741, 755).

On September 3, 1986, the day before the incident, Mr. Lawlor came out to the scene where Mr. McCain and his crew were burying telephone cable. (T-199, 250-251, 256, 268, 492). Mr. Lawlor was there at the Petitioner's request for the purpose of locating the underground electric cable owned by his employer, the Respondent. (T-164, 258, 264, 268, 492). A conversation ensued between them (T-268-9, 297) and then Mr. Lawlor spent 45 minutes to one hour ascertaining the whereabouts of the underground electric cable (T-364). After using sophisticated equipment, provided by the Respondent, he located the underground cable (T-276, 324). To indicate where the cable was,

he marked the ground with red paint and ground flags (T-281, 330-1, 493-4), and told Mr. McCain not to dig within 2 to 3 feet of the markings (T-495, 499, 267, 287, 358, 360).

The following day, September 4, 1986, Mr. McCain was operating a trenching machine in an area unmarked by Mr. Lawlor, digging out the ground for the laying of telephone cable. (T-503, 506). The machine had a bulldozer blade, called a "stinger", which digs the earth (T-505) while the operator rides atop the machine and watches the digging (T-506). Usually, electric power cable is buried under 36 inches of dirt and telephone lines have a minimum of 30 inches of "cover" (T-208, 290, 314, 347, 359, 361, 411, 575, 716, 805).

At the time of the accident, Mr. McCain was on the trencher next to a metal fence (T-261, 263, 531, 560-1) in an area at least 5 to 6 feet from Mr. Lawlor's red paint marks (T-349, 357, 371, 400). Mr. McCain had previously been instructed by Mr. Lawlor and others to stay 2 to 3 feet from the red markings (T-267, 358, 360-1, 405, 495, 757-8). If he were over 2 to 3 feet from the markings he could use the trencher (T-289, 353, 361, 456-7, 499, 817); if he were within the marked zone, handdigging was required because of the increased risk of cutting the electric power cable. (T-354, 452).

Just before the incident, Mr. McCain had his left hand on the trencher's controls and his right hand on the machine's hood (T-508); the floor of the trencher was made of steel (T-870). As the trencher was digging, the "stinger" hit the 7,200 volt

electrical cable and Mr. McCain felt "intense pain" from an electric shock, giving him a "falling sensation", rendering him immobile, and his body "just shaking"; he immediately heard a "popping" noise. (T-509). He recalls someone pouring water in his face (T-508-511). A crew member drove him to the Henkels & McCoy's office where he appeared to be "red", "trembling", "incoherent", and "mumbling" (T-394). He was immediately taken to the hospital. (T-394).

He was kept in the hospital overnight for observation (T-629) and thereafter was seen and treated by a neurosurgeon (T-637), an ear, nose and throat specialist (T-663) and a neurologist. The neurosurgeon's final diagnosis was "electric shock" (T-632) and the ENT doctor found "tinnitus", a ringing in the ear and scarring of the cochlea nerve (an electrical short-circuiting of the ear itself) as consistent with electrical shock (T-664-667).

Mr. McCain related for the jury his episodes of continuing "blinding headaches", "sensitivity to light", a ringing in his ears, nauseousness, and the development of a withdrawing personality as a way to cope with his injuries (T-516-527, 530-533). Kay Parrish, the plaintiff's girlfriend for over four years prior to the accident (T-673), described how Mr. McCain had been a hard worker prior to his injuries (T-674), and how he suffers intense headaches and nausea and had become "argumentative" and "belligerent" after the accident (T-676-677); she described how he would sit in the shower during such attacks

(T-676). His temper caused her to leave him for several months (T-678-9).

In cross-examination and in its case-in-chief, the Respondent explored several areas of defense which either question the Petitioner's theory of the case or sought to demonstrate comparative negligence by the Petitioner. In each instance, conflicting evidence was admitted on behalf of the Petitioner to challenge the Respondent's theories.

Thus, while the Respondent's employee testified that the cable was cut within 2 to 3 feet of his red markings (T-285-6), other testimony revealed that the cut was at least 5 to 6 feet away (T-349,357,371, 400), in an area considered safe to use the trencher (T-289, 353, 361, 456-7, 499, 817), and contrary to the Respondent's claims that Mr. McCain should have been hand-digging (T-804, 843).

The Respondent sought to show that the trench had been dug too deeply for telephone cable (T-166, 208, 211, 217, 292, 842); the Petitioner countered by showing that those measurements offered by the Respondent had been taken after the accident, and after the power cable had been dug out and enlarged by other workers (T-169-70, 403-4). The Petitioner went on to show that the trencher was not able to precisely dig an accurate depth (T-360, 574-5), that the 30 inches of "cover" for telephone cable was a <u>minimum</u> requirement (T-361, 411), and that additional depth is dependent upon each cable company's requirements (T-808-9). While the Respondent maintained that the trench was 38 to 41 inches deep (T-166, 211, 217, 292, 347), the Petitioner denied

that he was digging that deep (T-576) and pointed out that he needed to dig at least 32 to 33 inches in order to get a 30-inch "cover" (T-575).

The Respondent sought to establish that Mr. McCain told Mr. Lawlor that he would be digging in an area other than where the accident occurred (T-252, 317, 334), but it was undisputed that Mr. Lawlor marked the area near the accident scene with his red paint and ground flags. (T-281, 330-1, 493-4).

The final theory of defense was that Mr. McCain had simply not been shocked at all for three reasons:

1. The electric cable de-energizes when cut (T-341),

2. Other workers had not been shocked when cutting a cable with a trencher, (T-344, 346, 443, 446, 459, 741-2, 785-6, 806-7, 852) and

3. It was "technically impossible" for him to have been shocked while sitting on the trencher (T-846-7, 850, 888). All of these reasons were refuted by the Petitioner and the Petitioner's expert, Dr. Paris Wiley, Ph.D., an electrical engineer from the University of South Florida (T-890-1), who testified how it was physically possible for Mr. McCain to be shocked when the "stinger" hit the power cable. (T-909-915). Specifically, Dr. Wiley explained how electricity works and how it needs a complete circuit to cause a shock (T-901-904, 911). When the trencher cut the cable while the machine was up against the tall grass, shrubbery and metal fence, the electrical circuitry was completed. (T-909,912-915). He "totally" disagreed with the Respondent's expert, William Theu, that it would have

been impossible for the Petitioner to have been shocked under these circumstances. (T-915).

The jury, after considering the evidence, returned a verdict of $250,000.00, finding the Respondent 70% negligent and the Petitioner 30% negligent (T-1049).

SUMMARY OF THE ARGUMENT

The Respondent attacked the jury verdict and final judgment on the primary basis that the incident in this case was not sufficiently "foreseeable" by the Respondent because the Respondent was unaware of a trencher operator ever being injured while operating his machine.

The Petitioner argues that the trial court correctly denied the Respondent's Motion for Directed Verdict at the close of the Petitioner's case-in-chief.

On the issue of "foreseeability", the negligence of the Respondent in incorrectly locating its underground electrical cable created a "scope of danger" in which the Petitioner was placed, which resulted in the cutting of the power cable and subsequent injury. Contrary to the Respondent's argument, it is not necessary that the Respondent foresee the actual way in which someone might be injured, but rather that a dangerous condition was created by the Respondent's negligent acts. Electric underground cable is located so that contractors will not sever that line and cause injury or death, or interruption of service. The Respondent cannot escape liability for its negligent acts by arguing that it was unaware of any prior injuries under the facts of this case. The act of trenching in the vicinity of electric power cable carrying 7,200 volts is a dangerous undertaking which should be approached with caution and accuracy. In erroneously informing the Petitioner where he might safely operate his

trencher, the Respondent created a dangerous situation in which the Petitioner suffered his injuries. The Respondent knew its actions could create a hazardous situation and failed to exercise due care. The exact manner in which the accident occurred is not required to be "foreseeable" in order for the Respondent to be liable.

There was sufficient evidence at trial that the Petitioner suffered an electrical shock, resulting in severe and debilitating injuries. The evidence, both direct and expert, established that his trencher hit and severed a highly-energized electrical transmission line and that he was shocked. While ~~even~~ experts might disagree as to how the incident happened, the Petitioner clearly established that it did in fact happen.

After the trial court denied the Respondent's Motion for Directed Verdict, the Respondent proceeded with its defense case-in-chief, and thereby waived appellate review of that judicial determination. By doing so, it allowed the Petitioner an opportunity to cure any defects in his case-in-chief, and thereafter, the subsequent Motion for Directed Verdict (at the conclusion of all the evidence) should have been based upon all the evidence. By that time, any alleged deficiency in the Petitioner's case-in-chief on the issue of "foreseeability" had been corrected by additional testimony and the District Court of Appeal should have considered such testimony in reviewing the Respondent's subsequent Motion for a Directed Verdict.

I. THE DISTRICT COURT OF APPEAL ERRED IN RULING THAT THE TRIAL COURT SHOULD HAVE GRANTED THE RESPONDENT'S MOTION FOR DIRECTED VERDICT ON THE ISSUE OF "FORESEEABILITY"

In its majority opinion, the District Court ruled that since the Respondent was unaware of an operator of a mechanical trencher suffering an electrical shock when severing an energized power line, the incident in this case was not foreseeable and thus no legal duty attached to the Respondent to prevent such an incident. Florida Power Corporation v. McCain, 555 So.2d 1269 (Fla. App. 2d, 1989).

Any action for negligence requires proof of the traditional elements of duty, a breach of duty, and damage "proximately caused" by the breach. Lake Parker Mall, Inc. v. Carson, 327 So.2d 121, 123 (Fla. App. 2d 1976). This third element of "proximate cause" itself has two tests which are designed to impose some limits on the legal consequences of one's actions: "causation-in-fact", or the "but for" test, and "foreseeability". Stahl v. Metropolitan Dade County, 438 So.2d 14, 17 (Fla. App. 3d 1983); Pope v. Pinkerton-Hays Lumber Co., 120 So.2d 227, 229-230 (Fla. App. 1st 1960); Prosser, The Law of Torts, (4th edition), sections 41, 43.

As to the first test of "causation-in-fact", the evidence is clear that the Respondent's employee erroneously marked the area in which the Petitioner was digging with his trencher. Had the employee not mismarked the area where the underground power cable was located, the accident would not have occurred.

As to the issue of "foreseeability", Prosser writes that this concept is based on judicial policy considerations of the extent to which a tortfeasor's negligent acts will be held liable for ensuing injury. Prosser, supra, section 42. Once the negligent act and resulting injury have been established, the question then arises as to whether the resulting injury was one that could have been "reasonably foreseen" as flowing from the negligent act. Such a policy determination to limit liability of an otherwise negligent tortfeasor is to be made on a case-by-case basis "...upon mixed considerations of logic, common sense, justice, policy and precedent". Prosser, supra.

The argument of the Respondent on the "foreseeability" test has been: "Even though we provide personnel to come out, locate, and mark the whereabouts of our energized electrical cable (which carries 7,200 deadly volts of electricity), we had no duty to correctly locate and mark the cable for Mr. McCain (who was shocked when he severed the cable while operating a trencher in a supposedly safe area) because we have never heard of anyone getting shocked while operating a trencher which cut our energized power lines."

A similar factural situation is found in Lewis v. Gulf Power Co., 501 So.2d 5 (Fla. App. 1st 1986). In that case, the plaintiff was injured stringing cable television lines when he tightened a guy wire (owned and maintained by the defendant) which became suddenly charged with electrical current, resulting in a short circuit and explosion. The evidence presented to the trial court in a summary judgment proceeding on behalf of Gulf

Power was that while their guy wires had been disturbed on at least a dozen occasions in the past, no one had ever been injured previously as a result. In reversing the summary judgment in favor of Gulf Power, the First District Court of Appeal found that the issue of notice of danger should not have been resolved by the judge. Similarly, in this case, unquestionably the Respondent was aware of numerous cuttings of its electrical power cable where no actual physical injury had been reported. (T-344, 346).

In advancing its argument that because no trencher operator had ever been shocked before, it had no legal duty in this case, the Respondent relied heavily upon Florida Power and Light Co. v. Lively, 465 So.2d 1270 (Fla. App. 3d 1985). There the Court held that the power company was not required to mark non-energized static lines 102 feet above the ground and almost 9 miles from the airport which were stuck by the plaintiff while attempting an emergency airplane landing. Not only is the case distinguishable from the instant case on the facts, the Court itself specifically noted that the case "...does not involve an injury occasioned by energized electrical transmission wires, the maintenance of which puts a high duty of care on the electrical supplier." (emphasis added) Florida Power and Light Co., supra, at 1276, note 5.

Contrary to the argument of the Respondent that "no priors" dissolve its duty, both the facts and the law dispel its position. The jury obviously found that Mr. McCain had been shocked. The Petitioner's expert testified how it happened.

While the trial testimony reflected no known prior injuries while operating a trencher, no one ever testified that no similar injury had ever occurred under the facts of this case (which were presented in the Petitioner's case-in-chief): the trencher was up against the metal fence, entangled with tall grass and shrubbery, the ground was wet, and the positioning of the Petitioner's body at the time of the cable cutting. Certainly, there is nothing unusual about any of these accepted facts which resulted in the Petitioner's injuries, but not one witness for the Respondent could testify that such an accident under these specific facts had never happened.

Add the following facts to those just discussed: the Respondent assumed the duty to accurately locate its electrical cable (T-264), which carried 7,200 volts of electricity (T-272), which was frequently cut by contractors (T-344) and which, when cut by a trencher blade, delivered 7,200 volts in the blade's tip and caused the trencher itself to be charged with 100 to 200 volts (T-849-850; 888-889). One reason the Respondent located its cable was to prevent injury or death to those who might hit their cable (T-775-776). All of these facts occur ordinarily while engaged in the particular pursuit of using a trencher and any reasonably prudent person would so agree.

The majority opinion of the District Court found that testimony by Mr. Lawlor in the Petitioner's case-in-chief tended to negate "foreseeability" because the electrical cable "...was constructed in such a way as to deenergize immediately upon the trencher blade making contact with the cable". Florida Power

Corporation, supra, at 1269. However, this summary of Mr. Lawlor's testimony is neither correct nor complete. Rather, this was Mr. Lawlor's testimony which was adduced in the Petitioner's case-in-chief:

> "This terminal pole up here on the top has fuses and feeds down the pole. If this line is severed, immediately, as soon as somebody's trencher blade makes contact with it or a moving instrument makes contact with the conductor in the center, it's immediately grounded. That's why the neutral runs all the way around it, the current runs back to the fuse and blows the fuse, clearing the line, all within milliseconds. (T-341, emphasis added).

Other witnesses for the defense testified that when a cable is severed and the fuse is blown, it sounds "...like a shotgun going off..." (T-781), "...a .45 or a small shotgun". (T-848). In his direct testimony, the Petitioner testified that he felt an electric shock and heard "...a popping noise..." (T-509). Thus, as viewed by the District Court, the evidence was not that the power line de-energized immediately, but rather "within milliseconds". The evidence, and inferences from the evidence, as presented in the Petitioner's case-in-chief, established that there was indeed a period of time between the actual cutting and the automatic shut-off of electrical current when the severed power cable was still conducting electricity.

Subsequent testimony from the Respondent's expert witness, William Thue, in the Respondent's case-in-chief, established the timing between a cut in the cable and de-energizing as "...a fraction of a second, less than a tenth of a second..." (T-849). Although expressing an opinion that it would have been impossible

for the Petitioner to be shocked, he did testify that at the moment of contact between the trencher and the cable, "...the tip of the blade is touching the 7,200 volts..." (T-849). Continuing his testimony, he stated:

> "Anyway there is the voltage and current at the tip of the blade. Now, there is a - remember it's a fraction of a second and there is the possibility that some voltage will appear and in my opinion the entire trencher because of its rubber wheels and other construction might get to a hundred or two hundred volts for that fraction of a second". (T-850, see, also, T-888-889).

The issue here is not whether a trencher operator had ever been shocked before under the facts of this case. If that were true, then Mr. McCain could not recover, but anyone who sustained injury in a similar manner afterwards could recover. "Foreseeability" is not that simple. The real issue is whether the Respondent, by incorrectly marking the location of its electrical cable for the Petitioner, created a risk in which it was reasonably foreseeable that the Petitioner (or any other person) could be injured in some way. The classic case of Crislip v. Holland, 401 So.2d 1115, 1117 (Fla. App. 4th 1981) described that window of liability:

> "In order for injuries to be a foreseeable consequence of a negligent act, it is not necessary that the initial tortfeasor be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur. Rather, all that is necessary in order for liability to arise is that the tortfeasor be able to foresee that some injury will likely result in some manner as a consequence of his negligent acts." (Emphasis added by the Court.)

The Court went on to hold that "...if the harm that occurs is within the scope of danger created by the defendant's negligent conduct, then such harm is a reasonably foreseeable consequence of the negligence." (Crislip, supra, at 1117, quoted with approval, Stevens v. Jefferson, 436 So.2d 33, 35 (Fla. 1983). See, also, Broome v. Budget Rent-A-Car of Jax., Inc., 182 So.2d 26, 28-30 (Fla. App. 1st 1966); Braden v. Florida Power and Light Company, 413 So.2d 1291, 1292 (Fla. App. 5th 1982); K-Mart Enterprises of Florida, Inc. v. Keller, 439 So.2d 283, 286 (Fla. App. 3d 1983); Anglin v. State of Fla. Dept. of Transportation, 472 So.2d 784, 787 (Fla. App. 1st 1985); Guyton v. Colvin, 473 So.2d 266, 267 (Fla. App. 1st 1985); Tieder v. Little, 502 So.2d 923, 926 (Fla. App. 3d 1987); Koprowski v. Manatee County, 519 So.2d 78, 80 (Fla.App. 2d 1988).

Thus, the issue is not whether the Respondent knew of any actual prior injuries suffered when a trencher hit its cable, but rather whether some injury was within the "scope of danger" created by its employee who failed to correctly locate its electrical cable which was energized with lethal voltage. While throughout the trial the defense sought to confine the reason to locate its underground cable to non-interruption of electrical service, its supervisor admitted on cross-examination that locating cable also prevented personal injury or death (T-755-756).

It should noted at this juncture that the test of "foreseeability" is not a subjective test of the actual litigants, but rather is an objective test in nature. The

resolution of the "foreseeability" issue is really not whether the Respondent knew of prior injuries suffered by telephone cable workers severing its electrial power lines, but rather whether "a prudent or reasonably cautious man" might reasonably expect danger and injury in the cutting of an electrical power cable while sitting atop a mechanical device. Broome, supra, at 29,30; Pinkerton-Hays Lumber Co. v. Pope, 127 So.2d 441, 442-3 (Fla. 1961).

The foreseeability of this accident was enhanced by the extra duty imposed by law upon the Respondent, who was engaged in a highly dangerous undertaking. That danger was recognized by the Second District Court of Appeal in Ahearn v. Florida Power and Light Company, 129 So.2d 457,461 (Fla. App. 2d 1961), when it held that:

> "The generation and distribution of electrical energy is highly dangerous to life and property. Electricity, the basic commodity of a power company, coursing invisibly through the quiet of uninsulated high tension wires, of itself sounds no warning as to its lethal nature. So it is, those who operate such a facility have the obligation to exercise case and vigilance in proportion to the peril involved."

This holding was re-affirmed in Simon v. Tampa Electric Company, 202 So.2d 209, 211 (Fla. App. 2d 1967); since electricity is so dangerous, power companies "...are bound to use care in proportion to the danger involved." Teddleton v. Florida Power & Light Co., 200 So. 546, 549 (Fla. 1941).

The Respondent, in seeking to escape liability on the test

of "foreseeability", has completely ignored its assumption of a duty owed to the Petitioner when it undertook to locate its underground electric cable for him. Whether or not the Respondent owed any duty to the Petitioner at all was resolved when it assumed that duty and incorrectly located the cable. The law required the Respondent to act in a reasonable, prudent manner which it failed to do through its employee's error. Banfield v. Addington, 140 So. 893, 896 (Fla. 1932); Fidelity & Gas Co., of N.Y. v. L.F.E. Corp., 382 So.2d 363, 368 (Fla. App. 2d 1980); Barfield v. Langley, 432 So. 2d 748, 749 (Fla. App. 2d 1985). The Petitioner relied upon the Respondent's employee to correctly locate the cable and protect him from injury (T-619).

The Respondent had a duty to the Petitioner to tell him where the Respondent's power cable was located. There was obvious danger involved in the endeavors of both the Respondent's employee and the Petitioner. The Respondent was required to act in a reasonable, prudent manner consistent with the danger involved. It did not act in such a manner and as a result, the Petitioner sustained permanent injuries. The fact that the Respondent was unaware of a similar prior accident cannot eliminate its duty of care, which the jury found it had breached. (For similar cases in other jurisdictions, see, Mallow v.Tucker, et.al., 54 Calif. Reptr. 174 (Calif. App. 4th 1966); Hobbs v. Detroit Edison Company, 202 N.W. 2d 431 (Michigan 1972); Williams v. City of New Orleans, 433 So.2d 1129 (La. App. 4th Cir. 1983).

The Respondent relied heavily on the case of Lopez v. Florida Power & Light Co., 501 So.2d 1339 (Fla. App. 3d 1987) to

support its argument that the Petitioner's trial evidence failed to established that Mr. McCain's injuries were "proximately caused" by the Respondent's breach of duty. The issue in Lopez was not whether the claimant had been shocked (indeed there was an electrocution), but rather how had he been shocked. In Lopez, there were no actual witnesses to the incident itself although there was testimony regarding clearances between the avocado tree and the electrical lines both before and after the incident. No witness testified as to what occurred at the time of the actual incident. The plaintiff's expert gave at least three possible theories as to how the accident happened, including the possibility that the decedent simply touched the electrical wires with the metal pole. Significantly, it was specifically stated by the Court that there was no evidence of a violation of any "applicable code, regulation, or standard of care." (Lopez, supra, at 1341)

In the instant case, there was evidence of a "standard of care", i.e., that underground electrical cable should be properly and accurately located and the judge instructed the jury accordingly under the National Electric Safety Code (T-1036). The issue of how the accident happened was clearly established by the Petitioner's evidence, i.e., that the "stinger" of the trencher hit an energized electrical underground cable. The real issue in this case is the opposite of the issue in Lopez. It was not: How did the incident occur? Rather the question was: Did the incident occur? This question was answered by the jury after hearing conflicting evidence from the parties.

The Respondent's reliance on Lopez fails in this case for the simple reason that the power company didn't tell Mr. Lopez that it was safe to use a metal pole to pick avocados. In this case on appeal, the Respondent told the Petitioner it was safe to dig where he was digging. In fact, in Lopez, the defendant had specifically warned against the dangers of fruit picking. (Lopez, supra, at 1340-1341.)

The trial judge, in his Order on Motion For New Trial (and cited by Judge Threadgill in his dissenting opinion), wrote that:

> "This Court is not prepared to rule as a matter of law that Florida Power could not foresee that if an insulated electrical line carrying 7,200 volts of electricity were cut by a mechanical device the operator of the device might receive an electrical shock and an accompanying injury". (R-1425-1426).

In this written statement is reflected not only the Petitioner's theory of the case, but a finding by the trial court that there was competent, believable testimony supporting the Petitioner's case.

In considering the case on appeal, an appellate court should view favorably the evidence and all reasonable inferences favorable to the plaintiff in a motion for directed verdict. Nelson v. Zeigler, 89 So.2d 780, (Fla. 1956); Cox v. Wagner, 162 So.2d 527 (Fla. App. 3d 1964); Warn Industries v. Geist, 343 So.2d 44 (Fla. App. 3d 1977). While the question of "foreseeability" is generally a question of law to be decided by the court initially, "...when reasonable persons can differ as to

whether a particular injury is foreseeable, it becomes a jury question". City of Jacksonville v. Raulerson, 415 So.2d 1303, 1305 (Fla. App. 1st 1982), citing Vining v. Avis Rent-A-Car Systems, Inc., 354 So.2d 54 (Fla. 1977). Or to put it another way: "If there is room for a difference of opinion between reasonable persons as to the inferences that might be drawn from conceded facts, the matter should be submitted to a jury". White v. Arvanitis, 424 So.2d 886, 888 (Fla. App. 1st 1982). Indeed, a motion for directed verdict should be granted only if there is no evidence upon which a jury could reach a verdict. Parsons v. Reyes, 238 So.2d 561, 563 (Fla. 1970). See, also, Braden, supra, at 1291-1292.

Can it be reasonably said, by reasonable people, that no threat of an electric shock could be anticipated in the course of cutting a 7,200 volt electric power line with a metal mechanical device? Would not most reasonable people at least approach such an undertaking with a measurable degree of caution? Indeed, even reasonable appellate judges experienced a difference of opinion on this question (as did the trial judge), making the issue a proper matter for a jury to decide.

II. THE DISTRICT COURT OF APPEAL ERRED IN RULING THAT IT COULD NOT CONSIDER ALL OF THE EVIDENCE ADDUCED AT TRIAL IN FINDING THAT THE PETITIONER HAD FAILED TO ESTABLISH "FORESEEABILITY"

The majority decision and opinion rendered below by the District Court reviewed only the evidence presented during the Petitioner's case-in-chief in holding that the Petitioner failed to present sufficient evidence on the issue of "foreseeability". In doing so, the majority specifically stated that it could not consider any evidence at the trial on the "foreseeability" issue which was admitted during the Respondent's case-in-chief and during the Petitioner's rebuttal, even though the Court found evidence to support the Petitioner's position on this issue. Florida Power Corp., supra, at 1270.

The Court noted at 1270:

> "Although Byrd's testimony may provide limited support for McCain's position on the issue of foreseeability, we cannot consider it since this testimony was received after Florida Power's motion for directed verdict should have been granted. For the same reason, we cannot consider the testimony of McCain's rebuttal witness, Dr. Paris Wiley, as a basis for establishing the foreseeability element of McCain's claim".

However, as the Petitioner has argued in his Jurisdictional Brief, the propriety of the trial court's denial of the Respondent's initial Motion for Directed Verdict, made at the conclusion of the Petitioner's case-in-chief, is not subject to appellate review when the Respondent, upon the denial, proceeded

with its own case-in-chief. When a trial court denies a motion for directed verdict at the end of a plaintiff's case-in-chief, the defense has two options: 1) decline to present his own case, argue the issue of sufficiency to the jury, and thereafter appeal an adverse verdict, or, 2) present his own case, but thereby waiving any error of the court's denial of his initial motion for directed verdict. Gulf Heating and Refrigeration Co. v. Iowa Mutual Insurance Co., 193 So.2d 4 (Fla. 1966); Barnett First National Bank of Cocoa v. Shelton, 253 So.2d 480 (Fla. App. 4th 1971); State, Department of Transportation v. Manning, 288 So.2d 289 (Fla. App. 2d 1974); See, also, 6551 Collins Avenue Corp. v. Miller, 104 So.2d 337 (Fla. 1958).

Having decided to proceed with its evidentiary case after the denial of its motion, the Respondent effectively waived appellate review of the denial until it renewed its motion for directed verdict at the close of all the evidence. However, by that time, it was the duty of the trial court to consider the merits of this subsequent motion based upon all the evidence, not just that evidence adduced in the Petitioner's case-in-chief. This Court so ruled in Gulf Heating & Refrigeration Co., supra, at 5:

> "...a defendant, by proceeding with the presentation of his evidence, waives any error in denial of its motion, and ...the court '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'. (emphasis added by the Court).
>
> The appellate issue must accordingly be resolved by review of the defendant's as well as plaintiff's evidence."

This principle was followed previously by the Second District Court of Appeal in State, Department of Transportation, supra, at 290.

At the point in the trial when the Respondent renewed its oral motion for a directed verdict, Tommy Byrd, a supervisor employed by the Respondent had admitted on cross-examination that the Respondent engaged in locating its underground power cable for a reason other than interruption of electrical service to its customers - that it did so to prevent personal injuries or death (T-755,756). At this juncture, the Respondent's expert witness, William Thue, had already established that the trenching machine would carry 100 to 200 volts after severing the 7,200 volt cable and had admitted on cross-examination that vegetation, high grass and shrubbery conduct electricity. (T-849-850,875, 877-878, 888-889). And finally, at this point in the trial, Dr. Paris Wiley, the Petitioner's expert witness, had testified that the tall grass, the shrubbery, and the metal fence were all conductors of electricity capable of serving as a second contact point which completed the electrical circuit and resulted in the Petitioner's shock. (T-909, 911-915, 943-944).

All of this evidence supports the Petitioner's case on the "foreseeability" issue, and should have been considered by the District Court in its determination of whether the Respondent's Motions for Directed Verdict should have been granted.

CONCLUSION

The Petitioner established in his case-in-chief at trial a duty on the Respondent's part to accurately locate its underground electrical cable, and that it failed to do so. As a result, the Petitioner's equipment struck an energized electric power line and the Petitioner was shocked and suffered injury and damages. The evidence was sufficient at the conclusion of the Petitioner's case-in-chief to establish that the accident was foreseeable and the trial court properly denied the Respondent's Motion for Directed Verdict.

By deciding to present its evidentiary case after denial of its initial Motion for Directed Verdict, the Respondent waived appellate review of that denial, and the District Court of Appeal, in considering the question of the sufficiency of the evidence on the "foreseeability" issue, should have considered all of the evidence adduced at trial.

For the reasons stated, the Petitioner respectfully requests that this Court reverse the decision and opinion of the District Court of Appeal, Second District, with directions to affirm the Final Judgment previously entered in this cause in favor of the Petitioner and against the Respondent.

ROBERT A. HERCE, ESQUIRE

J.THOMAS WRIGHT, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July, 1990, a copy of the foregoing has been furnished by hand delivery to Mr. Kenneth Deacon, Esquire, at his law office located at: 150 2nd Ave. North, St. Petersburg, FL. 33731

J. THOMAS WRIGHT, ESQUIRE