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IN THE SUPREME COURT OF FLORIDA

THOMAS McCAIN,

Petitioner,

vs.

FLORIDA POWER CORPORATION,

Respondent.

CASE NO.: 75,637
DISTRICT COURT OF APPEAL
SECOND DISTRICT - NO.:88-03047

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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

THOMAS MCCAIN, the Plaintiff at trial, Appellee before the Second District Court of Appeal, and Petitioner before this Honorable Court shall be referred to herein as "Petitioner". FLORIDA POWER CORPORATION, the Defendant at trial, Appellant before the Second District Court of Appeal, and Respondent before this Honorable Court shall be referred to here as "Respondent" or "Florida Power." The record on appeal referred to in this Brief shall be designated as "R".

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner filed suit in Pasco County Circuit Court alleging that Respondent had negligently marked the location of an underground distribution line which caused Petitioner to receive an electrical shock when a piece of heavy equipment he was operating came in contact with the line. (R. 1054-1056) The matter was brought to jury trial in July, 1988.

On September 4, 1986, Petitioner had been employed by Henkels & McCoy for approximately two weeks. (R. 425-426) Henkels & McCoy was a subcontractor hired by General Telephone Company to lay underground cable around the Colony Cove subdivision in Pasco County. (R. 163) The job involved the use of a piece of heavy equipment called a trencher, a rubber tired tractor-type machine which digs a narrow trench for the telephone cable. (R. 148)

The day before the accident, Mr. Edward Lawlor, an employee of Florida Power, went to the job site for the purpose of locating the Florida Power underground distribution line. (R. 268) The work order indicated that a General Telephone cable was being installed at a depth of thirty (30) inches. (R. 314) Florida Power located underground lines of this type to prevent cable cuts which could cause a loss of electrical service to their customers. (R. 248) Mr. Lawlor used two different pieces of equipment in an attempt to determine the exact location of the cable. (R. 275-277) Mr. Lawlor forewarned Petitioner that he was having a great deal of difficulty locating the underground line because there was

an overhead and underground conflict in the area. (R. 286) Petitioner stated that he would only be digging south of an existing General Telephone pedestal because he was aware of the many existing lines in that area. (R. 318) Additionally, Petitioner informed Mr. Lawlor that he would be hand digging around the General Telephone pedestal and between the telephone pole and transformer, as required by industry standard when numerous cables crossed in an area. (R. 335) On September 4, 1986, Petitioner struck the Florida Power distribution line while sitting on and operating the trencher. (R. 393) The contact was made north of the line marked by Mr. Lawlor, in an area Petitioner previously told Mr. Lawlor he would hand dig if he had to dig at all. (R. 285, 288) Mr. Lawlor, demonstrating the cable, testified that the cable is designed such that ". . . if the 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" (emphasis added). (R. 341) This deenergizes the power line. (R. 341) Petitioner alleged that at the time he struck the underground cable, he received an electrical shock which resulted in headaches and ringing in his ear. (R. 1055)

At the time of the accident, Petitioner was working with two other laborers, neither of whom could be located for trial. (R. 141) The two co-workers drove Petitioner to the office of

Henkels & McCoy rather than calling paramedics or driving him directly to the hospital. (R. 394) Minnie Chitty, the Supervisor at Henkels & McCoy, testified that when Petitioner arrived at the office, he showed no signs of physical injury but that he was flushed, upset, and incoherent. (R. 453) Petitioner originally denied any loss of consciousness when the accident occurred. (R.628) In fact, Ms. Chitty had another employee drive Petitioner to the hospital rather than take him herself. (R. 394) She chose, instead, to go to the accident site to determine what had happened. (R. 395) Ms. Chitty informed the court that in her nine and one half years with Henkels and McCoy, trench contacts with underground cables were so numerous she could not even start to guess how many times they occurred. (R. 442-443) She estimated such contacts happened a minimum of 50 times. (R. 443) No trencher operator, other than Petitioner, ever reported receiving an injury as a result of an electrical shock when a trencher hit an underground cable. (R. 442-443; 446)

At the hospital, the emergency room physician found no burns, marks, or entry or exit site of any electrical jolt; however, Petitioner was kept overnight for observation. (R. 629) When examined by Dr. Ubillus at Riverside Hospital, Petitioner was alert, oriented, without distress, and without any indication of muscle spasms. (R. 628-629) He did not have any cardiovascular complaints such as chest pain, shortness of breath, or burning sensation. (R. 628) After performing chemical studies, an EKG, and other tests, there was no objective finding of any injury to

Petitioner. (R. 630-632) He was released from Riverside Hospital the next day. (R. 630-632)

Shortly after his release from the hospital, Petitioner contacted an attorney who referred him to another physician, Dr. Donald Mellman. (R. 639) Petitioner first saw Dr. Mellman on September 16, 1986, and relayed to the doctor a history of severe headaches which he claimed were the result of receiving an electrical shock. (R. 638, 641) Petitioner then told Dr. Mellman that he was knocked unconscious by the shock, contrary to his statements made immediately after the accident. (R. 628, 641)

Dr. Mellman testified that his sole basis for concluding that Petitioner had suffered from an electrical shock was Petitioner's subjective statement that he had been shocked. (R. 648) Dr. Mellman concluded that Petitioner's alleged symptoms and complaints "far outweighed" any finding. (R.648) On October 1, 1986, Dr. Mellman saw Petitioner in the office and informed him that he could return to work the following day. (R. 652) Petitioner, however, refused to go back to work and stated to the doctor that he was unwilling to even try. (R. 652, 655) Petitioner did not return to see Dr. Mellman after the doctor expressed his expert medical opinion that Petitioner could return to at least light duty work and could operate a vehicle or other machinery. (R. 653, 656)

At trial, Petitioner related his recollection of the accident and his injuries. He testified that on August 29, 1986, another laborer on his crew named "Mike" cut a power line while operating a trencher on the same job. (R. 485) That incident was considered

so inconsequential by Petitioner that it was not even reported to his supervisor, Minnie Chitty. (R. 441) The August 29 cable cut did not cause any electrical shock or injury. (R. 543) Petitioner testified that his accident occurred while he was sitting on the trencher which was close to the fence, but "not on the fence." (R. 531) Petitioner related that when he arrived at Riverside Hospital, he was experiencing muscle spasms all over, and that particularly his hands and feet were moving on their own. (R. 511) He also claimed to have shrill noises in his ear and excruciating head pains at that time. (R. 511) The hospital records and physicians reports from Riverside Hospital do not support any of these alleged claims. (R. 628-630) Petitioner has not seen any doctor since returning to Texas to live. (R. 600)

At the close of Petitioner's case, Respondent requested the Court direct a verdict in Respondent's favor because no testimony or evidence had been presented at trial which established there was any breach of a known duty with regard to the existence of any danger. (R. 687, 692) Petitioner failed to prove how the accident occurred or how Petitioner received an electrical shock. In support of its Motion, Respondent argued that although Respondent's employee may have marked the location of the line at a place other than exactly where it was discovered, the testimony of all the witnesses established that the sole purpose for marking and locating these lines was to avoid interruption of services to the customers of Florida Power and to avoid the additional expense of having to repair any severed lines. (R. 688) Each and every

witness with any knowledge of underground power cable accidents testified that they had never heard of anyone ever receiving an injury when operating a trenching machine which came in contact with an energized underground line. (R. 688-689) No evidence was before the court of any duty to warn of a known dangerous condition because, in literally hundreds of similar of contacts, not one person had ever been injured. (R. 689) Liability for a negligent act requires knowledge of the scope of danger that an act may cause. (R. 689) Respondent's motion was denied. (R. 694)

In Respondents Case in chief, Tommy Byrd, a Florida Power Supervisor, testified that he oversees crews that install and repair underground cables for Florida Power. (R. 702) Mr. Byrd was specifically aware of three cases where Florida Power personnel, and two other occasions where independent contractors, had cut underground distribution lines similar to the one cut by Petitioner. (R. 740) He also testified that in the area of Tarpon Springs where this accident occurred, contractors cut underground cables approximately two times per month requiring the services of his crew to repair the cable. (R. 741) To Mr. Byrd's knowledge, no one has ever been injured in any of these accidents. (R. 742)

Jeff Allen, a Foreman for Henkels & McCoy, through deposition testimony, stated that in his capacity as Foreman, he operates a trencher like the one used by Petitioner. (R. 1357) On two occasions he hit energized power cables while operating a trencher. (R.1361) He did not receive electrical shock from either accident. He noted that it is a frightening experience because it blows a

fuse which makes a loud noise and sometimes smokes. (R. 1361-1362)

Pete Blosser, a State Qualifier for Heuer Utility, Inc., testified as an expert in the area of underground utility lines. (R. 793) It was Mr. Blosser's expert opinion that Petitioner should have stopped his machine about eight feet from the General Telephone pedestal and hand dug through the area rather than remaining on the trenching machine. (R. 803-804) Digging to a depth of 42 inches, as Petitioner did, was a deviation from the standard for laying telephone lines. (R. 805-806) Finally, Mr. Blosser testified that he was aware of instances where members of his crew had come in contact with cables such as the one hit by Petitioner, and that no one had ever been injured as a result of a contact. (R. 806-807)

William Thue, a Consulting Electrical Engineer with 38 years of experience working for Florida Power & Light, testified as an expert in underground distribution lines. (R. 832) Mr. Thue also testified that Petitioner did not take proper care in digging in the area because of both the depth of his trenching operation and the fact that he should have been hand digging in the area. (R. 842843) Mr. Thue stated that it is technically impossible for a person sitting on a trencher to receive an electrical shock from severing an underground cable. (R. 847-850) In Mr. Thue's 38 years of experience working with energized underground power cables, he had never heard of a trenching machine operator receiving an injury or an electrical shock while sitting on a

trencher that came into contact with an energized underground line. (R. 852) On cross examination, Mr. Thue was questioned regarding several possibilities as to whether an electrical shock was possible if the trencher had been touching a metal fence, high vegetation, or shrubbery. (R. 874-878) Even Petitioner's own counsel recognized that "none of us really know all of the circumstances that were present when Mr. McCain struck the cable." (R. 886) Mr. Thue maintained that the structure of the trencher and the underground cables made it technically impossible for Petitioner to receive a shock.

Dr. Paris Wiley, an Associate Professor of Electrical Engineering at the University of South Florida, testified as a rebuttal witness for Petitioner. (R. 889) Dr. Wiley said that it was his belief that a person operating a trencher could receive an electrical shock if the electric circuit was completed and if the operator was a part of the circuit. (R. 906) Dr. Wiley admitted that if the trencher was being operated across a relatively flat surface, it would be impossible for the operator to be shocked. (R. 901) When questioned as to circumstances under which an operator could receive a shock, Dr. Wiley hypothesized that "if you provided a way for the electricity to return to the power company", "if this machine was in any way contacting the earth at some other point besides the point where it contacted the cable", "if [the blade] is contacting the earth or something that is contacting the earth", that would create a "possible path." (Emphasis added.) (R. 909-910) Dr. Wiley maintained that "if the stinger hit the

cable and the shrubbery was touching the rollbar, it was 'possible' for the circuit to be completed." (R. 912) He continued, formulating that "if" any part of the trencher was touching the metal fence, or "if" Mr. McCain was perspiring, or "if" the ground was moist, then it was possible to complete the electrical circuit. (R. 913-914) Dr. Wiley conceded that he had never heard of anyone receiving an electrical shock while operating a trencher and hitting an underground power line, nor had he ever done any study of underground distribution lines. (R. 921, 932, 933) Dr. Wiley admitted that he was never told by Petitioner that there was any contact between the blade of the machine and the grass at the time contact was made with the underground power line. (R. 926) Nor was Dr. Wiley ever informed that Petitioner testified that he did not touch the fence with the machine. (R. 927) Dr. Wiley further admitted that the pictures in evidence did not show any marks of the blade touching the ground sufficient to make the second contact of which he was testifying. (R. 927) He also stated that electricity could not travel through the rubber wheels of the trencher. (R. 935) Dr. Wiley's overall conclusion was that if there was no second contact, there was no electrical shock.

At the close of all the evidence, Respondent renewed its Motion For Directed Verdict, again stating that there was no evidence to establish a duty on the part of Florida Power with regard to any known hazard, and that Petitioner had failed to establish that Florida Power knew or should have known of any danger to Petitioner. (R. 954) The motion was denied. (R. 955)

After closing arguments, the case was submitted to the jury. The jury returned a verdict awarding Petitioner $250,000 in damages, finding that there was negligence on the part of Florida Power Corporation which was the cause of 70% of Petitioner's damages. (R. 1049) Respondent timely filed a Motion For Entry of Judgment in accordance with the Motions For Directed Verdict or, in the Alternative, a Motion For New Trial or, in the Alternative, a Motion For Remittitur, on August 1, 1988. (R. 1395-1397) Final Judgment was entered in this cause on August 3, 1988. (R. 1398) The post-trial motions were denied on September 29, 1988. Respondent timely filed its Notice of Appeal on October 25, 1988. The Second District Court of Appeal quashed the jury verdict and directed a verdict in favor of Respondent because Petitioner had not met his burden of establishing that Florida Power reasonably could have foreseen any injury resulting from a trencher severing an underground power cable. This opinion was filed on December 22, 1989. Petitioner's Motion for Rehearing and Amended Motion for Rehearing were denied on January 31, 1990. Petitioner served a Notice to Invoke Discretionary Jurisdiction to the Florida Supreme Court on March 1, 1990. This Honorable Court accepted jurisdiction on June 21, 1990.

SUMMARY OF THE ARGUMENT

A negligence claim requires the proof of the existence of a duty, a breach of that duty, and an injury which is the result of the proven breach. The foreseeability of an injury is determinative in establishing whether a duty existed and whether a breach of the duty was the legal causation of an injury. Unless a duty exists, there can be no negligence. In order for a negligence action to stand, the defendant must be under a specific legal duty to protect a "given plaintiff" from the "particular risk involved." When there is no knowledge or notice of prior accidents or of the potential for injury, there is no legal duty.

In the instant case, witness after witness testified that they had no knowledge of an operator of a trencher receiving an injury when the machine cut an energized, underground distribution line such as the one encountered by Petitioner. All of these witnesses resoundingly established that they had never known or heard of anyone receiving an electrical shock from any such accident. Thus, there was no duty on Respondent to any "given plaintiff" for this "particular risk." The Second District Court of Appeal, in deciding this case, recognized that whether a duty exists is a question of law for the court. The Second District reviewed this record and noted that "McCain had the opportunity to call a witness that would establish this element of foreseeability in his negligence action and that McCain failed to do so." Florida Power Corporation v. McCain, 555 So.2d 1269, 1270. In fact, Mr. McCain's

own expert, Dr. Wiley, readily supported Respondent's position with his testimony that he, too, had never heard of anyone being injured in an accident such as that complained of by Petitioner.

Petitioner's alleged injury was not a foreseeable consequence of any danger created by the negligent act or omission of Respondent. Florida law adheres to the "more likely than not" standard of causation in negligence cases. There is no legal liability for acts which cause an injury which is, at most, only foreseeable as a remote possibility. Florida courts have further found that legal causation is not proven where an expert witness can only offer possible theories rather than definitive circumstances on which to premise liability. In the instant case, Petitioner's expert witness merely contrived a "possible" scenario in which Petitioner might have received an electrical shock. It was merely speculation and conjecture as to how this accident may have happened. This testimony is insufficient as a matter of law because the mere "possibility" of causation is not legally sufficient. Furthermore, the fact that an accident occurred does not establish liability. The critical element of foreseeability must be proven by Petitioner. The Second District Court of Appeal correctly found that Petitioner failed to establish the critical element of foreseeability in his negligence action and, therefore, quashed the jury verdict and directed that a judgment be entered in favor of Respondent.

The cross examination of Tommy Byrd and/or the rebuttal testimony of Dr. Wiley did not remedy or cure the void of proof on

the element of foreseeability in Petitioner's case. Mr. Byrd merely confirmed that Florida Power was safety conscious. Dr. Wiley's testimony, rather than helping Petitioner, enhanced Respondent's position that no one had ever heard of anyone being injured in an accident such as that of Petitioner. Therefore, the finding of the Second District Court of Appeal, that the critical element of foreseeability was never established by Petitioner at trial, remains valid whether viewing the evidence after Petitioner's Case in chief or after the submission of all the evidence. The decision of the Second District Court of Appeal directing the verdict in favor of Respondent should be upheld.

LEGAL ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE TRIAL COURT SHOULD HAVE GRANTED RESPONDENT'S MOTION FOR DIRECTED VERDICT BECAUSE PETITIONER FAILED TO ESTABLISH THE CRITICAL ELEMENT OF FORESEEABILITY IN HIS NEGLIGENCE ACTION.

The injuries complained of by Petitioner at trial were not the foreseeable result of any act or omission by Respondent and, thus, there was no legal duty incumbent upon Respondent in the instant case. All parties agree that in order to prevail on a negligence claim, one must prove the existence of a duty, a breach of that duty, and an injury which is the result of the breach. The foreseeability of an injury is a prerequisite to the imposition of a duty upon any Defendant, and foreseeability is also determinative in proving proximate causation. Webb v. Glades Electric Cooperative, Inc., 521 So.2d 258 (Fla. 2d DCA 1988); Simon v. Tampa Electric Company, 202 So.2d 209 (Fla. 2d DCA 1967). In the instant case, Petitioner failed to submit competent, substantial evidence to meet the standard of proof required to establish any duty on the part of Respondent or any proximate causation to Petitioner's alleged injury. Accordingly, Petitioner failed to establish this essential elements of its negligence cause of action. Therefore, the Second District Court of Appeal correctly directed the jury verdict be quashed and a directed verdict entered in favor of Respondent.

In Florida Power & Light Company v. Lively, 465 So.2d 1270 (Fla. 3d DCA 1985), the plaintiff brought a negligence action

against the power company alleging that it had a duty to place markers on static lines, making them more visible to pilots who might encounter problems with flight. Id. at 1272. The Lively court stated that whether a duty exists is a "question of law", and if no reasonable duty was abrogated, then no negligence can be found. Id. at 1273. Quoting Lea Baumann Surgical Supplies, Inc., 321 So.2d 844 (La. App. 1975), the Court stated that it is elementary tort law that negligence is the breach of a duty of care "owed to the injured party. If there is no duty to exercise care as to a given Plaintiff, Defendant's conduct does not amount to negligence and is not actionable." Lively, 465 So.2d at 1273.

At trial, the testimony established that the purpose of obtaining locates on underground cables with machinery, such as that used by Petitioner, is to avoid any disruption in service or loss of electricity to Florida Power Corporation's customers in the area. (R. 248) Since there was no knowledge or evidence that any person had ever been injured by striking an underground power cable while operating a trencher, Florida Power, while owing a duty to its customers who may suffer a loss of electricity if a cable were cut, had no duty to the "given Plaintiff" because any such injury was not foreseeable. If there is no duty to exercise care as to a "given Plaintiff," there can be no negligence. The Lively court followed this same line of reasoning by finding that for a negligence action to stand, it must additionally be determined whether the Defendant was under a legal duty to protect "against the particular risk involved." Id. Again, since there was no

knowledge of any potential injury such as that alleged by Petitioner, there was no legal duty to protect against an unknown risk. Thus, Respondent cannot be negligent for failing to discharge a duty which did not exist.

In reaching its determination that, "as a matter of law", no duty or breach of duty existed, the Lively court looked to certain elements, one of which was "no notice of prior accidents of a similar kind involving power lines." Id. at 1274. At trial numerous witnesses testified that they were personally aware of many incidents where trenchers struck an underground cable, but not one person was aware of anyone ever receiving an electrical shock from any such contact. Edward Lawlor, a Florida Power employee, testified that he had seen approximately fifty primary cable cuts by trenching or underground digging machines and no one had ever received an electrical shock. (R. 344-346) In fact, a Henkels & McCoy employee operating a trencher cut an underground power line just six days prior to Petitioner's accident on the same job site. (R. 435) The operator received no electrical shock or injury from that incident. (R. 435) Minnie Chitty, a Henkels & McCoy supervisor, testified that she was aware of more than fifty electrical underground cable cuts without any resulting injury. (R 442-446)

Tommy Byrd, a Florida Power Supervisor, who oversees crews that install, locate, and repair cables for Florida Power Corporation, testified that he is personally aware of three cases where Florida Power personnel cut a 72,000 volt underground cable, without any resulting injuries. He was likewise aware of two other

occasions when independent contractors cut a Florida Power cable in situations such as Petitioner's accident, without any resulting injury. (R. 702, 739-740) Mr. Byrd stated that in the area of Tarpon Springs, where this incident occurred, independent contractors make approximately two such cable cuts per month. (R. 741) He had never heard that anyone has ever been injured from such an accident. (R. 742) Jeff Allen, foreman for Henkels and McCoy, testified that while operating a trencher, he had hit energized power cables on two occasions. (R. 1361) He testified that he did not receive an electrical shock on either occasion. (R. 1361) Pete Blosser, state qualifier for Heuer, Inc., an underground utility contractor, testified that members of his crew have struck energized cables such as the one hit by Petitioner without any resulting injury. (R. 806-807) William Thue, consulting engineer specializing in underground distribution cables, testified that in his 38 years of experience with Florida Power & Light, he had never known the operator of a trenching machine to receive an injury or electrical shock by coming in contact with an underground power cable while sitting on a trencher. (R. 852)

Even Petitioner's own expert witness, Dr. Wiley, testified that he had never heard of anyone receiving an electrical shock while operating a trencher and hitting an underground power cable. (R. 921) There was absolutely no testimony or evidence of any kind presented at trial that anyone had ever sustained an injury from this type of accident. The Second District Court of Appeal noted in its opinion that Respondent's argument that "McCain had the

opportunity to call a witness that would establish this element of foreseeability in his negligence action and that McCain failed to do so." Florida Power Corporation v. McCain, 555 So.2d 1269, 1270 (Fla. 2d DCA 1989) (emphasis added).

The burden of proving each of the essential elements of the negligence cause of action, including foreseeability, did indeed rest with Petitioner, the Plaintiff below. Petitioner seeks to shift this burden to Respondent by contending that none of Respondent's witnesses testified that an accident under these conditions had never happened. (See Petitioner's Initial Brief on the Merits, Page 14) The Second District, in rejecting this argument, recognized that it was McCain's burden to produce some evidence that Florida Power could foresee that McCain's trencher striking this power cable would injure McCain. Because of McCain's failure to offer a critical element of proof, the Second District correctly found that Florida Power's Motion for Directed Verdict should have been granted. Id. at 1271.

In the case at bar, the Plaintiff failed to demonstrate that he is within that "zone of risk" or "scope of danger" sufficient to be reasonably foreseeable. The undisputed and unanimous testimony established that there was no known hazard of electrical shock from an accident such as complained of by Petitioner. The "scope of danger" known to Florida Power was the potential that customers would lose electrical service. While recognizing that electrical companies are held to a high degree of care, the court in Rice v. Florida Power & Light Company, 462 So.2d 834 (Fla. 3d

DCA 1978), nevertheless, stated that when no reasonable duty is abrogated, as a matter of law no negligence can be found. One of the factors relied upon by the Rice court was that Florida Power & Light had no actual knowledge of the changed use of the property and, therefore, no notice of the potential danger which exists to Rice. Id. at 837.

In reversing the jury verdict rendered against Respondent, the Second District Court of Appeal substantiated its rationale and reasoning by reviewing all of the landmark electrical company cases dealing with foreseeability and reasonable foresight. The Second District, like the Third District Court of Appeal in Lively, recognized the high standard demanded of power companies. The Second District stated:

> An electric company 'is under an obligation to do all that human care, vigilance, and foresight can reasonably do, consistent with the practical operation of its plan to protect those who use its electricity' but it is not an insurer against all possible accidents. Escambia County Electric Light & Power Co. v. Sutherland, 61 Fla. 167, 55 So. 83, 91 (1911) accord, Florida Power Corporation v. Willis, 112 So.2d 15 (Fla. 1st DCA 1959).

Florida Power Corporation v. McCain, 555 So.2d, at 1271 (emphasis added).

The Second District further quoted this Court's long standing holding that:

> '[E]ven where the highest degree of care is demanded, . . . the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. . .' '[I]f men went about to guard themselves against every risk . . . which might . . . be conceived as possible, human

> affairs could not be carried on at all. The reasonable man, then, to whose idea behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution but the measure of what appears likely in the known course of things.'

Id., citing Stark v. Holtzclaw, 90 Fla. 287, 105 So. 330, 332 (1925) (emphasis added).

The Second DCA was cognizant of the holdings of both Crislip v. Holland, 401 So.2d 1115 (Fla. 4th DCA), rev. den., 411 So. 2d 380 (1981), and Ahern v. Florida Power & Light Co., 129 So.2d 457 (Fla. 2d DCA 1961), relied upon by Petitioner. In its overall review of the facts, evidence, and testimony in the record, however, the court correctly found that those cases were not dispositive in this case.

Neither Respondent, nor the Second District Court of Appeal, ignored Petitioner's contention that a duty was owed by Petitioner in undertaking to locate its underground electrical cable. The Second District stated that "although Florida Power and its employee had a duty to exercise reasonable care in locating the cable, a failure in that duty does not somehow establish that Florida Power could foresee an electrical shock injury resulting from the cable being struck and severed." Florida Power Corporation v. McCain, 1269 So.2d, at 1271.

In order for an act or omission to be regarded as a proximate cause of an injury, it must be one which could be reasonably foreseen. Lopez v. Florida Power & Light Co., 501 So.2d 1339 (Fla. 3d DCA 1987).

> A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities, at best, evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Gooding v. University Hospital Building, Inc., 445 So.2d 1015 (1988) (emphasis added).

Florida courts have consistently held that the mere possibility that an event may occur is not the same as foreseeability. Lively, 465 So.2d at 1275. "There must be a probability that something will occur, not a possibility." Id. In Crislip v. Holland, 401 So.2d 1115 (Fla. 4th DCA 1981), the court held that a plaintiff must demonstrate that he is within a "zone of risk" reasonably foreseeable by defendant. The harm that occurs must be within the "scope of danger" created by the defendant's negligent contact, only then does it become reasonably foreseeable. Id. at 1117. Prosser, Law of Torts, § 41 (4th Ed. 1971).

In Lopez, the plaintiff brought an action against Florida Power & Light and Asplundh Tree Expert Company for the wrongful death of her husband who was electrocuted when he came in contact with an overhead electrical power line while picking fruit in his backyard. Id. at 1340. The electrical engineer called as plaintiff's expert witness offered three possible explanations as to how the accident occurred, but could not state definitively what had transpired, and stated that there were "many ways" in which the specific accident could have occurred. Id. The case was submitted to the jury and a verdict returned for Lopez. Id. at 1431. The

trial court set aside the verdict and entered a judgment for Florida Power & Light and Asplundh. Id.

In upholding the trial court's directing of the verdict in favor of the power company, the Lopez court stated that the record was not sufficient to prove that any act or omission of the defendants was the proximate cause of Mr. Lopez's death. Id. at 1342. In so holding, the Third District relied on the same line of cases as the Second District Court of Appeal herein. These cases hold that there is no legal liability for acts which cause an injury which is only foreseeable as a remote possibility or only slightly probable. Id. at 1342 (citing Florida Power & Light v. Lively, 465 So.2d 1270 (Fla. 3d DCA 1985)). The Lopez court further relied on this Honorable Court's holding in Gooding which stated that Florida Court's follow a "more likely than not standard of causation" in negligence actions. Lopez, 501 So.2d at 1342. In comparing the standards set forth by this Honorable Court with the record in Lopez, the Third District determined that the directed verdict was correct. The Third District specifically looked at the fact that Lopez's own expert witness had presented "an array of theories from which the jury could select a promise for liability." Id. The Court went on to state that merely proving that an accident occurs is not sufficient to establish a case of negligence in that, the "more likely than not" requirement had not been satisfied. "Acts which cause injury but are foreseeable only as remote possibilities, those only slightly probable,

are beyond the limit of legal liability." Florida Power & Light v. Lively, 465 So.2d 1270, 1276 (Fla. 3d DCA 1985).

In the instant case, the Second District, likewise, correctly found that a directed verdict should have been granted in favor of Respondent. A review of this record readily reveals that "the more likely than not" standard established by this Court in Gooding was not met by Petitioner. The only testimony indicating any possibility that Petitioner might have received an electrical shock was that of Dr. Paris Wiley, Petitioner's rebuttal witness. Dr. Wiley never testified how this accident happened. When questioned as to whether an operator sitting on a trencher could be shocked, Dr. Wiley stated "if trenching across a lawn, no." (R. 901) When questioned whether it was "possible" under any circumstances for the operator of a trencher to receive an electrical shock, Dr. Wiley testified that it would be necessary to complete the electrical circuit and to have the operator be a part of that circuit. (R. 906) Dr. Wiley's testimony as to whether the circumstances under which Petitioner could have possibly received an electrical shock required that several contingent "if's" be met. (R. 906-909) Dr. Wiley theorized that "if" the stinger hit the cable when shrubbery was touching the rollbar, it was possible to provide a continuous path of electrical current. (R. 912) He also thought that "if" part of the trencher was touching the metal fence, it might complete the current. (R. 913) He further speculated that "if" Petitioner's skin was dry, "if" he was perspiring, "if" the ground was moist, "if" some part of the

machine was touching the ground, and numerous other potential factors necessary for the required second contact. (R. 914) Dr. Wiley was then asked:

> Q. But then either the fence or the grass sticking out of the fence or the shrubs sticking out of that fence are all sufficient, together with his perspiration, to form a good conductor where he would get shocked; is that your opinion?
>
> A. Not as good a conductor as some other possibility but the potential is there at 7,200 volts to force current through shrubbery or grass especially if it's healthy with water content.

(R. 914-915) Dr. Wiley's contentions, just like the expert in Lopez, did not offer any definitive scenario by which the accident actually occurred. His testimony amounted to little more than an array of theories, none of which were supported by the evidence. No testimony substantiated that the trencher was touching either grass, or shrubbery, or fence, or the ground. Dr. Wiley's testimony was mere speculation as to whether an accident could possibly occur. The "mere possibility of such causation is not enough." Lopez, 501 So.2d at 1342. When the matter of causation remains one of "pure speculation or conjecture" or the probabilities are "at best, evenly balanced", the court must direct a verdict for the defendants. Id. Dr. Wiley testified on deposition that the chances of this accident happening at all were approximately 50/50, or, as the Lopez court stated, "at best, evenly balanced." (R. 930) There is no evidence from which a reasonable jury could have concluded that there was any negligence on the part of Respondent which caused the injury to Petitioner. The "more likely than not" standard of causation and proof

enunciated by this Court in Gooding and relied upon in Lopez simply was not met by Petitioner.

Petitioner failed to meet his burden of producing evidence supporting a duty, the breach of that duty, and the resulting harm. From either the standpoint of proximate cause or the determination of whether any legal duty exists, the actions of Respondent were insufficient to impose any liability for Petitioner's injuries. Petitioner's alleged injury was not a foreseeable consequence of any danger created by a negligent act or omission on the part of Respondent. Respondent had no prior knowledge of any such accident or even knowledge of the possibility of such an accident, and there is no evidence to indicate that they could have expected to foresee or anticipate such a possibility. City of Sarasota v. Eppard, 455 So.2d 623 (Fla. 2d DCA 1984). "Probable cause is not possible cause. Foreseeable is not what might possibly occur." Cassel v. Price, 396 So.2d 258 (Fla. 1st DCA 1981) n.10 (citing Bryant v. Jax Liquors, 352 So.2d 542 (Fla. 1st DCA 1977)). Based on a review of the record and the law cited by Respondent and the Second District Court of Appeal, its decision directing a verdict in favor of Respondent should be upheld.

Lewis v. Gulf Power Company, 501 So.2d (Fla. 1st DCA 1986), relied upon by Petitioner, is not dispositive of the issues before this Court. In Lewis, the Court reversed a Summary Judgment entered in favor of Gulf Power Company because other facts developed at the Motion for Summary Judgment. Such facts include the disclosure that Gulf Power had entered into a written agreement

with Cox Cable Corporation wherein Cox was licensed to use Gulf Power's power poles and string cable for television hook-ups and Cox Cable fully indemnified Gulf Power from any liability and was to utilize employees and contractors who were experienced in working with energized electrical conductors. The major factual and legal distinction between the Lewis decision and this case is that, in Lewis the power company was on notice that a dangerous condition was created by the cable company's personnel and on numerous occasions it had used corrective measures to reinforce the guy wires. The First District Court of Appeal in Lewis readily recognized that a power company is not an insurer and does not have a duty to provide an absolute safe workplace for employees of independent contractors hired to work on or around power lines. Id. at 7.

In reversing the jury verdict rendered against Respondent, the Second District Court of Appeal followed a long line of Florida case law which mandates 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). Accordingly, the Second District Court of Appeal's ruling that the jury verdict be vacated and a directed verdict be entered in favor of Respondent should be upheld by this Honorable Court.

II. THE DISTRICT COURT OF APPEAL CORRECTLY REVERSED THE JURY VERDICT BECAUSE THE EVIDENCE ADDUCED BY PETITIONER AT TRIAL FAILED TO ESTABLISH THE CRITICAL ELEMENT OF FORESEEABILITY IN ITS CASE.

After Petitioner presented all of his evidence at trial, he failed to establish the critical element of foreseeability, thereby precluding any finding of negligence or liability on behalf of Respondent. Respondent requested the trial court direct a verdict in its favor at the end of Petitioner's Case in chief, after the presentation of all of the evidence and in its post trial motions (R. 687-694, 954-955, 1395-1397). Thus the record was properly preserved for appellate review. The cross examination of Mr. Byrd and the rebuttal testimony of Dr. Paris Wiley neither cured nor substantiated the essential element of foreseeability in Petitioner's case.

Petitioner's statement that the Second District found evidence in the rebuttal testimony to support his allegation that his injuries were foreseeable is a mischaracterization. The Second District stated that Byrd's testimony "**may provide limited support**" for Petitioner's contention. Florida Power Corporation v. McCain, 555 So.2d at 1270 (emphasis added). A close review of Mr. Byrd's testimony on pages 755 and 756 of the record reveals that his testimony, in actuality, is the denial of the scenario depicted by Petitioner's counsel that Florida Power does not care about people being killed. Petitioner's counsel then posed a compound question to which Mr. Byrd tacitly agreed in a general response that Florida Power is safety conscious. (R 756) Petitioner's query on the

issue of preventing death or injury was no more than mere conjecture by Petitioner and the answer extemporaneous speculation by Mr. Byrd. It was not substantiated by any competent evidence or formal policy that cables are located in order to prevent unheard of injuries.

Indeed, if it were truly Petitioner's position in this case that Florida Power undertook to mark these cables for the purpose of preventing injury or death, Petitioner would have emphasized that in closing argument. In fact, Petitioner's contention was quite the opposite. (R 956-999; 1021-1032) He vehemently argued that "the only reason we [Florida Power] locate it [underground lines] is to prevent disruption of service to our customers. That's what two employees from Florida Power said. We only do it to prevent disruption of service. They [Florida Power] don't give a darn somebody might get fried or kill themselves or get hurt. They only want to do it to prevent disruption of service." (R 966, emphasize added) Accordingly, after the presentation of all of the evidence in this matter, Petitioner ultimately agreed with the position consistently taken by Respondent, that the only reason Florida Power locates underground cables is to prevent the disruption of electrical service to residents in the area. Absolutely no one at trial, including all of Petitioner's witnesses, could identify, observe, or remember any person ever being injured by a trencher coming into contact with an underground cable.

The rebuttal testimony of Dr. Wiley, which is reviewed in detail in ARGUMENT I, pages 24 and 25 herein, likewise, does not

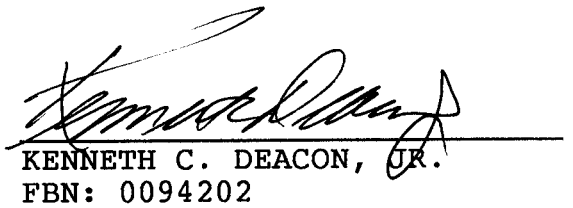
in any way enhance Petitioner's theory that his injury was in any way foreseeable. Dr. Wiley never testified how this accident happened. He merely speculated about what might occur contingent upon numerous "if's" being met. When his numerous hypotheses were scrutinized on cross examination, he was not able to substantiate which, if any, of these scenarios actually occurred. More importantly, Dr. Wiley readily admitted that he had never heard of anyone sustaining injury while operating a trencher which came in contact with an underground cable. (R. 921, 932) He further testified that a shock could never occur on a smooth, flat lawn. (R. 901) This area was smooth and flat. Therefore, his testimony did not add any credence to Petitioner's claim that his injury was foreseeable. The testimony remained undisputed and unanimous that the type of injury allegedly sustained by Petitioner was not a foreseeable circumstance for which Respondent was legally responsible.

Accordingly, the Second District Court of Appeal's finding that a verdict should have been directed in favor of Respondent would not be altered whether it was granted at the end of Petitioner's Case in chief or at the end of the presentation of all of the evidence. Therefore, the Second District Court of Appeal's ruling should be upheld.

CONCLUSION

For the reasons set forth herein, Respondent failed to establish the critical element of foreseeability at the trial in this cause. Accordingly, the holding of the Second District Court of Appeal quashing the jury verdict and directing a verdict in favor of Respondent, FLORIDA POWER CORPORATION, should be upheld.

HARRIS, BARRETT, MANN & DEW

By: 

KENNETH C. DEACON, JR.
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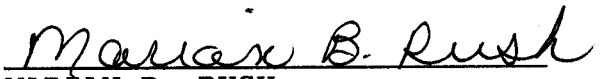
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits has been furnished by U.S. Mail to ROBERT A. HERCE, ESQUIRE, P.O. Box 4646, Tampa, Florida 33677 and J. THOMAS WRIGHT, ESQUIRE, 2508 Tampa Bay Boulevard, Tampa, Florida 33607, this 13th day of August, 1990.

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