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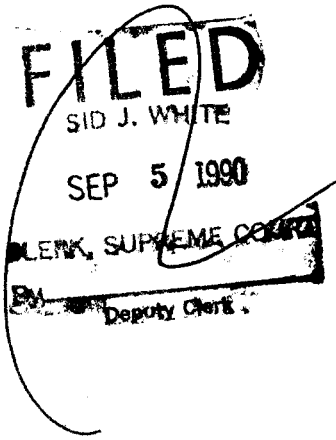

IN THE SUPREME COURT OF FLORIDA

THOMAS McCAIN, individudally 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

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

PETITIONERS' REPLY BRIEF

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TABLE OF CITATIONS

RESPONSE TO RESPONDENT'S ARGUMENT AND STATEMENT OF THE FACTS

Respondent's selected and incomplete Statement of the Facts raises inferences that could be confusing or misleading unless the complete facts, taken in their proper context are considered. Much of the factual scenario painted by the Respondent is either incomplete and/or conflicting with other facts brought out at the trial and omitted by Respondent in its Answer Brief. Because the facts and their reasonable inferences are so important in relation to the legal issues on review, Petitioner is compelled to describe the following testimony for this Court's consideration, which explains and rebutts the assertions of respondent.

Respondent refers to the trenching machine as "heavy equipment, a rubber-tire tractor-type machine." In reality, the trencher is a metal machine not much larger than a good riding lawn mower that sits close to the ground on rubber tires about 1-1/2 feet in diameter. A video introduced at trial depicts the machine and the attachments used in trenching. (T 697) The video shows how the operator is seated facing sideways, enabling him to watch the digging in the back of the machine while also being able to watch the front motionwith a slight turn of the head.

Florida Power located underground power lines to prevent cable cuts which would cause a loss of electrical service to their customers, but also, as testified to by Florida Power's employee Tom Byrd, to prevent a person such as the Petitioner from being injured or killed (T755 & 756). Mr. Byrd further

stated that for those reasons, its very important for their employees to be reasonably accurate in locating a cable (T576), allowing a leeway of two feet (T757); if a person came out three feet he knew he was safe to dig there(T758), and if he were six feet away he would be even safer (T758). In addition, Mr. Byrd, who was Ed Lawlor's supervisor, admitted that Florida Power's employees (more specifically the person who locates the cable and paints the red line) know that the person who is digging is relying on them (T758).

Prior to digging the area where he struck the cable, Petitioner told Ed Lawlor where he needed to dig to lay his telephone cable (T492). Lawlor never told Petitioner to hand dig in the area he was using the trencher (T498, 499), nor did he tell Petitioner to hand dig or to stay away from the area where the cable was struck with the trencher (T501.).

Petitioner hand dug around the telephone pedestal (T497), which was verified in photographs marked plaintiff's exhibit 3, 9 and 13. (T497) He then resumed using the trencher in an area approximately nine feet from Lawlor's red marks (T371) when he struck the cable and felt a tremendous jolt of electric current (T584), and next remembers someone pouring water on him (T586). He was not 100% sure if he was knocked unconscious (T586).

When taken to the hospital, Petitioner related that he was having muscle spasms all over; his eyes hurt to light; he had "...a real shrill whistling like radio shrill..." in his ear; and he had "excruciating head pains" (T511), and blinding

headaches. (T516). He compared these head pains to regular headaches by saying "...its like comparing a mosquito to a jumbo jet..." (T512), "...everything you are, your whole being is nothing but pain..." (T518), which also makes him nauseous and causes him to vomit (T519, 520). Sometimes he gets those head pains four or five times a day (T517).

After being hospitalized and later tested by Dr. Mellman, Petitioner could not go back to work because of his head pains and his inability to remain on a job because he would have to leave when the pain started (T524). Respondent cleverly omitted mentioning that Petitioner's main treating physician was Dr. David Dillenbeck, a neurologist who tested, treated, diagnosed and monitored the Petitioner.

Dr. Dillenbeck was scheduled to be out of the State on the day of the trial so his video testimony was taken and shown to the jury. Unfortunately the Court Reporter did not transcribe the audio portion of Dr. Dillenbeck's video testimony, so his testimony does not appear in the transcript. Fortunately, however, his video was introduced into evidence and is a part of the record. (T 684)

Dr. Dillenbeck testified to all of the tests he performed on Petitioner and diagnosed him as having "electric shock syndrome." He described Petitioner's head pains as being in the nature of vascular headaches, which often do not respond to medication. He stated that he changed Petitioner's medication a few times and continued contact with Petitioner even after

Petitioner moved to Texas, mainly for purposes of prescribing or changing his medication. Petitioner did not move to Texas until about 2-1/2 months before the trial (T599), which would be over 1-1/2 years after the electric shock. He had to move there to live with his mother because of his poverty and his need for someone to take care of him (T527). Dr. Dillenbeck testified that within a reasonable degree of medical probability, the Petitioner suffered a permanent injury caused by the electrical shock, and that there was not much more he could do for Petitioner other than prescribe medication.

Dr. Edward Kampsen also examined Petitioner and found that he had a ringing in his ear (T664,665), and a scarring of the corklea nerve, consistent with an electrical shock (T667).

Steve Porter, an investigator for Liberty Mutual Insurance Company, responded to the scene of the accident on the same day and within 2 hours of the time he was notified (T367). Mr. Porter, who is 6 feet, 6 inches tall, paced off the distance between Mr. Lawlor's red paint marks marking the underground cable and where the cable actually was and estimated a distance of nine feet (T371), but was certain, without question, that it was more than seven feet (T371).

In it's Statement of Facts, Respondent omitted much of the testimony of William Thue, it's expert witness. Mr. Thue is a consulting engineer (T832) with a bachelor's degree in electrical engineering (T833). He testified on direct examination that it was technically impossible for a person sitting on a

trencher to receive an electrical shock (T847) because, he explained, there is no way for current to get back to the ground (T850). However, on cross-examination, Mr. Thue was shown photographs of the accident scene and upon questioning admitted the following:

a) That the trencher was real close to the fence (T882-882). (Petitioner previously testified that the trencher was right next to the fence, right up on it, but not on it and the ground was moist.) (T531, 532).

b) along the fence the grass was green, real high and sticking out and he considers it to be a semi-conductor (T878).

c) there was shrubbery protruding from the fence from 18 inches to two feet in some areas (T878).

d) vegetation and high grass can conduct electricity if its moist, and high grass can conduct electricity when its still green (T875, 877, 878).

e) if the shrubbery or vegetation were touching the roll bar on the trencher electricity would flow through the roll bar, through the vegetation, and down into the ground through the metal fence (T878-879).

f) electricity tries to get back to the ground (T872,877).

g) the trencher was made of steel, an excellent conductor of electricity (T870).

h) a person can be a conductor of electricity (T880).

i) when the trencher tip of the blade struck the conductor, the blade was charged with 7,200 volts of electricity (T849).

j) the entire trencher might get to 100-200 volts for a fraction of a second (T850, 888-889), and that is sufficient voltage to cause harm (T889).

k) it only takes about 1/10th of an amp to kill a person (T879)

l) if the power company mismarked the cable location, it made a mistake (T860,861)

m) Petitioner would not be at fault if he struck a cable 8 feet from where he was told it would be

n) He doesn't know what part of the trencher Petitioner was touching with his hands and feet when he struck the cable (T869-870)

Despite these admissions on cross-examination, Mr. Thue refused to admit that it was possible for Petitioner to have been shocked, but added that if an operator were walking on the ground and touching the trencher he would receive a shock (T876).

In rebuttal, Petitioner called Dr. Paris Wiley, Ph.D., an Associate Professor of Electrical Engineering at the University of South Florida (T890). His number one speciality is in electric magnetics (T894), which includes the study of the way current flows (T896) and counsel for the Respondent has previously used him as an expert (T938). Dr. Wiley totally disagreed with Mr. Thue's opinion that it was impossible for the operator of a trencher to be shocked under any circumstances, and even stated, "Let him try and I'll watch". (T915).

When counsel for Respondent took Dr. Wiley's deposition, Dr. Wiley had just recently entered the case and knew very few facts of the case (T940). During the deposition, Dr. Wiley tried very hard not to speculate in guessing whether Petitioner

had more or less then a 50-50 chance of being shocked, but did so after counsel for Respondent "twisted my arm" (T929). After that deposition and before trial Dr. Wiley was given more of the facts of this case than he had at the deposition and was able to study them before giving an opinion (T940), including the fact that Petitioner had one hand on the hood of the trencher and another hand on the control, which gave him two contact points on the machine (T940-941).

With regard to his explanation as to how and why Petitioner was shocked, Dr. Wiley explained, in part, the following:

1. For electricity to flow, a complete path must be established (T904).

2. Driving the trencher on your lawn would not cause the operator to get shocked (T906).

3. To get shocked, a person needs to complete the electric circuit and be a part of it (T906).

4. When the trencher hit the 7,200 volt cable, it became energized, and to be shocked, a person must provide a way for the electricity to get back to the ground (T908-909).

5. The human body will conduct electricity, through his hands and feet while touching the metal trencher (T910).

Dr. Wiley was then shown photographs marked of Plaintiff's exhibits 5, 6 and 9, which show a lot of green shrubbery coming through the fence and protruding about 1-1/2 feet, and high grass protruding from the fence (T912). The jury also saw the photographs.

6. To be shocked a person needs a second contact point after the trencher hit the cable (T943).

7. The grass, shrubbery, or the fence depicted it the photos were all sufficient second contact points to cause electric current to flow through Petitioner's body because a continuous path for the electrical current to flow has been provided (T912, 943).

8. When a person is shocked or electrocuted, burn marks are not always evident. He has seen a person severely burned by electricity who survived the experience and another man die from electrical shock who didn't have a mark on him (T916).

Much of the testimony heard by the jury was conflicting.

As stated by this Court in Atlantic Coast Line R. Co. v. Johnston, 74 So.2d 689 (Fla. 1954) and numerous other Courts in this State,

> "It is true that much of the evidence on essential points was in direct conflict but as we have so often said, resolving conflicts is for the jury and where there is ample evidence to support their verdict - we will not disturb it when the trial judge refuses to do so."

The issues involved in this case have been debated back and forth, both verbally and in writing, in all three levels of the Court system. While the Respondent, in its Answer Brief on the Merits, apparently wants to argue numerous unrelated aspects of the case and creatively present its favorable version of the facts as though this Court were a jury, the petitioner views the case, and the facts, as a rather simple case of simple negligence: the Respondent undertook to inform the Petitioner where its underground electrical cable was located. It told the Petitioner where it was and he relied upon the information. In fact, the

Respondent's employee incorrectly located the power line and the Petitioner, while digging in the area, struck and partially severed the cable, suffering an electrical shock.

There are several points in the Respondent's Answer Brief which merit rebuttal because of incorrect statements of applicable law and a re-casting of the facts which were presented at trial.

Firstly, the Respondent levels a broadsided attack upon the testimony of Dr. Paris Wiley, the expert witness who testified on behalf of the Petitioner, upon the basis that he never specifically established how the Petitioner was shocked when the trencher struck the power line. The Respondent analogizes his testimony with the opinions of the expert in Lopez v. Florida Power & Light Co., 501 So.2d 1339 (Fla. App. 3d 1987). In that case, the expert was unable to establish exactly how the accident occurred. There were no witnesses to the actual accident where Mr. Lopez was harvesting avocados in his backyard with a long metal pole when he was electrocuted. His widow's expert witness testified that there could have been at least three possible scenarios in which the incident could have occurred, but he was unable to state which possibility had actually occurred. The evidentiary question in Lopez was: How did the accident happen? Unlike the unwitnessed incident in Lopez, the petitioner in this case was able to tell the jury how the accident happened: his trencher blade struck the underground power cable, and he was shocked.

The Respondent argues that Dr. Wiley's testimony is similar in nature to the Lopez expert's testimony in that he did not definitely testify as to how the Petitioner was shocked, and thus, his testimony is useless. What the Respondent absolutely fails to recognize, however, was that Dr. Wiley was called as a rebuttal witness by the Petitioner, to challenge the Respondent's expert witness, William Thue, who testified in the Respondent's case-in-chief that it was technically impossible for the Petitioner to have been shocked when he severed the energized power line with the trencher. Specifically, Mr. Thue, a 38 year veteran employee of Florida Power, testified that there was no possible way that a trencher operator could be shocked when a trencher blade strikes a power cable (T-847, 850). This impossibility existed even though his own testimony also established that for an instant the tip of the trencher blade is energized with 7200 volts of electricity and the entire trencher may be energized with 100 to 200 volts for a fraction of a second (T849-850, 888-889).

On cross-examination, Petitioner's counsel explored several possibilities to challenge the witness' assertion of the impossibilities of shock under certain facts. For instance, is the steel floor of the trencher an excellent conductor of electricity? Answer: Yes (T870). Does vegetation conduct electricity? Answer: Yes (T875). Could high grass be a conductor? Answer: Yes (T875). If the trencher operator were standing on the ground touching the trencher when the cable was hit, would there be a possibility of shock? Answer: Yes, a

high probability (T-876). Could the Petitioner have been shocked if he were touching the trencher, which was touching a metal fence, when the blade hit the cable? Answer: No (T-876). If the petitioner had one hand on the controls of the trencher and the other hand on the machine when the blade cut the cable, was there a possibility of shock? Answer: No (T-877). Could the high grass and shrubbery protruding from the metal fence next to the trencher contribute to an electrical shock? Answer: No (T-878, 882). The witness' bottom line: the accident could not have happened, but his testimony was conflicting within itself.

Dr. Wiley was called as a rebuttal witness to contradict the opinions of Mr. Thue. Similar questions previously posed to Mr. Thue were propounded to Dr. Wiley, but with different answers. Could the tall grass and shrubbery have conducted electricity and thereby serve as the necessary second conductor point? Answer: Yes (T-943). Was it technically impossible for the Petitioner to have been shocked when he was operating the trencher and the blade struck the cable? (as Mr. Thue had previously testified) Answer: No, it was not impossible (T-906; 915; 944).

Thus, the Respondent's analogy of Dr. Wiley's testimony to the Lopez case is without merit. The Lopez evidence was adduced in the plaintiff's case-in-chief in an attempt to establish how an unwitnessed accident occurred; the expert was unable to say what actually happened, and no other witness could either. Dr. Wiley's testimony came in rebuttal, after the Petitioner had already testified in his case-in-chief as to how

the accident happened. Dr. Wiley refuted Mr. Thue's testimony on the impossibility of the injury ever occurring. The real issue in this whole exchange of testimony was not a battle over how the accident occurred but rather over whether it did in fact occur. Dr. Wiley did not speculate on the facts. He used the facts and documents already in evidence, including all the photographs shown to the jury to reach his conclusion and opinions and to explain how and why Petitioner was shocked.

Secondly, while it is a correct statement of the law that the issue of whether a duty exists and resulting injury is foreseeable is a question of law for the Court (as asserted by the Respondent), it is also true that the issue of foreseeability becomes a jury question when "...reasonable persons can differ..." as to the facts and reasonable inferences which might be drawn from the facts. City of Jackonsville v. Raulerson, 415 So.2d 1303, 1305 (Fla. App. 1st 1982), See, also, Vining v. Avis Rent A-Car Systems, Inc., 354 So.2d 54 (Fla. 1977); White v. Arvanitis, 424 So.2d 886,888 (Fla. app. 1st 1982). This Court has specifically held that in negligence cases, it is the jury that must decide the litigated issues involved. (Stirling v. Sapp, 229 So2d 850 (Fla. 1969); Conda v. Plain, 222 So.2d 417 (Fla. 1969).

In fact, this Court has clearly held that District Courts of Appeal are not at liberty to re-evaluate and re-decide factual issues previously determined by a jury at trial. This Court in Helman v. Seaboard Coast Line R. Co., 349 So.2d 1187 at 1189 (Fla. 1977) enunciated a three-part rule of law on appellant review of jury verdicts:

> "First, it is not the function of an appellate court to re-evaluate the evidence and substitute its judgment for that of the jury...
>
> Second, if there is any competent evidence to support a verdict, that verdict must be sustained regardless of the District Court's opinion as to its appropriateness...
>
> Finally, the question of whether defendant's negligence was the proximate cause of the injury is generally one for the jury unless reasonable men could not differ in their determination of that question."

In this instant cause under review, the majority in the District Court decision did just what this Court has admonished the intermediate appellate courts not to do - review evidence already ruled upon by a jury and trial judge.

Thirdly, the respondent's Answer Brief continuously cites Florida Power & Light Company v. Lively, 465 So.2d 1270 (Fla. App. 3d 1985) to support its argument that since no other trencher operators were known to suffer injury when striking an energized underground power line, the injury suffered by the petitioner was unforseeable. But Lively is so far off the mark that it is uncomprehensible that its holding could even remotely be argued to govern the outcome in this case. In Lively, an airplane in distress struck non-energized static lines 30 to 40 feet above the ground and almost 9 miles from the airport. The plaintiff's claim was that warning signs should have been posted (to include an area of approximately 140 square miles). First, the Court itself directly noted that the case did not involve energized power lines. Second, unlike the facts in the instant

case, the power company in Lively didn't tell the pilot of the plane that there were not any static wires where the accident occurred. Third, unlike Lively, the instant case involves the active participation by an agent/employee of the Respondent in the events which resulted in the petitioner's injury where the alleged tortfeasor's negligence, if any, involved the placement of certain static wires miles from the airport. The clear over-riding factual issue (concern of the Court) in Lively was the extent to which the defendant power company would be required to hang warning signs on all of its wires (whether energized or not) throughout a 140 square mile area to guard against an airplane striking the wires while almost 9 miles from the airport.

Ignored in the discussion of Lively by the Respondent is the important line of cases beginning with Crislip v. Holland, 401 So2d 1115 (Fla. App. 4th 1981) that foreseeability does not require that the negligent actor "...be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur." Crislip, at 1117.

Fourth, the respondent' Answer Brief repeatedly cites Gooding v. University Hosp. Bldg. Inc., 445 So.2d 1015 (Fla. 1984) in support of its argument on foreseeability. However, Gooding concerns the issue of causation in a medical malpractice case (did the action or inaction by the hospital probably affect the decedent's demise?) and not the foreseeability of the consequences of the hospital's action or inaction.

Finally, the respondent has totally failed, or declined, to discuss Petitioner's argument relating to the District Court's position below restricting consideration of the evidence to the

Petitioner's case-in-chief on the foreseeability issue. Once the trial court denied the Respondent's oral motion for directed verdict at the close of the Petitioner's case-in-chief, and the Respondent elected to proceed with its own case-in-chief, it waived review of that initial trial court determination; its subsequent motion at the close of the evidentiary phase of the proceeding necessitated a review by the trial court (and the District Court) of all the evidence, including rebuttal testimony presented by the petitioner. Gulf Heating & Refrigerator Co. v. Iowa Mutual Insurance Co., 193 So.2d 4 (Fla. 1966). When such a review of the evidence is undertaken, it is incumbent upon the reviewing Court to consider the evidence, and all favorable inferences from the evidence, in a light most favorable to the non-moving party, i.e., the Petitioner in this cause. In addition, conflicts in evidence are to be resolved in favor of the jury verdict. Warin Industries v. Geist, 343 So.2d 44,47 (Fla. App. 3rd 1977); Alessi v. Farkas, 118 So.2d 658 (Fla. App. 2nd 1960) and Midstate Hauling Co. v. Fowler, 1976 So.2d 87 (Fla. 1965)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of September, 1990 a copy of the foregoing has been furnished by mail to Mr. Kenneth Deacon, Esq., P.O. Drawer 1441, St. Petersburg, Florida 33731.

Attorney