ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 09,266

On Review From The
District Court of Appeal, Fourth District - Case No. 95-2390

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

v.

EDWARD PERIERA,

Respondent.

AMICUS CURIAE BRIEF

OF TRE FLORIDA DEFENSE LAWYERS ASSOCIATION

IN SUPPORT OF PETITIONER, FLORIDA POWER & LIGHT COMPANY

'PAUL R. REGENSDORF, ESQ.
FLORIDA BAR NO. 152395
FLEMING, O'BRYAN & FLEMING, P.A.
Attorneys for
Florida Defense Lawyers Association
500 E. Broward Blvd., 17th Floor
Fort Lauderdale, FL 33394
Phone: 954-764-3000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTRODUCTION AND STATEMENT OF INTEREST

The amicus curiae, the Florida Defense Lawyers Association ("FDLA"), who is here appearing in support of the position of the petitioner, Florida Power & Light Company, is a statewide association with strong, long-standing and firmly held views on the development and implementation of tort law in the State of Florida in general, and its application to the vital public utility industry in specific. Its interests have been historically asserted on a broad variety of issues, most particularly where some overriding question attracts its professional interest beyond the merits, or lack thereof, of any particular case. The undersigned has appeared in this Court on behalf of the FDLA, as have a number of other counsel.

The Florida Defense Lawyers Association is a statewide organization of lawyers who are committed to the study and exposition of the law, principally torts, as it relates to a variety of defendants, including electric and other public utilities. In that representation, the FDLA is committed to the fair and just development and enforcement of the law as well as to its clear and consistent exposition to lawyers, judges and members of the public in the State of Florida. By aggressively asserting the interests of its constituent members, and particularly in this case the electric utility industry, it is the belief of the FDLA that it can significantly advance the state of the law upon which our judicial system is based.

In the case before this Court, while the factual circumstances which led to the trial court granting a summary judgment are unique, the concern as an amicus curiae was attracted because of the perceived departure by the Fourth District Court of Appeal from the appropriate and vital analysis of the legal issue of duty which it is believed occurred in the Fourth District's review of the trial court's decision.

The FDLA will utilize the same abbreviations as contained in the petitioner's initial brief. Specifically, the symbol ("App.__") will be used to refer to those documents contained in the petitioner's appendix to the initial brief. The symbol ("R___") will be used to refer to portions of the record on appeal not otherwise in FPL's appendix. Petitioner Florida Power & Light Company will be referred to as "FPL" or "defendant", and respondent Edward Periera will be referred to as "plaintiff" or "Mr. Periera". All emphasis contained in this brief, unless otherwise clearly identified, will be that of the undersigned.

STATEMENT OF THE CASE AND OF THE FACTS

As reflected in the petitioner's statement of the case and of the facts, the operative facts which led the trial court to grant a summary judgment in favor of the defendant FPL on the issue of duty, and which also caused the Fourth District to reverse that summary judgment, are not in substantial or material dispute. The plaintiff Mr. Periera, while intoxicated, was riding a motorcycle (also known as a dirt bike) at night, without an operable headlamp[1], on a bicycle path next to roadway swale. He claims to have struck his shoulder on a guy wire owned by FPL. (App. A). The guy wire anchor was located between the road and the bicycle path and the non-electrified guy wire itself goes up from the anchor in the ground to a crossarm which crosses the bicycle path. The guy wire then diagonally up to where it attaches near the top of the pole. The utility pole that the guy supports is located on the far side of the bicycle path with respect to the road.

After a hearing on FPL's motion for summary judgment (App. C), the trial court determined that FPL owed Mr. Periera no duty, citing Florida Statute 6316.1995 (1987) and relying upon the First District Court of Appeal decision in Powell v. Florida Department of Transportation, 626 So.2d 1008 (Fla. 1st DCA 1993), rev. denied,

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[1] Although the motorcycle was not equipped with an operable headlight at the time of the accident, Mr. Periera claimed that he had in some fashion tied a flashlight to the handlebars, although no flashlight was recovered following the incident. See Fla. Stat. 5316.400 (1987).

639 So.2d 980 (Fla. 1994). The Fourth District reversed that decision, but certified its decision as being in conflict with Powell.

ISSUE PRESENTED FOR REVIEW (RESTATED)

WHETHER, AS A MATTER OF LAW AND PUBLIC POLICY, A FLORIDA ELECTRIC UTILITY OWES A DUTY TO AN INTOXICATED OPERATOR OF A MOTORCYCLE WHEN THAT OPERATOR IS RIDING THE DIRT BIKE WITHOUT AN OPERABLE HEADLAMP ON A BICYCLE PATH, AT NIGHT, IN VIOLATION OF FLORIDA STATUTE 5316.1995, AND THE OPERATOR CLAIMS TO HAVE HIT HIS SHOULDER ON A NON-ELECTRIFIED GUY WIRE SUPPORTING A UTILITY POLE WHICH WAS ADJACENT TO A ROADWAY.

SUMMARY OF ARGUMENT

The FDLA has interest in this case because of what it concludes is a departure from the appropriate standard to be used in determining the existence or not of a legally cognizable duty as set forth by this Court in McCain v. Florida Power Corp., 593 So.2d 500 (Fla. 1992). Employed correctly, both the law and public policy in the State of Florida conclusively establish that there was no foreseeable zone of risk to an individual such as Mr. Periera who was operating his motorcycle, at night, without an operable headlamp, while intoxicated, on a bicycle path where his vehicle was prohibited from being. The possibility that a power company could, under different circumstances, owe a duty to a pedestrian or bicyclist properly upon the bike path does not translate into a duty to Mr. Periera. Florida law, and that of other states that have considered this precise question, recognizes that a defendant can have a legal duty with respect to a sidewalk for those individuals lawfully and properly upon that sidewalk, but no duty with respect to the self same conditions to a person who is driving an unauthorized motorcycle on the sidewalk. Florida law recognizes the same difference in duty analysis when reviewing obligations owed by a landowner toward different types of individuals who appear on his property.

Similarly, the fact that FPL is a regulated utility in the State of Florida does not create any "different" or "broader" duty.

Indeed, because of the necessity for electrical structures at or near roadways to provide both economical power and lighting, the law in the State of Florida has been reticent to extend any extensive duty with respect to vehicles that stray from the appropriate traveled way. Where, as here, the motorist was willfully driving a motorcycle unlawfully, at night, without a headlamp, and while intoxicated, there is no reason in law or public policy to extend a special duty to that motorcyclist.

Finally, in anticipation of what may be an argument by Mr. Periera, the FDLA would strenuously urge this Court to review and clarify Florida law so as to ensure that Florida Power & Light Company, like other public utilities and businesses in the State of Florida, is required to satisfy a standard of reasonable care under the circumstances and not some vague, subjective and ill-defined standard uncritically referred to in early decisions in an inconsistent fashion.

There is nothing in the law OF in the facts of this case that requires an electric power utility to exercise any degree of care, let alone a degree of care toward Mr. Periera beyond that of reasonable care.

ARGUMENT

I. FOCUS OF FDLA CONCERN

Although the case before this Court has some truly "interesting" facts, the FDLA's concern is with the method of analysis (or absence thereof) reflected by the decision of the Fourth District in the court below, Periera v. Florida Power & Light Co., 680 So.2d 617 (Fla. 4th DCA 1996). Because that decision, left unchanged, does not appear to the FDLA to follow the rigors required in a legal duty analysis, the FDLA's principal interest in this cause is the restatement or clarification of that analytical process for future courts and lawyers. Once re-established (or modified) by this Court, it is then believed that the appropriate analytical construct, applied to the facts before this Court, will result in a reversal of the decision of the Fourth District.

II. APPROPRIATE METHODOLOGY FOR A LEGAL DUTY/PUBLIC POLICY ANALYSIS

The most cogent recent statement of the methodology to be used in a legal duty/public policy analysis in a negligence case is this Court's decision in McCain v. Florida Power Corp., 593 So.2d 500 (Fla. 1992). This Court, in McCain, like this case, faced a decision from an intermediate appellate court whose "method of analysis used to reach [its] conclusion [was] somewhat unclear". Id.

Using the concept of foreseeability as its takeoff point, this Court concluded that that concept has application in two distinct, but separate, analyses that have to be made before there can be a finding of liability in a negligence case. The first is whether a duty exists against which a defendant's conduct should be measured. That question is one of law for the court, consistent with considerations of public policy. The second issue (ordinarily a question of fact) is whether any breach of a recognized duty is a proximate causation of damage to the claimant.

While there is an element of foreseeability in each of these issues, this Court in reviewing precedent and public policy decried the blurring of those concepts and proceeded to mandate a separate analysis on these issues.

III. WAS THERE A LEGALLY COGNIZABLE DUTY, CONSISTENT WITH PUBLIC POLICY, OWED BY FPL TO THIS PLAINTIFF UNDER THE CIRCUMSTANCES OF THIS CASE?

THE ANSWER IS "NO".

In considering a defendant's potential liability, the first question is whether there was a legal duty owed by this defendant to this plaintiff under these circumstances. As noted above, the issue is one of law for the court and raises questions of public policy as to what obligations should the law impose upon a defendant under certain defined circumstances. See McCain v. Florida Power Corn., supra; Gath v. St. Lucie Countv-Fort Pierce Fire Diet., 640 So.2d 138, 139-40 (Fla. 4th DCA 1994)(J. Anstead

concurring and quoting trial court opinion); Firestone Tire & Rubber Co. v. Lippincott, 383 So.2d 1181 (Fla. 5th DCA 1980).

The law in Florida creates an objective test to be utilized in this analysis concerning whether a defendant's conduct creates a foreseeable zone of risk, a test which is "fraught with policy considerations". Gath, supra at 140.

The foreseeable zone of risk test as to the existence of a duty for a defendant must be addressed and overcome before a trial court can consider the issue of proximate causation, with its somewhat narrower and different component of foreseeability. It is precisely this distinction that the Fourth District either overlooked or applied incorrectly. For the reason set forth below, an electric utility, under the facts and circumstances of this case, has no legal duty, and no public policy consideration should impose a duty.

What then is the duty of a power company, or for that matter, anyone else who has a need to place some structure adjacent to a road or bicycle path? Obviously, it may depend on the conditions, the location, and the reason the structure was placed near the bike path or roadway. More importantly, it also requires a review of who was hurt and under what circumstances.

IV. TRE CIRCUMSTANCES SURROUNDING MR. PERIERA'S ACCIDENT

The plaintiff here was a motorcyclist operating his dirt bike in violation of Florida Statute S316.1995 (1987), which proscribes the operation of such a motorcycle on the bike path involved in

this case. Moreover, at the time of the incident, Mr. Periera was intoxicated, operating the motorcycle at night and without an operable headlamp. See, e.g., Florida Statutes SS316.193, 316.400. Under these circumstances the question must arise, what public policy or social value is advanced by imposing a duty on FPL toward this motorcyclist. Stated differently, where is the reasonable foreseeability of this type of conduct?

Many of these considerations came to bear in the case of Powell v. State of Florida Department of Transportation, 626 So.2d 1008 (Fla. 1st DCA 1993), rev. denied, 639 So.2d 980 (Fla. 1994), which was recognized by the Fourth District as being in conflict with its decision in this case. In that case, a motorcyclist claimed injury as a result of driving his motorcycle on an allegedly dangerous and defective sidewalk. The First District, facing a situation not unlike that before this Court (except without an intoxicated operator and without the accident occurring at night with no operable headlamp on the cycle), concluded, as a matter of law, that the sidewalk's owner (DOT), had no duty to the motorcyclist. The court concluded that such an incident, and claimant, were not within the foreseeable zone that defines the duty, which is otherwise the first step to opening the courthouse's door for a claimant. The First District correctly noted, citing Cassel v. Price, 396 So.2d 258, 264 (Fla. 1st DCA) (citation omitted), rev. denied, 407 So.2d 1102 (Fla. 1981), that:

> If no reasonable duty has been abrogated, no negligence can be found. A person is not

> required to take measures to avoid a danger which the circumstances as known to him do not suggest as likely to happen.

That which, in Powell, as a matter of law and consistent with public policy, did not create a legally cognizable duty, is not rendered more actionable (or foreseeable) because Mr. Periera here was operating his motorcycle in an intoxicated state, at night, without an operable headlamp, on a bicycle path not designed for motorcycles.

V. WHAT OTHER PUBLIC POLICY CONSIDERATIONS BAD COME TO BEAR ON THIS ANALYSIS?

One of the other obvious facts (and therefore policy considerations) in this case is that the defendant is an electric utility, regulated extensively by the Florida Public Service Commission. As a utility, it is charged with the general responsibility to distribute power within its franchise area in an economical, efficient and reasonable manner. As such, utility poles are frequently placed near the edge of roadways, frequently within road rights-of-way. The supporting and ancillary structures (such as guy wires) necessarily follow in the same general area. In the case at bar, the utility pole was across the sidewalk from the road, but because of engineering considerations, the guy wire came down from near the top of the pole to a horizontal post or crossbar across and well above the sidewalk (not involved in this incident) and then from the end of that crossbar down to the anchor adjacent to the bike path.

While in a perfect world one might want to have all such structures (poles, guys, anchors, etc.) located far away from any possible vehicular traffic (whether motorized or not), the reality is quite to the contrary. When one combines the requirement to conserve money for the consuming public (by using government-owned rights-of-way for poles and structures) along with the frequent necessity to place such structures near roads so that street lights on the poles can serve their purpose, the public policy reality is that power company structures are required to coexist near vehicular ways. As such, although not imbued with a concept akin to governmental immunity, it is clear that considerations of public policy favor the realities of pole and structure placement.

Thus, Florida Power & Light Co. v. Macias, 507 So.2d 1113 (Fla. 3d DCA 1987), the Third District faced a situation (and a corresponding duty analysis) in which an automobile left the traveled roadway and after a combination of circumstances, deflected off a utility pole (six feet off the road surface) and eventually hit a tree. Recognizing that in its duty analysis

> It is incumbent upon the courts to place limits on foreseeability, lest all remote possibilities be interpreted as foreseeable in the legal sense...

the court concluded that there was no legal or policy reason to impose a duty because the accident was "of an extraordinary nature". 507 So.2d at 1115, 1116. See also Middlethon v. Florida Power & Light Co., 400 So.2d 1287 (Fla. 3d DCA 1981); Speigel v. Southern Bell Tel. & Tel. Co., 341 So.2d 832 (Fla. 3d DCA 1977).

Comparing the circumstances of Macias (an automobile leaving the appropriate traveled path, without evidence of intoxication or other criminal or grossly negligent conduct), with that of the case before this Court (involving an intoxicated motorcycle operator, driving on a bike path, at night, and without an operable headlamp), it strains foreseeability in the duty context to the breaking point to suggest an electric public utility should have a duty to protect Mr. Periera when it had no corresponding duty to protect the Macias family. Again, the FDLA would ask what possible public policy would force potential liability on an electric utility on these facts when none was recognized in Macias.

VI. POSSIBLE DUTY OWED A BICYCLIST COMPELS NO CONCLUSION THAT DUTY WAS OWED TO MR. PERIERA.

In the midst of the Fourth District's discussion of potential liability in this case, although not clearly placed in the McCain-mandated structure for that analysis, was the court's statement, immediately before its conclusion, that FPL could have a duty of care for Mr. Periera, because as far as it knew the guy wire was as much of a hazard to bicyclists lawfully on the path as it was to motorcyclists who were not. 680 So.2d at 619, App. F. Without commenting on whether that analysis holds true in the physical world, the FDLA would respectfully suggest that the claimed analogy is wide to the mark. Two cases have been identified nationally which involve comparable circumstances where motorcycles were being operated on sidewalks in contravention of the law or common sense. See Morel1 v. City of Breaux Bridge, 660 So.2d 882 (La.Ct.App.

1995), rev. denied, 666 So.2d 321 (La. 1996); Knapp v. New York Telephone Co., 615 N.Y.S.2d 257 (App.Div. 1994).

In each case, a motorcyclist brought a negligence action against the entity responsible for the sidewalk when the alleged defective condition (or absence) of the sidewalk resulted in a crash and personal injuries. Analysis in each case followed directly (or by acknowledged analogy) the duty analysis of the Supreme Court in McCain, and in each case, the reviewing court found no liability. In Knapp (because the absence of foreseeability negated the presence of a legally cognizable duty), and in Morell (because the unintended use of the sidewalk by a motorcyclist constituted an "unreasonable risk" which the court equated to the McCain "duty-risk analysis"), the court ruled as a matter of law that there could be no responsibility to a motorcyclist under comparable facts.

In each case, however, the fact that some duty may have been owed to pedestrians or bicyclists did not change the legal conclusion that no corresponding duties were owed to the operator of a motorized vehicle on the sidewalk (let alone one operated by an intoxicated motorcyclist, at night, without an operable headlamp). As the Knapp court stated

> the fact that NYT may have owed such classes of users of the sidewalk [pedestrians or bicyclists] a duty of care cannot be translated as extending such duty to plaintiff.

Knapp, supra at 259.

VII. MR. PERIERA WAS LEGAL EQUIVALENT OF TRESPASSER WITH NO CAUSE OF ACTION FOR HIS INJURIES.

Although no precisely comparable case factually has been found to date in Florida, the concept that an entity such as FPL could owe a duty to one class of individuals who come into contact with an allegedly unreasonable condition, but not to certain others, is firmly entrenched in Florida law in the area of possessors or owners of land. As the Third District stated in Macias:

> A utility pole owner, such as FPL, has been said to owe the same duty as the possessor of land who creates an artificial condition thereon.

Florida Power & Light Co. v. Macias, 507 So.2d 1113, 1115 (Fla. 3d DCA 1987)(citing Boylan v. Martindale, 431 N.E.2d 62 (Ill. App.Ct. 1982).

The law in Florida with respect to potential liability of possessors of land expressly recognizes that, contrary to the Fourth District's decision below, the duty owed an individual on the land of another and the extent of that duty are directly related to the status of the individual on the land. Thus, for any particular condition, a landowner may owe different duties to different individuals, depending upon whether or not that individual is an invitee, licensee or trespasser.

While Florida law does impose upon a landowner the duty to exercise reasonable care with respect to invitees on the premises, the duty imposed upon a possessor of land with respect to a trespasser is "only to avoid willful and wanton harm to him and

upon discovery of his presence to warn him of known dangers not open to ordinary observation". Woodv. Camp, 284 So.2d 691, 694-95 (Fla. 1973). See also Florida East Coast Rv. Co. v. Southeast Bank, N.A., 585 So.2d 314 (Fla. 4th DCA 1991). Continuing the analogy of the utility company as a landowner, it is respectfully suggested that the onlv status into which an intoxicated motorcyclist traveling at night without an operable headlamp on a bike path, in violation of at least one Florida statute, can be is that of a trespasser. While the issue of precisely what duty might be owed to a bicyclist under different circumstances will have to await another day, it is the responsibility of this Court, with respect to this plaintiff, to hold that there was no cognizable duty that the law and public policy in the State of Florida would impose upon an electric public utility under the circumstances of this case.

VIII. THE FACT THAT THE OWNER OF TEE GUY WIRE IN QUESTION WAS AN ELECTRIC PUBLIC UTILITY DOES NOT IN ANY WAY EXTEND OR CHANGE TEE STANDARD OF CARE BY SUCH UTILITY BEYOND THE OVERRIDING RULE THAT THE STANDARD OF CARE OWED IS THAT OF REASONABLE CARE UNDER THE CIRCUMSTANCES.

The Fourth District in its short opinion attached no stated significance to the fact that the guy wire in this case was owned by an electric public utility (as opposed to a billboard or flagpole company). Indeed, count two of the complaint in this cause against FPL correctly alleged that, if there had been a duty owed to the plaintiff under the circumstances of this case, it would have been a duty "to exercise reasonable care and diligence".

(App. A at π13, p4). Similarly, the Fourth District suggested no different standard other than reasonable care by referring generally to this as a negligence case.

Notwithstanding these two facts, however, and notwithstanding the absence of any argument for some different standard of care in the trial court, counsel for Mr. Periera in his briefs in the Fourth District argued for some greater or different standard of care and it can reasonably be anticipated that he will do so before this Court. In anticipation of the possibility of that argument, the following analysis of the obligations owed by a power company in general is submitted in hopes that any decision to come from this Court will clarify or restate the responsibilities of an electric power utility in Florida with respect to its standard of care.

The whole system of Anglo-American negligence law has been based upon the premise that it is essential to establish an objective standard for a jury against which it can judge the conduct of a defendant in a negligence case. That objective standard has been the so-called "reasonable man", now incorporated in Florida Standard Jury Instruction 4.1. See also W. Page Keaton, et al, *Prosser & Keaton on the Law of Torts,* (5th Ed. 1984) §32. This standard requires that the conduct of the defendant in general be judged against what the so-called reasonable man would have done under the same or similar circumstances. Thus, the greater the risk that an individual's conduct might have, the greater amount of

care it would have to exercise in order to be "reasonably careful"[2].

Notwithstanding this compelling standardwhich continues to be the bedrock of Florida negligence law, early cases dealing with the liability of electric utilities in negligence cases would, from time to time, utilize such phrases as "high degree of care", "highest degree of care" and the like in discussing power companies. While many of those cases would also note that the legal standard continued to be reasonable care[3], somewhat loose language has from time to time been picked up by subsequent courts

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[2] Thus, both the seller of corrosive acid and the seller of windshield washer solution owe a duty of reasonable care. The acid seller might have to use a greater amount of care to be reasonable, however, because its work has more inherent risks.

[3] A good example of the several decisions of this and other courts, usually prior to the days of standard jury instructions, is the case of Stark v. Holtzclaw, 105 So. 330 (Fla. 1925). The Court in Stark stated that companies engaged in the business of selling electricity "are held to a high degree of care in the safety of the public..." 105 So. at 332. This Court went on to note, however, that such electric companies are "not insurers of the safety of children or adults and are not held to a degree of care, prudence, and foresisht bevond which prudent and careful persons have to exercise in such like circumstances. Key West Electric Co. v. Roberts, 81 Fla. 743, 89 So. 122, 17 A.L.R. 807". 105 So. at 332. Thus, read carefully, it can be seen that although language relating to a "high degree of care" is utilized on occasion in electrical cases, the correct analysis reverts to the reasonable man standard. It is only when those "high degree of care" phrases are quoted out of context that confusion arises. For similar cases demonstrating some confusion, see Gunn v. City of Jacksonville, 64 So. 435 (Fla. 1914); Jacksonville Electric Co. v. Sloan, 42 So. 516 (Fla. 1906). Despite the use of the somewhat uncritical language such as "high degree of care" or "highest degree of care", it is not believed that those cases have ever imposed a standard of care on the trier of fact other than the appropriate reasonable man standard.

including this Court in McCain, supra, to the point where a casual reading confuses the concept of the standard of care (which continues to be the reasonable man standard) with the amount of care that a jury might find to be necessary in order to judge the conduct "reasonable".

Various commentators have noted this semantic problem in states around the United States. For example, *Prosser & Keeton* described the confusion in language in this fashion:

> The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it. Those who deal with instrumentalities that are known to be dangerous, such as high tension electricity, gas, explosives, elevators, or wild animals, must exercise a great amount of care because the risk is great."...
>
> Although the language used by the courts sometimes seems to indicate that a special standard is being applied, it would appear that none of these cases should losicallv call for any departure from the usual formula. What is required is merely the conduct of the reasonable person of ordinary prudence under the circumstances, and the greater the danger, or the greater responsibility, is merely one of the circumstances, demanding only an increased amount of care.

W. Page Keaton, et al, *Prosser & Keaton on the Law of Torts,* (5th ed. 1984), §34 at 208-09 .

Similarly, Harper and James identify the situation as follows:

> According to prevailing modern doctrine, this proportioning of care to danger does not mean that different degrees of care (or of negligence) are being applied, because the legal standard remains constant - namely, what a reasonably prudent person would do in all

> the circumstances. And this standard is the one broadly applied throughout the field of negligence.

Harper and James, *The Law of Torts,* (2d Ed., 1986). § 16.13.

Thus, while the amount (sometimes loosely referred to as the degree of care) varies with the risk or danger inherent in the circumstances, this Court needs to adhere strictly to the universal negligence standard - the reasonable man - which flows throughout the law of Florida and elsewhere, including cases involving electrical injuries. See, e.g., 27A Am. Jur. 2d, *Energy and Power Sources,* §215-218 (19961, "Liability as governed by negligence principles". ("The liability of electric companies, telephone companies, and others transmitting or using electricity for damage or injury is governed, neither by the principles of insurance of safety, nor by those of contracts, as, for example under breach of implied warranty but, as in the case of unintended damage or injury generally, by the rules of the law of negligence"); 27A Am. Jur. 2d, *Energy and Power Sources,* §218(1996), "Standard or degree of care required." ("While the measure of duty resting upon electric or telephone companies and others transmitting or using electricity, in order to exonerate them from liability for negligence, is expressed by the courts in forms varying from reasonable or ordinary care and diligence to a close approximation to the view that they are insurers, or that they owe a high, very high or the highest or utmost degree of care, the generally accepted rule in such cases, however, as in determining liability

for negligent injuries generally, is that such companies or persons are bound to use reasonable care in the construction and maintenance of their lines and apparatus - that is such care as a reasonable person would use under such circumstances - and will be responsible for any conduct falling short of this standard. The degree of care which will satisfy this requirement varies, of course, with the danger which will be incurred by negligence and must be commensurate with the danger involved"; Richard C. Tinney, Annotation, *Liability for Injury or Death Resulting When Object is Manually Brought Into Contact with, or Close Proximity to, Electric Line,* 34 A.L.R. 4th 809 (1984). ("As a general rule, the principles of the law of negligence govern the liability of producers and distributors of electricity, owners of transmission lines, owners or occupiers of premises on which electric lines are located, and others who may be held responsible for the safety of electric lines or of persons who come in proximity to such lines, for injuries or deaths which result when objects are brought in close contact with, or close proximity to, electric lines...")

From the foregoing, the FDLA respectfully suggests to this Court that any argument that an electric power utility in the State of Florida owes anything <u>other</u> than a standard of reasonable care under the circumstances is <u>just simply</u> wronq. While some confusion may have perhaps been engendered by general discussions relating to the risks inherent in the transmission and distribution of <u>electricity,</u> there is no basis in Florida law, nor should there be,

for the contention that an electric utility is governed by anything other than the accepted and venerable reasonable care standard that governs other entities in the State of Florida.

The fatal defect in the respondent's position in the Fourth District, (occasioned it would appear by less than rigorous understanding of the law of negligence), is perhaps no more simply illustrated than by evaluating the standard of care owed by a neurosurgeon performing a delicate and extremely dangerous neurosurgicalprocedure, needed by the patient and fully understood by him or her prior to the procedure. While a casual observer might suggest that the neurosurgeon would have to exercise the "highest", "utmost degree of care", the law in the State of Florida simply defines the duty as follows:

> Negligence is the failure to use reasonable care. Reasonable care on the part of a physician is the use of that knowledge, skill and care which is generally used in similar cases and circumstances by physicians and communities having similar medical standards and available facilities.

Florida Standard Jury Instruction 4.2.

The respondent's anticipated attempt to impose some other standard of care against FPL in this case should be unsuccessful for yet another reason. Even if one were to reject the collective wisdom of an entire system of jurisprudence and the numerous commentators set forth above, reject the objective standard, and impose some amorphous, subjective, "high" degree of care standard with respect to the distribution of electricity, it could not

reasonably be suggested that that would apply to a non-electrified guy wire attached to a crossarm and ultimately to a utility pole. Similar guy wires are found throughout the State of Florida, holding up other structures of all types by all sort and kinds of businesses, and no logical (or other) reason exists as to why a guy wire owned by a power company should have any different standard of care attached to it than a guy wire owned by a billboard company. To suggest otherwise would seem to impose upon the driver of an FPL truck some "high" duty of care beyond that owed by every other driver merely because he worked for a company that sells a product that has more inherent dangers that the purveyor of cotton puffs or other less dangerous commodities.

While it could perhaps-be argued, in a proper case, that the amount of current in a particular wire might extend its electrical properties further away from the wire, so as to create a broader zone of risk for a foreseeability analysis, that academic or physical possibility has no application with respect to a guy wire[4].

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[4] Indeed, in this Court's decision in McCain, which was an electrical contact case, particular conduct could create a greater than usual zone of risk which could have the potential of expanding the amount of care proportionally. 593 So.2d at 504. The authority cited in McCain for that general proposition, however, is one of the early electricity cases, Escambia County Elec. Light & Power Co. v. Sutherland, 61 Fla. 167, 55 So. 83 (1911), which has been properly criticized as being a departure from the appropriate reasonable man standard. See 21 Fla. Jur. 2d *Energy* §48, footnote 66.

From the foregoing, it is respectfully suggested to this Court that FPL owed no duty of care to Mr. Periera in the circumstances of his accident which could, consistent with Florida law and public policy, impose any liability upon Florida Power & Light Company. The FDLA respectfully suggests that had the Fourth District properly employed the McCain methodology to the unusual if not bizarre facts of the case before this Court, this proceeding would not have been necessary[5].

[5] FPL has in its brief additionally argued, and it is believed correctly, that the record conclusively establishes that Mr. Periera's actions were the sole proximate cause of his own injury and as such, there was an alternative basis far the summary judgment. With respect to that argument, as well as any others not expressly addressed in this brief, the FDLA simply adopts and incorporates the position of FPL in this cause.

CONCLUSION

For the reasons set forth in the foregoing brief, the Florida Defense Lawyers Association respectfully urges this Court to do two things.

First, it is urged that this Court reverse the decision of the Fourth District after conducting a duty-foreseeability-public policy analysis consistent with the principles set forth in McCain, which can only yield the conclusion that no duty existed which FPL could have breached in this cause.

Secondly, it is respectfully urged, however, that this Court take this opportunity to carefully elucidate the continuing rule that an electric power utility in Florida, with respect to its electrical matters, owes to members of the public who may come in contact with its facilities, the duty of reasonable care under the circumstances. While many cases which use the words "high" or "highest" or "utmost" degrees of care may have some value in instructing generally that a greater amount of care may be necessary to convince the trier of fact that a power company has been reasonable, it is believed that the continued existence of such phraseology is and has been counterproductive. Florida Power & Light Company and other electric utilities in the State of Florida have to exercise more care than the manufacturer of cotton puffs, but each business is governed by the same standard of Anglo-

American jurisprudence, that of reasonable care under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail this 3rd day of February, 1997, to Cheryl Kempf, Esq., 11770 US Highway #1, Suite 600, North Palm Beach, FL 33408, Suzanne H. Youmans, Esq., McDermott, Will & Emery, 201 S. Biscayne Blvd., Miami, FL 33131, Thomas E. Buser, Esq., 700 SE Third Avenue, Courthouse Law Plaza #100, Ft. Lauderdale, FL 33316, Walter Wolf Kaplan, Esq., One East Broward Blvd. #700, Ft. Lauderdale, FL 33301, and Scott A. Mager, Esq., Mager & Associates, PA, One East Broward Blvd., Barnett Bank Tower, 17th Floor, Ft. Lauderdale, FL 33301.

FLEMING, O'BRYAN & FLEMING, P.A.
Attorneys for Florida Defense Lawyers Association
500 E. Broward Blvd., 17th Floor
P.O. Drawer 7028
Fort Lauderdale, FL 33338-7028
Phone: 954/764-3000

By: _____
PAUL R. REGENSDORF
FBN: 152395

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