

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,266N

---

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

---

FLORIDA POWER AND LIGHT,  
Petitioner,

v.

EDWARD PERIERA,

Respondent.

---

**FILED**

SID J. WHITE

FEB 26 1997

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

AMICUS CURIAE BRIEF

OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

SUPPORT OF RESPONDENT, EDWARD PERIERA

RICHARD A. BARNETT, ESQUIRE

✓ "FLORIDA BAR NO. 257389

ATTORNEY FOR ACADEMY OF FLORIDA  
TRIAL LAWYERS

121 S. 61st Terrace, Suite A  
Hollywood, Florida 33023

Phone: 954/961-8550

**INTRODUCTION AND STATEMENT OF INTEREST**

The amicus curiae, The Academy of Florida Trial Lawyers is a state wide association which has long represented the interests of the public in the development of the common law of torts in the State of Florida, The Academy of Florida Trial Lawyers believes that the issue before this Court, the duty of the electric utilities of Florida to the public ought to be examined by AFTL since it represents injured citizens who are subjected to the risks created by the ubiquitous presence of electrical structures throughout the state.

**STATEMENT OF CASE AND FACTS**

Mr. Periera was struck by an unmarked, unlit guide wire which crossed a bicycle path on which he was riding his motorcycle. He was riding at night with no head light but with a light he attached to his motorcycle. He had an elevated blood alcohol. Prior to Mr. Periera's injuries, two children had been injured in the same place while riding bicycles during the day. These incidents had been reported to FPL.

The Trial Court granted a Summary Judgment for FPL based upon Florida Statute 8316.1995 (1987) v. Florida Department of Transportation, 626 So.2d 1008 (Fla.1st DCA 1993) rev.denied 639 So.2d 980 (Fla.1994). The Fourth District reversed that decision and certified the question to this Court.

**ISSUE PRESENTED FOR REVIEW RESTATED**

As a matter of law and public policy, does an electric utility owe a duty to one who is injured by their unmarked, unlit guideline wires crossing a bicycle path?

### SUMMARY OF ARGUMENT

It is well established in Florida jurisprudence that the determination of a Defendant's duty to an injured party depends on whether that Defendants' activities on the land have created a zone of risk. Issues of the Plaintiff's behavior go to the subsequent elements of establishing a cause of action in tort to wit: proximate cause and comparative negligence. The issue whether a Defendant has a duty to the Plaintiff is a matter of law for the Court in the first instance. The issue of proximate cause is for the finder of fact unless there are unequivocal facts establishing that as a matter of law and policy the Defendant should not be held responsible for the injury.

At bar, Defendant would have this Court stand those rules on their head by making the determination of duty dependent on an inquiry into the behavior of the Plaintiff. Thus the trial judge is being asked to conclusively determine controverted facts concerning the victim's behavior and to decide therefrom that the Defendant has no duty.

This approach was rejected by this Court in the context of the same Defendant before the Court today, the electric utility. McCain v. Florida Power Company, 593 So.2d 500 (Fla.1992). The analytical separation of duty, proximate cause and comparative negligence adopted then is equally applicable at bar.

Additionally, this Court should overrule 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 concerned an injury due to a defective sidewalk.

The analysis in Powell **conflicts** directly with this Court's decision in McCain.

Even if this Court chose to let Powell stand, this case is distinguishable in that the hazards presented by electric installations are qualitatively different than the hazards arising from sidewalks.

This case is also distinguishable because there is a factual issue that the Defendant had actual notice **of** prior injuries in the exact place Plaintiff was injured.

Public policy is well served by adhering to the ruling in McCain and to change the legal rules would result in less prevention, more injuries and greater societal. **costs**.

## ARGUMENT

### I. THIS CASE IS CONTROLLED BY THE DECISION IN MCCAIN V. FLORIDA POWER CORP.

This Court held that duty of an electric utility to the public depends upon whether placement of structures necessary for the transmission of electrical energy create a zone of risk.

McCain v. Florida Power Corp., 593 So.2d 500,502,504 (Fla.1992):

"The duty element of negligence focuses on whether the defendant's conduct foreseeably created a **broader** " zone of **risk**" that poses a general threat of harm to others.

...

As to duty, the inquiry for the reviewing appellate court is whether the defendant's conduct created a foreseeable zone of risk, not whether the defendant could foresee this specific injury that actually occurred (emphasis in original).

The issue with regard to duty in this case is whether the presence of the guide wire traversing a bicycle path created a zone of risk for those persons using the path. This analysis does not depend, for its application, on the specific characteristics or behaviors of the person entering the zone of risk. The threshold question is whether a zone of risk is created. If the answer is **yes**, then the characteristics and behaviors of the injured **person** are considered in connection with the elements of proximate cause and comparative negligence.

Quoting McCain 593 So.2d at 502,

"The proximate causation element ... is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred.

The McCain court further stated that the determination of duty is not relevant to the resolution of issues of comparative negligence or specific factual matters connected with proximate cause.

Amicus FDLA has asked this Court to reject the McCain analysis and adopt a new rule that the trial court considering the duty of the utility to the injured party should consider not only whether a **zone** of danger was created but also the actions of the person **who** was subjected to the hazard. The effect of this approach would make the determination of the duty on the part of FPL depend on the negligence of the injured party. In effect, it is a return to the harshest form of contributory negligence which was rejected 32 years ago by this Court. This Court also specifically rejected that approach in McCain stating:

"Certainly, the power company is entitled to give the fact finder all available evidence about intervening causes, precautions taken against the risk, the fact that no similar injury has occurred in the past, and the comparative negligence of the plaintiff, among other matters. These questions clearly are relevant to the fact based elements of breach of proximate causation. But the mere fact that such evidence exists - even if it ultimately may persuade a fact finder - does not relieve the **power** company of its duty".

The public is well served by the rule adopted in McCain for determining the duty of the utility. Under this rule, the utility is encouraged to evaluate the potential harm to the public arising from the **installation of** its equipment. Under the analysis **posited** by FDLA a particular hazard created by the utility may not give rise to a duty since both foreseeable proximate cause and comparative negligence would be telescoped into the zone of risk



analysis- The result of such a holding would be that FPL need not be concerned whether they had created a zone of risk since the determination of their duty to the injured party would depend on arguing the particular characteristics and behavior of the injured person. In this case, FPL would have the trial court determine as a matter of law that no duty exists despite the hazard they created, which had already injured two other persons, because Mr. Periera may have been intoxicated **or** on a path where he didn't belong or on a motorcycle with improper equipment.

This Court has already addressed those arguments in McCain Ibid. at 504:

(W) Where reasonable persons could differ as to whether the facts established proximate causation - i.e., whether the specific injury was generally foreseeable or merely an improbable freak - then the resolution of the issue must be left to the fact finder... The judge is free to take this matter from the fact finder only where the facts are unequivocal, such as whether the evidence supports no more than a similar reasonable inference.

The practical effect of telescoping duty, proximate cause and comparative negligence into the determination of duty ab initio is that Florida Power and Light will **be** encouraged to determine whether its structures create a hazard an an ex post injury basis rather than preventatively.

## II. FLORIDA POWER AND LIGHT DOES NOT BUILD AND MAINTAIN SIDEWALKS

The FPL's Amicus relies on 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 concluded that there was no duty owed to a motorcyclist who was injured when he drove over a defective sidewalk because there was no evidence of previous incidents and plaintiff's conduct violated a state statute.

First, Amicus would argue that Powell was decided incorrectly by grafting notions of proximate cause and comparative negligence onto a duty analysis. The proper analysis is whether or not the defective sidewalk created a zone of risk. If that question is answered affirmatively, then the question of duty is resolved and it is for the fact finder to determine whose behavior was the proximate cause of the injury.

Second, an important distinguishing factor ~~from Powell~~ is that here there is a factual question whether FPL was informed of the of the two prior injuries and was therefore on notice of the hazard that injured Mr. Periera.

Notwithstanding the foregoing, the very nature of the hazards of electric utility installations are qualitatively different than those created by governmental agencies who build and maintain sidewalks.

Although an uneven sidewalk may create a zone of danger, most municipalities promulgate ordinances specifying the amount of

vertical displacement necessary to violate the Code. There are many instances of vertical displacement that are de **minimus**.

Electrical wires, guide wires and supporting structures by their very nature present a greater hazard to the public than a sidewalk which has settled. Sidewalks are at ground level. Electrical poles, wires and support structures are present at varying elevations many of which coincide with the height of members of the public. Furthermore, these electrical wires and guide wires are difficult to visualize.

These **reasons** and others support this Court's **holding** in **McCain** that electrical utilities have a higher than usual standard of care to the public at large. Notwithstanding the statement by FDLA Amicus that this higher standard was "**loose** language . . . by . . . this Court in **McCain**, the truth is evident by the reasoning of the Court.

"By its very nature, power - generating equipment create-s a zone of risk that encompasses all persons who fareseeable may came in contact with that equipment.

. . .

"while it is true that power companies are not insurers, they nevertheless must shoulder a greater than usual duty of care in proportion to the greater than usual zone of risk associated with the business enterprise they have undertaken".

### III. PUBLIC POLICY

The question before this Court should not be the incorporation into duty analysis the behavior of those individuals who are injured or killed. Such a result would not only decrease the incentive for the utility to maximize safety but completely obliterate the doctrinal distinction between duty, proximate cause and contributory negligence. At bar, there may be issues of proximate cause and contributory negligence based upon the particular characteristics and behavior of the injured person. These issues are determinations for the fact finder at trial, not for the trial court on Summary Judgment based on lack of duty by the Defendant, The electric utility asks this Court to overrule McCain so they need not anticipate dangers they create from their structures because their common law duty could be obviated by the conduct of the victim. Such a rule would be tantamount to saying that if there is no fault by the victim then and only then must FPL answer for its negligence.

Finally, the rules of duty, proximate cause and comparative negligence as presently constituted make sense from a cost benefit analysis. An ounce of prevention being worth a pound of cure certainly applies in this situation where the electric utility under present law has an a priori incentive to determine whether they are creating zones of risk. If the legal rule were to change, such preventative safety may be relaxed and the increased number of injuries and deaths which occur each year in proximity to

electrical utility equipment would be reflected in increased medical expenses, lost productivity and transaction costs of litigation all of which would have otherwise been avoided.

CONCLUSION

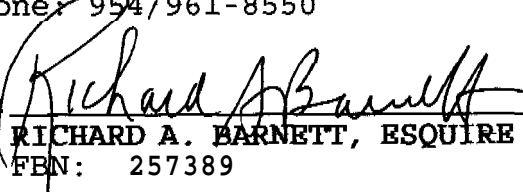
It is respectfully requested that this Court affirm the decision of the Fourth District Court of Appeals and remand this case to the trial court for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to: Cheryl Kempff, Esquire, 11770 US Highway #1, Suite 600, North Palm Beach, FL 33408, Suzanne H. Youmans, Esquire, McDermott, Will & Emery, 201 S. Biscayne Boulevard, Miami, FL 33131, Thomas E. Buser, Esquire, 700 S.E. Third Avenue, Courthouse Law Plaza #100, Fort Lauderdale, Florida 33301, Scott Mager, Esquire, Mager & Associates, PA One East Broward Boulevard, Barnett Bank Tower, 17th Floor, Fort Lauderdale, Florida 33301 and Paul R. Regensdorf, Esquire, Fleming, O'Bryan & Fleming, P.A. 500 E. Broward Boulevard, 17th Floor, Fort Lauderdale, Florida 33338 on this 23rd day of February, 1997.

RICHARD A. BARNETT, P.A.  
ATTORNEY FOR AFTL  
121 S. 61st Terrace, Suite A  
Hollywood, Florida 33023  
Phone: 954/961-8550

By

  
RICHARD A. BARNETT, ESQUIRE  
FBN: 257389