IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Supreme Ct. No. 89,266
4th DCA Case No. 95-02390

FLORIDA POWER & LIGHT CO.,

Petitioner,

vs.

EDWARD PERIERA.,

Respondent.
_____ /

On Review From the Fourth District
Court of Appeal - Case No.: 95-02390

Answer Brief of Respondent Edward Periera

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Respondent, EDWARD PERIERA, certifies that the following persons and entities have or may have an interest in the outcome of this case:

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MISCELLANEOUS

PREFACE

Throughout Respondent's Answer Brief, citations to the Appendix to Answer Brief shall be referred to as "App. " followed by the page number where the cited material appears. Respondent shall be referred to as "Respondent" or "Periera." Petitioner shall be referred to as "Petitioner" or "FPL." Citations to Mr. Periera's and Ms. Murray's deposition on record shall be referred to as "R." followed by the page number where the cited material appears in the record.

STATEMENT OF THE CASE AND FACTS

Respondent, Edward Periera, generally agrees with the Statement of the Case and Facts as provided for in Petitioner's Initial Brief. Respondent, however, disagrees with the characterization of Periera as "intoxicated." Respondent would also add the following:

As a result of Periera's striking the guy wire, owned and operated by FPL, Periera was rendered unconscious. (R. at 112) Upon regaining consciousness, Periera crawled to the nearest house, banged on the front door, and asked the occupant (identified a Martha Murray) to call the medics. (R. at 112) Upon the taking of Ms. Murray's deposition, it was learned that the guy wire which caused injuries to Periera had been the cause of injuries to at least two other persons prior to Periera's incident. (R. at 279) Both of those persons were children who were injured while riding bicycles, during the daytime, on the bicycle path in front of Ms. Murray's house, and both children experienced cuts and bleeding as a result of hitting the guy wire in question. (R. at. 279-280) Both children, when hitting the guy wire, were thrown from their bicycles. (R. at 279).

Ms. Murray stated to an agent and/or employee of FPL after these incidents that the wire needed to be moved or that a fluorescent marker be put on it. (R. at 280, 282) She spoke to the departments related to installation and removal of lights, wherein an employee/agent had previously installed a light on the same utility pole which the guy wire supported. (R. at 280, 282, 287) She told the agent and/or employee, in a telephone conversation, that the guy wire needed to be moved or a fluorescent reflector or warning light needed to be put on it, as she had seen on other guy wires of the same type. (R. at 282) She did not follow up with FPL and does not know if FPL took any action in this regard. (R. at 282-283)

The Fourth District Court of Appeal, upon review of the trial court's decision granting summary judgment in favor of FPL, rejected the holding and application of the First District Court

of Appeal's ruling in Powell v. Florida Dep't of Transp., 626 So. 2d 1008 (Fla. 1st DCA 1993), rev. denied, 639 So. 2d 980 (Fla. 1994) had found that the defendant had no liability where it was *not* foreseeable to the defendant that someone would be riding a motorcycle on the sidewalk. (App. A, p. 1) The Fourth District held that, based upon the record in this case, FPL's guy wire was as much of a hazard to bicyclists, who were lawfully on the path, as to motorcyclists, who were not, and therefore the statute did not relieve FPL of liability as a matter of law. (App. B, p. 2).

In reversing the trial court's decision, the Fourth District referenced City of Tamarac v. Garchar, 398 So. 2d 889 (Fla. 4th DCA 1981), overruled on other grounds, Seaboard Coastline Railroad Co. v. Addison, 502 So. 2d 1241 (Fla. 1987), where the court found that the city *owed* the plaintiff a duty of care, despite the fact that the plaintiff had violated a statute prohibiting drivers from traveling on the median, where the plaintiff struck a large boulder. (App. B, p. 2).

SUMMARY OF ARGUMENT

The issue raised in this appeal is whether the Fourth District properly ruled that FPL owed a duty of care to Periera.

The Fourth District properly ruled that the First District's decision in Powell was inapplicable or erroneous, and that summary judgment would be improper at this stage. Despite Periera's alleged violation of Section 3 16.1995, Florida Statutes, FPL's duty does not change: It still must adequately mark and maintain the guy wire on the electric pole and its failure to do so created as much a foreseeable risk of harm to persons lawfully on the bike path as to persons unlawfully on the bike path.

Additionally, even if the First District ruled correctly in the Powell case, that decision is not in conflict with the Fourth District's decision here because that case is factually distinguishable from

the case at bar. Unlike the facts in Powell, FPL either knew or should have known that the guy wire which injured Periera was dangerous: The record evidence demonstrated that FPL was aware that two children had been injured as a result of the guy wire, placing FPL on actual or constructive notice of the existence of the dangerous condition. It was thus foreseeable that someone could get injured by FPL's failure to properly mark the guy wire, which placed a duty of care on FPL to prevent injuries arising from the dangerous condition. The jury should be given the opportunity to decide whether the evidence is sufficient to warrant the imposition of liability and damages.

Although not discussed as conflicting with the Powell decision, FPL argues that the violation of the statute is not evidence of comparative negligence on the part of Periera, but only goes to the issue of duty. If this Court does review this issue, the result is similar - the law provides that this issue is for the jury to determine the comparative fault of the parties.

Thus, this Court should affirm the decision of the Fourth District Court of Appeal.

ARGUMENT

I. FPL OWED A DUTY TO PERIERA AS A MATTER OF LAW

A. The Fourth District Court of Appeal Correctly Determined That Powell Was Wrongly Decided

> As *to duty,* the proper inquiry for the reviewing appellate court is whether the defendant's conduct created a foreseeable zone of risk, *not* whether the defendant could foresee the specific injury that actually occurred.

McCain v. Florida Power Corp., 593 So.2d 500, 504 (Fla. 1992). (Emphasis in original)

In this appeal, the Petitioner essentially asks this Court to summarily conclude that companies - like FPL in this case - should be totally immune from liability where the Plaintiff has violated a statute (such as section 3 16.1995), regardless of how negligent they may be in the

construction or maintenance of their creations.' Notwithstanding the potential violation of a statute, Periera should be given his day in court, leaving to the jury the question of whether his actions warrant a reduction in the compensation due to him for FPL's negligent action in the placement of the guy wire. The Fourth District was correct when it reversed the trial court's decision to grant summary judgment in favor of FPL, properly choosing not to endorse the First District's decision in Powell v. Florida De-, 626 So. 2d 1008 (Fla. 1st DCA 1993), rev. denied, 639 So. 2d 980 (Fla. 1994). In Powell, the case relied upon by Petitioner and the trial court in granting FPL's Motion for Summary Judgment, the First District concluded that where there was no evidence of any previous incidents, no duty existed where the plaintiff was injured while riding his motorcycle on a sidewalk, in violation of Florida Statute section 3 16.1995, because such conduct was unforeseeable. Powell, 626 So. 2d at 1008-09.

It is axiomatic that the essential elements of a negligence suit involve duty, breach of duty, legal cause, and damages. Florida Power & Light Co.. v. Lively, 465 So. 2d 1270 (Fla. 3d DCA 1985). The threshold inquiry in any negligence action is whether the defendant owed a duty of care to the plaintiff. See Initial Brief at 4. Absent a duty to the plaintiff, there is no actionable negligence. See generallv, McCain v. Florida Power Corn., 593 So. 2d 500 (Fla. 1992).

The issue of duty involves whether the defendant created a *generalized* and foreseeable risk of harm to others. Stanzenski v. Tennant Co,, 617 So. 2d 344,346 (Fla. 1st DCA 1993) (emphasis supplied), or, as Petitioner put it, "whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a *general* threat of harm to others." McCain, 593 So. 2d at 502 (emphasis

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'More particularly, FPL seeks to exempt itself from liability even though FPL was on notice that the guy wire in question may have been responsible for previous injuries involving two children who were hit while riding their bicycles on the bike path.

supplied). "Foreseeability clearly is crucial in defining the scope of the general duty placed on every person to avoid negligent acts or omissions." Id. at 503. In McCain, this Court held that the duty element of negligence is established by meeting a minimum threshold legal requirement and further noted that "the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk *more likely than not* was created by the defendant." Id. (emphasis supplied). If there is *any* general and foreseeable risk of injury, the courts are not free to relieve the power company of its duty. Id at 504.

Relying solely on Powell, the trial court found that the purported violation of Section 3 16.1995 of the Florida Statutes, by itself, precluded Periera from stating a cause of action against FPL based on negligence because Periera's conduct was unforeseeable to FPL. The problems with the application of Powell can be readily seen.

For example, there would be no recovery for a pedestrian who, while crossing a street outside of a marked crosswalk, inadvertently fails to yield the right-of-way to an oncoming vehicle (in violation of Section 3 16.130(10) of the Florida Statutes) and is severely injured by a drunk driver traveling over the speed limit, A person taking a casual walk on the roadway, although there is a sidewalk provided, (again in violation of Section 3 16.130(3), Florida Statutes) who is injured by a car running a red light, would also be barred from recovery because his/her violation of the statute took away any duty on the part of the motorist. More specifically to these facts, a person driving a tractor on a bike path (in violation of Section 3 16.1995 of the Florida Statutes) who is injured when his tractor turns over when the front wheel falls into an open manhole would be forever precluded from recovering against the DOT for the damage to his tractor (even if there was evidence that the exposed manhole had recently injured children). A person who fails to wear a seat belt would equally be barred from recovery even though injured by a negligent driver. Indeed, the violation of any statutory directive would preclude a complainant from any recovery, notwithstanding the

obvious culpability of the person responsible for the injury. The senseless and expansive results illustrate Powell's weaknesses and support affirming the Fourth District Court opinion in Periera, since, as the Fourth District noted, "FPL's guy wire was as much a hazard to bicyclists, who were lawfully on the bike path, as to motorcyclists, who were not." Periera, 680 So. 2d at 618.

Florida precedent, does provide that under these particular facts, a defendant, such as FPL, still owes a duty of care to another person, regardless of whether they have violated a statute in the course of being injured by such defendant. The impropriety of the Powell decision is best illustrated by the Fourth District's holding in Citv of Tamarac v. Garchar, 398 So. 2d 889 (Fla. 4th DCA 1981), overruled on other grounds, Seaboard Coastline Railroad Co. v. Addison, 502 So. 2d 1241 (Fla. 1987), cited by the Fourth District in the present case. In Garchar, the plaintiff sued the city for negligence when his vehicle traveled onto a median and struck a large boulder in the median which was located six feet from the edge of the paved road. Id. at 891. After an adverse jury verdict, the city appealed. The Fourth District held that despite the plaintiffs violation of Section 3 16.090 which prohibits vehicles from driving on the median - the city still owed the plaintiff a duty of care.

FPL's attempts to distinguish Garchar does not change its dispositive application to the instant case. First, FPL argues that Garchar was "lawfully operating his vehicle on a roadway." See Initial Brief at 12. This fact is insignificant as a matter of law, since the critical fact analogous to both cases is that both Garchar and Periera were unlawfully operating their vehicles in violation of a statute when the defendants' negligence caused their injuries.

Second, FPL argues that the city, unlike FPL, "unquestionably owed motorists like Garchar a duty to properly design an maintain the road and median." See Initial Brief at 12. Contrarily, it cannot be reasonably disputed that FPL owes a duty to properly design and maintain its equipment and, especially where there is record evidence of injuries to others, FPL can be held legally

responsible for such resulting injury. Finally, FPL argues that Garchar is distinguishable because, in Garchar, the city's negligence in failing to properly design the road, created the effect of channeling vehicular traffic onto the median. However, here, like the facts in Garcher, there was evidence of previous complaints relating to the condition causing the injury. Here, the record showed that FPL was on notice as to the hazardous condition of the guy wire. (M. Depo. 10, 12). There is a genuine issue of material fact as to FPL's knowledge of the (guy wires) dangerous condition/placement of the guy wires and its corresponding negligence for failing to correct the defect.

The decision in Powell also suggests that the First District Court of Appeal considered that "foreseeability" depends on whether the defendant could foresee the specific manner in which the injury of the plaintiff occurred. Powell, 626 So. 2d at 1008. However, this Court has already ruled to the contrary. See McCain, 593 So. 2d at 504. In McCain, this Court held that a duty is owed when the defendant's conduct creates a foreseeable zone of risk, no matter if the defendant could foresee the specific injury that occurred. Id. at 504. The proper inquiry, according to McCain, is whether the guy wire created a foreseeable zone of risk. Under the facts of this particular case, the injuries which could result from the negligent placement of a guy wire could reasonably be foreseen to cause injury. Accord Rice v. Florida Power & Light Co., 363 So. 2d 834, 839 (Fla. 3d DCA 1978)("Had a clear view of the exposed lines not existed, or *had FPL had actual notice* that individuals were flying model airplanes attached to electrical conductors, the changed use of the underlying property might have been sufficiently persuasive to leave the question of the existence of a duty and a breach of that duty for the resolution of a jury." (Emphasis added).

In Duff v, Florida Power & Light Co., 449 So. 2d 843 (Fla. 4th DCA 1984), a minor was injured while he was installing a CB antenna next to his residence, when the antenna came into

contact with an electrical power line which ran along an easement adjacent to his residence. This Court reversed the lower court's grant of summary judgment in favor of FPL, specifically finding that factual issues remained regarding foreseeability, reasonableness of care, and negligence of minor. Id. at 844. The court, citing Rice, held that the standard regarding correctness of summary judgment is "whether it would be reasonable to impose upon the power company a continuing duty to foresee and protect against the kind of injury involved." Id. citing Rice, 363 So. 2d at 838. The Court distinguished the facts of that case from Rice: In Rice, the company had no notice of the airplane activity occurring in the vicinity of the power lines, whereas, in contrast, this Court stated that it could not determine - as a matter of law - that the installation of an antenna was unforeseeable. Id.

The law in Florida is well settled that it is not necessary for an alleged tortfeasor to foresee the exact nature and extent of a person's injuries or the exact manner in which the injuries occur. All that is necessary to establish liability is that the tortfeasor be able to foresee that some injury will likely result in some manner as a consequence of the tortfeasor's negligent acts. Ader Truck Rental. Inc., 625 So. 2d 979,981 (Fla. 1st DCA 1993); Webb v. Glades Elec. Co-Op., Inc., 521 So. 2d 258, 259-60 (Fla. 2d DCA 1988); Crislip v. Holland, 401 So. 2d 1115, 1117 (Fla. 4th DCA 1981); Leib v. City of Tampa, 326 So. 2d 52 (Fla. 2d DCA 1976).[2]

Finally, the decision in Standard Havens Products, Inc. v. Benitez, 648 So. 2d 1192 (Fla. 1994), is also analogously instructive, where this Court held that product misuse is not an absolute

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[2] See City of Pinellas Park v. Brown 604 So. 2d 1222 (Fla. 1992) (it is immaterial that defendant could not foresee precise manner in 'which injury occurred or exact extent; true extent of liability is question for jury); Padgett v. West Florida Elec. Co-Op.. Inc., 417 So. 2d 764 (Fla. 1st DCA 1982) (In a case involving an electric utility, the method and extent of injury is irrelevant; the question is simply whether the power company could have reasonably foreseen the occurrence of the injury).

bar to a product liability claim sounding in negligence, but merely merges into a defense of comparative negligence, which may reduce plaintiffs recovery in proportion to his or her own comparative fault. Id. at 1197. In Standard, the plaintiff sued the manufacturer of a pollution control machine known as a "baghouse" after his leg got caught in the apparatus resulting in partial amputation, all of which occurred while he was working. Id. at 1193. The defendant-manufacturer defended by claiming that the injury was caused by the plaintiffs "misuse" of the machine, which was not reasonably foreseeable to the defendant, and thus the plaintiff should not recover. Id. at 1194.

In Standard, this Court reviewed its earlier decision in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (replacing the doctrine of contributory negligence with comparative negligence in Florida), where it stated the following telling words:

> [T]oday it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss, If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

Id. at 11 96.[3] This Court concluded that product misuse does not bar a claim based upon negligence merely because the misuse was unforeseeable, but rather creates an issue of comparative negligence

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[3]Former Chief Judge Gerald Mager of the Fourth District Court of Appeals, was the brain child for the sentinel adoption of the doctrine of comparative negligence. In Jones v. Hoffman 272, So.2d 529 (Fla. 4th DCA 1973), he said

> Under a comparative negligence system, the relative degree of negligence of the parties is involved in determining whether, and the to which, either should be held liable; so that the plaintiffs negligence serves not to relieve the defendant entirely from liability but merely to diminish the damages recoverable.

Id. at 530.

for the trier-of-fact, reducing a plaintiffs recovery in proportion to his or her own comparative fault. Standard, 648 So. 2d at 1197.

While this case does not deal with "product" misuse, it deals with an alleged misuse, i.e., the purported misuse of the bicycle path by Periera in violation of section 3 16.1995. Based upon this Court's reasoning in Standard, Periera's misuse of the bicycle path does not preclude him from recovering from FPL based upon its negligence in failing to properly maintain the guy wire. Rather, such an alleged misuse (although a criminal traffic violation) would only serve as evidence of comparative negligence, which would be an issue placed before the trier-of-fact at trial. Justice and equity require that the alleged negligence of Periera be considered along with FPL's negligence in apportioning damages, and not completely bar recovery, thereby letting FPL off the hook despite its culpability.

Based on the preceding, the Fourth District, therefore, properly concluded that, despite Periera's purported violation of section 3 16.1995, Florida Statutes, FPL's duty of care extended to Periera, as Periera's actions were within the "generalized and foreseeable zone of risk" created by FPL's negligence. The trial court erred in granting summary judgment, the Fourth District Court was correct when it reversed that decision, and this Court should affirm.

B. Even If Powell Was Decided Correctly, FPL Still Owed A Duty To Periera

Even assuming that Powell was correctly decided by the First District, Powell is distinguishable from the facts of the case at bar, and as such, FPL still owed Periera a duty of care to insure that its guy wire was adequately maintained and marked.

The issue remains one of "foreseeability." In Powell, the First District concluded that it was not foreseeable to the DOT that someone would ride their motorcycle on the defective sidewalk in

violation of the statute prohibiting such activity. Powell, 626 So. 2d 1008 (Fla. 1 st DCA 1993), rev. denied, 639 So.2d 980 (Fla. 1994). Therefore, the court concluded the DOT owed no duty to Powell. Id. at 1008-09.

In Powell, however, there was no evidence that DOT was on notice of the defective sidewalk. Here, there was record evidence of complaints and/or possible injuries which resulted from the placement of the guy wire which indicates that FPL otherwise knew or should have known about the dangerousness of the unmarked guy wire. As a result of this knowledge, it can be fairly said that FPL could reasonably foresee the activity of a person riding along the path where the unmarked guy wire was located (and where Periera and others were injured). In this regard, the Fourth District in Periera concluded that

> FPL's guy wire was of much as hazard to bicyclists, who were lawfully on the bike path, as to motorcyclists, who were not. We therefore conclude that the statute does not relieve FP&L of duty as a matter of law.

Periera, 680 So.2d at 6 18.

Additionally, FPL's argument that it owed no duty to Periera because it was unforeseeable that someone would be riding a motorcycle on a bicycle path in violation of the statute is substantially weakened when one looks to the following cases:

1. Webb v. Glades Elec. Co-Op.. Inc., 521 So. 2d 258 (Fla. 2d DCA 1988);
2. Padgett v. West Florida Elec. Co-Op., Inc., 417 So. 2d 764 (Fla. 1st DCA 1982); and
3. Crisliw v. Holland, 401 So. 2d 1115 (Fla. 4th DCA 1981).

In Webb v. Glades Elec. Co.-Op, Inc., 52 1 So.2d 258 (Fla. 2d DCA 1988) the plaintiff – while riding on horseback through a pasture was thrown from his horse when he struck a guy wire. Glades owned and installed the guy wire directly over an easily recognizable cow path, but without any attached markings or warning devices. Id. at 259. Webb's complaint alleged that Glades had negligently installed and failed to adequately mark the guy wire, where it should have reasonably

anticipated cowboys such as the plaintiff would be riding horseback. The Second District Court reversed the lower court's order of dismissal, holding that Webb's allegations were adequate to raise an issue of foreseeability to be determined by the trier of fact. Id. at 260.[4]

Similarly, FPL placed the guy wire in question in an area directly over/in a path that FPL could easily anticipate (and in fact knew) that persons would be traveling. The deposition of Ms. Martha Murray further indicates that she had told an employee and/or agent of FPL that two previous injuries had occurred to children riding their bikes through the same area, and that the guy wire should be moved or that a fluorescent marker be put on it (R. at 280, 282, 287). Thus, FPL is misguided by its reliance on cases like Powell, which found no liability where it was not foreseeable to the defendant that someone would be riding a motorcycle on the sidewalk. The type of injury which occurred in this case was foreseeable and therefore Powell is not applicable in that regard.

In Padgett v. West Florida Elec. Co-Op., Inc., 417 So. 2d 764 (Fla. 1 st DCA 1982), the decedent was driving home in the dark when his car lost control and traveled 200 feet into a ditch, then struck and severed a utility or telephone pole from the ground. Id. at 765. When the car came to a stop, decedent ran from the car and came into contact with three downed electrical wires, which electrocuted him. Id. Decedent's father sued the power company, alleging that its negligence in maintaining its power pole and electrical line safety equipment proximately caused his son's death. The lower court entered summary judgment in favor of the electric company, but the First District Court reversed, finding the existence of genuine issues of material fact with respect to whether the electric company could have reasonably foreseen the accident. The crux of the defendant's argument

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[4] Accord Fries v. Florida Power & Light Co., 402 So. 2d 1229 (Fla. 5th DCA 198 1) (summary judgment inappropriate where genuine issues of material fact existed as to whether FPL knew, or should have known, that water where accident occurred was frequented by sailing vessels, thereby deeming it foreseeable that accident like one in question would occur there).

was that it was unforeseeable that the plaintiff would be electrocuted when his car lost control and traveled so far, followed by the plaintiff exiting the vehicle and running into the wire, The court in its reasoning reiterated that foreseeability is to be determined independent of whether the specific injury that occurred is within the scope of risk attributable to the power company. Id. at 767.

In Crislip v. Holland, 401 So. 2d 1115 (Fla. 4th DCA 1981), the plaintiff, who was involved in a car accident, was thrown from a van and pinned between the van and a utility pole, resulting in her leg becoming impaled on a metal spike protruding from the utility pole. Id. at 1116. Plaintiff alleged that the City of Fort Pierce, by placing the spike in the utility pole, negligently created an unreasonable risk of injury to her. The lower court entered summary judgment on the ground that plaintiffs injury resulted from an independent, superseding cause. This Court reversed that decision, reasoning that through the exercise of reasonable care, the City might have reasonably anticipated that some person would come in dangerous contact with the spike in some manner. The Court further ruled that "the question of the extent of the City's responsibility to anticipate the consequences of its acts was the province of the trier of fact and should not have been summarily resolved in favor of either party." Id. at 1117.

The common denominator in these cases lay in the delicate distinction between duty and proximate causation. To adopt FPL's arguments in the case at bar would, in effect, allow the duty element to subsume the question of proximate causation, and improperly resolve a factual question better left for the exclusive province of the jury. See McCain, 593 So. 2d at 504 (Fla. 1992).

In the case at bar, FPL could reasonably foresee the activity of persons riding along the path where the unmarked guy wire was located (and where Periera, and others, were injured). FPL attempts to subvert the "foreseeability" issue by contending that the "guy wire was easily visible to persons using the bike path in the manner for which it was intended . . . ." See Initial Brief at 7.

However, as the law set out in this brief provides, whether Periera was using the bike path in the manner for it was intended is not dispositive of the issue of foreseeability. FPL placed a guy wire that crossed a bicycle path that it could reasonably foresee individuals coming into contact with, especially having notice that the guy wire in question had caused injuries to children riding their bicycles on the path on at least two prior occasions, and that the guy wire should be moved and/or florescent markers be placed on it to notify users of the path to the danger. (R. at 280, 282, 287). Accordingly, this case is significantly distinguished from the holding in Powell. Fourth District Court in Periera, therefore, properly concluded that, despite Periera's violation of section 3 16.1995, Florida Statutes, FPL's duty of care extended to Periera, as Periera's actions were within the "foreseeable zone of risk" created by FPL's negligence in failing to adequately maintain and mark the guy wire crossing the bike path upon which Periera rode.[5]

II. PERIERA'S CONDUCT MERELY CREATED ISSUES OF COMPARATIVE NEGLIGENCE

Before addressing the issues presented by FPL is its Initial Brief, it is Periera's opinion that the issue of "comparative negligence" is ultimately beyond the scope of this appeal. See Initial Brief at 10. Pursuant to the decision of the Fourth District, FPL certified the Fourth District's decision to be in conflict with the First District's decision in Powell. The only issue raised by this claimed conflict is whether a defendant owes a duty of care to a plaintiff whose conduct was in violation of

[5] FPL also argues that "Periera essentially was a trespasser on the bike path," who was owed no duty because a property owner is only under a duty to avoid wilful and wanton harm to trespassers, and upon discovery of his presence, to warn him of known dangers not open to ordinary observation. See Initial Brief at 9-10. In support of this argument, FPL states that "it cannot be said that any "dangerous condition" associated with the guy wire was not subject to the ordinary observation of those persons lawfully using the bike path." See Initial Brief at 10. This assertion is not supported by the record. The record evidence contains allegations that children were injured by the unmarked guy wire while lawfully on the path riding their bicycles, also providing FPL with knowledge of a "dangerous condition." (R. at 280,282).

a statute. The Powell decision does not create conflict on the issue of "comparative negligence," and thus, FPL's argument regarding same should not be reviewed by this Court. The question of comparative negligence continues to be left to the exclusive province of the jury. Hoffman v. Jones, 280 So.2d 43 1 (Fla. 1973). See also Hancock v . Department of Corrections, 585 So.2d 1068 (Fla. 1st DCA 1991), rev. denied, 598 So.2d 75 (Fla. 1992).

Notwithstanding that this issue is beyond the scope of this Court's review, FPL argues that the issue of comparative negligence is not involved in this case because, "examination of the cases relating to statutory violations as evidence of negligence reveals that the issue typically arises where the defendant violates a statute." See Initial Brief at 10-11. in support of this assertion:

1. Winemiller v. Feddish, 568 So. 2d 483 (Fla. 4th DCA 1990)
2. Chimerakis v. Evans, 221 So. 2d 735 (Fla. 1969)
3. de Jesus v. Seaboard Coastline Railroad Co., 281 So. 2d 198 (Fla. 1973), and
4. Gabriel v. Tripp, 576 So. 2d 404 (Fla. 2d DCA 1991)

However, even assuming Periera's conduct violated the Florida Statutes, such conduct, at best, merely creates issues of comparative negligence whose determination is to be left with the exclusive province of the jury, and as such is thereby beyond the directives requested in FPL's Motion for Summary Judgment. See State Farm Mutual Automobile Company v. Penland, 668 So.2d 200 (Fla. 4th DCA 1995)(reversed order for summary judgment based on seat belt defense); Nationwide Mutual Fire Insurance Company v. Bosburgh, 480 So .2d 140 (Fla. 4th DCA 1986) (evidence failed to establish comparative negligence based on alleged violation of statute requiring person riding motorcycle to wear protective headgear securely fastened);

The jury's capability (and right) to assess whether Periera was comparatively negligent was

explained by our Supreme Court in McCain:

> 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 or proximate causation. But the mere fact that such evidence exists - even if it ultimately may persuade the fact-finder - does not relieve the power company of its duty.

593 So.2d at 504.[6]

Based on the foregoing, this Court has demonstrated its preference to giving Plaintiffs, like Periera, their day in court, and this Court should therefore affirm the decision of the Fourth District remanding to the trial court to act in conformity therewith.[7]

III. FPL'S NEGLIGENCE WAS THE PROXIMATE CAUSE OF PERIERA'S INJURIES

FPL also argues that Periera's violation of the statute was the "sole proximate cause" of his injuries. FPL claims this to be "undisputable." See Initial Brief at 13. This assertion is simply unwarranted and in fact represents the primary reason as to why this Court should affirm the holding of the Fourth District. Periera argues only that he should be afforded a jury determination on what is inarguably a disputed issue of fact. Respectfully, the only issue that is "undisputable" is that it is disputable who should be responsible for a guy wire that could have previously injured children.

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[6] Kopf v City of Miami Beach, 653 So. 2d 1046, 1046 (Fla. 3d DCA 1995) (issues of negligence, comparative negligence, and causation which may properly be resolved only by a jury). See also, Stewart v. Boho, Inc., 493 So. 2d 95, 96 (Fla. 4th DCA 1986) (Owner can be held liable to invitee for failure to exercise reasonable care, even though invitee negligently encountered known danger, issue of comparative negligence goes to a jury determination as to how much of the defendant's liability should be offset by the plaintiffs relative fault).

[7] FPL is misplaced in its contentions that (1) there is a distinction between statutes which mandate "how" one must act, as opposed to "where" one must (or must not) act, and (2) that violations concerning "where" one may act only relate to "threshold duty issues" and not comparative negligence. See Initial Brief at 13.

In support of its argument, FPL first states that "obviously, if Periera had not been operating his motorcycle unlawfully on the bike path, he would not have encountered FPL's guy wire." See Initial Brief at 13. This conclusion, unfortunately, is flawed for two reasons: (1) the same argument could be made for the negligence of FPL and the guy wire i.e., were it not for the unmarking of the guy wire and/or the negligence of FPL in failing to heed the warnings of Ms. Murray, Periera would not have been injured by *the guy wire;* and (2) FPL makes a "but for" analysis, and therefore mistakes "proximate causation" (foreseeability) with "factual causation" (but for). See Department of Transp. v. Anglin, 502 So. 2d 896, 898 (Fla. 1987).

FPL further asserts that "reasonable persons could not differ on the proximate cause issue and FPL should not be held liable as a matter of law" because "the range of danger [was] too remote to be reasonably foreseeable." See Initial Brief at 14, quoting Mathews v. Williford, 3 16 So. 2d 480 (Fla. 2d DCA 1975). Yet the range of danger in this case was not as remote as FPL contends. In fact, the record demonstrates that the unmarked guy wire which caused Periera's injuries may have previously been responsible for the injuries sustained to two young children. (M. Depo. 9). This possibility, coupled with the fact that FPL was on notice of these occurrences, suggest that the danger imposed by the guy wire was indeed probable, rather than remote as FPL asserts. More importantly, this Court should err on the side of the plaintiff as defendant will still have the opportunity at or before trial to address whether there is a sufficient basis for a directed verdict or similar determination.

FPL also cites to Metropolitan Dade County v. Colina, 456 So.2d 1233 (Fla. 3d DCA 1984). In Colina, the court reversed a trial court holding which had found that Dade County was not liable for the death of a motorist caused by Dade's failure to place traffic control signs and/or place a repair crew at an intersection (whose power had been cut out due to a storm). In so holding, the Court in

Colina specifically found that Colina could see that the traffic light was not functioning and, by complying with statutory requirements, could have avoided the collision. Id. at 1235. Colina is distinguishable to the instant facts, in that Mrs. Colina at least had the opportunity to see the malfunctioning traffic light, which by running (in violation of Fla. Stat. § 3 16.123(2)(a)) contributed to her collision with another motorist which resulted in her death. Under this application Periera was given no similar opportunity. Mr. Periera did not (and is indeed is willing to demonstrate that he could not) see the unmarked guy wire which injured him.

FPL further cites to Pearce v. D.O.T., 494 So.2d 264 (Fla. 1st DCA 1986), where the court held that the failure of the "off going" gate to come down, whether negligently caused or otherwise, was not the proximate cause of the accident which occurred when the driver of the automobile ignored warning signals and attempted to drive a vehicle across the opening drawbridge. However, Pearce was afforded the opportunity to see the various warning signals given to motorist - including an overhead traffic sign stating "Draw Bridge, Stop When Flashing," two red lights which flashed when the sign was activated, and double red lights on the side of the road which would flash and ring bells on the traffic signal. Moreover, Pearce observed the gate go down and observed other cars ahead of him stop. In this case, Periera was not given these same warnings. No sign, red flashing lights, ringing bells, fluorescent marker or any other signal denoted FPL's placement of the guy wire. The Pearce court further held that the plaintiffs conduct was not foreseeable - as a matter of law- to the DOT because the plaintiff ignored the various warning signs and in fact accelerated in an attempt to jump the draw bridge. However, as contended throughout this brief, the injuries suffered upon Periera as a result of the negligent placement of the guy wire were foreseeable to FPL given the record evidence asserting their knowledge of the dangers and the previous injuries associated with the guy wire.

CONCLUSION

The Fourth District was correct in reversing the lower court's decision to grant summary judgment. Either Powell was wrongly decided or is inapplicable to the particular facts of this case. Companies like FPL should not be provided absolute immunity from liability for dangerous conditions it creates. Alternatively, the issue is one of comparative negligence for the jury.

In sum, FPL's reliance on Powell was misplaced and contrary to the well-established legal principles in this State. The Fourth District properly ruled that Powell wrongly held that a violation of the traffic statute mandates a finding of no duty on the part of the defendant. Respectfully, companies, like FPL, should not be imbued with the ability to capriciously shield themselves from all liability, no matter their level of culpability.

However, regardless of the correctness of the Powell decision, FPL still owed a duty of care to Periera as the record clearly established that it was foreseeable that one might be injured by the negligent maintenance of the guy wire. The deposition of Ms. Martha Murray demonstrated that at least two previous injuries occurred at the site, and FPL was thus on constructive and/or actual notice of the dangerous conditions the guy wire created. An alleged violation of section 3 16.1995, Florida Statutes, is not dispositive of whether FPL owed Periera a duty.

The Fourth District was thus correct in its decision to reverse the trial court's granting of summary judgment in favor of FPL. Respondent Periera respectfully requests this Court affirm the Fourth District's decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S.

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