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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 89,266

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

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

v.

EDWARD PERIERA,

Respondent.

IN ITIAL BRIEF

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PREFACE

In this Brief, Petitioner FLORIDA POWER & LIGHT COMPANY is referred to as "FPL" or "Petitioner."

Respondent EDWARD PERIERA is referred to as "PERIERA" or "Respondent."

Citations to the Appendix are referred to as "App. ___".

STATEMENT OF THE CASE AND OF THE FACTS

In October 1988, PERIERA was intoxicated and riding a motorcycle, at night and without a light, on a bicycle path, when he struck a guy wire of an FPL pole (App. F, p. 1). In December 199 1, PERIERA sued FPL for damages purportedly resulting from injuries sustained in the accident, asserting that FPL failed to properly maintain the guy wire and failed to warn PERIERA of the dangers associated therewith (App. A).

FPL moved for summary final judgment on the grounds that FPL owed no duty to PERIERA, as a matter of law, since PERIERA was in violation of Fla. Stat. § 3 16.1995 (1987), precluding operation of motor-powered vehicles on bicycle paths (App. C). By order dated May 18, 1995, the trial court granted FPL's motion, finding that (i) there was "no genuine issue as to the material fact that . . [PERIERA] was operating his motor powered vehicle upon the bicycle path in violation of. [Fla. Stat. § 3 16.1995 (1987)]" and consequently (ii) FPL "owed no duty to . . . [PERIERA] to take measures to avoid a danger which the circumstances as known to . . [FPL] did not suggest as likely to happen." (App. E). In so ruling, the trial court relied on the opinion of the First District Court of Appeal in Powell v. Florida Dep't of Transportation, 626 So. 2d 1008 (Fla. 1 st DCA 1993), review denied, 639 So. 2d 980 (Fla. 1994). PERIERA appealed, and the Fourth District Court of Appeal reversed the trial court's judgment, certifying its decision to be in conflict with Powell (App. F, p. 2). FPL timely invoked this Court's jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv) (App. G).

ISSUE PRESENTED

Whether FPL owes a duty of care to motorcyclists travelling on bicycle paths in violation of Fla. Stat. § 3 16.1995?

ANSWER

No. A motorcyclist travelling on a sidewalk in violation of Fla. Stat. § 3 16.1995 is outside the foreseeable zone of risk associated with FPL's placement and maintenance of equipment alongside bicycle paths.

SUMMARY OF ARGUMENT

The opinion of the Fourth District Court of Appeal expressly and directly conflicts with the opinion of the First District Court of Appeal in Powell v. State, Dep't. of Transportation, 626 So. 2d 1008 (Fla. 1 st DCA 1993), review denied, 639 So. 2d 980 (Fla. 1994). FPL owes no duty to motorcyclists travelling on bicycle paths in violation of Fla. Stat, § 3 16.1995 because such persons are outside the zone of risk created by FPL's equipment located adjacent to bicycle paths, Therefore, the accident and PERIERA's injuries were unforeseeable as a matter of law. A motorcyclist travelling on a bike path in violation of the statute is essentially a trespasser to whom FPL owes no duty. To hold otherwise would require FPL to become an insurer of persons who wilfully violate applicable law, thus endangering themselves and others.

The appropriate analysis is not one of causation or comparative negligence, but instead is restricted to the issue of duty. This is so because Fla. Stat. §3 16.1995 does not relate to the manner in which PERIERA could operate his vehicle, but instead relates to the location (and thus the zone of risk) in which he was operating his vehicle. Consequently, the doctrine of comparative negligence is inapplicable. Finally, to the extent FPL may have been negligent in the placement or maintenance of its equipment alongside the bike path, such negligence simply furnished the occasion for PERIERA's own negligence, which is the legal cause of his injuries. This Court should disapprove the holding of the Fourth District Court of Appeal and reinstate summary judgement in favor of FPL.

ARGUMENT

I. FPL Owed No Duty To PERIERA As A Matter Of Law

A. PERIERA's Unlawful Operation Of His Motorcycle Was Unforeseeable

The threshold inquiry in any negligence action is the legal question of whether the defendant owed a duty of care to the plaintiff; i.e., "whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." McCain v. Fla. Power Corp., 593 So. 2d 500, 502 (Fla. 1992). Absent a duty to the plaintiff, no actionable negligence exists. Id.; see also Robertson v. Deak Pererra (Miami). Inc., 396 So. 2d 749 (Fla. 3d DCA 1981), review denied, 407 So. 2d 1105 (Fla. 1981).

As this Court has recognized, foreseeability is "crucial in defining the scope of the general duty placed on every person to avoid negligent acts or omissions . a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others." McCain, 593 So. 2d at 503 (emphasis added). In the instant case, the trial court properly recognized that a motorcyclist travelling on a bike path in violation of Fla. Stat. § 316.1995 (1987)[1] is outside FPL's foreseeable "zone of risk" with regard to utility poles and guy wires alongside the bike path.

In Powell v. State. Dep't of Transportation, 626 So. 2d 1008 (Fla. 1st DCA 1993), review denied, 639 So. 2d 980 (Fla. 1994), Powell was injured while riding his motorcycle on a defective sidewalk. The sidewalk was maintained by the Florida Department of Transportation

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1 Fla. Stat. § 316.1995 provides: "No person shall drive any vehicle other than by human power upon a bicycle path, sidewalk or sidewalk area, except upon a permanent or duly authorized temporary driveway." Id. The accident in question occurred in 1988 and was governed by Fla. Stat. § 316.1995 (1987). The statute has not been amended since 1984.

("DOT"). The trial court granted DOT's motion for summary judgment, holding that DOT owed no duty to Powell and that Powell's sidewalk riding -- in violation of Fla. Stat. § 3 16.1995 -- was unforeseeable. The First District Court of Appeal agreed that DOT owed no duty to Powell since "DOT had no duty to foresee, as likely to happen, the use of a sidewalk by a motorcyclist . . . [thus] DOT owed no duty to keep sidewalks safe for motorcycle traffic, [and] no cause of action existed as a matter of law." Id. at 100% 1009. In the instant case, the trial court followed Powell and properly determined that FPL had no duty to foresee the use of the bike path by motorcyclists and thus owed no duty to PERIERA to guard against dangers associated with illegal use of the bike path.

Other jurisdictions have addressed the legal issue presented herein and have applied the rationale of Powell, concluding that the possibility of a motorcyclist unlawfully travelling on a bike path or sidewalk is unforeseeable as a matter of law. In Knapp v. New York Telephone Co., 615 N.Y.S.2d 257 (Sup. 1994), plaintiff sustained injuries while operating his motorcycle on a sidewalk in violation of New York's vehicle and traffic law. Plaintiffs injuries resulted when he encountered a cluster of vines and wires hanging from a telephone pole; the motorcycle became entangled in the wires and flipped over. Plaintiff sued the telephone company (NYT) alleging causes of action in negligence and nuisance. NYT moved for summary judgment, contending that "even assuming that the condition of tangled vines and wires existing at its telephone pole constituted negligence or nuisance on its part, plaintiffs riding of a motorcycle on the sidewalk, in violation of the vehicle and traffic law, was neither foreseeable nor contemplated thereby absolving NYT of legal responsibility for plaintiffs injuries notwithstanding its negligence." Id. at 258-259. Plaintiff opposed the motion, contending that the tangled vines and wires had existed for a long time and constituted an obvious

hazard to "all users of the sidewalk, including pedestrians and bicyclists, and that the issue of whether or not plaintiff as a motorcyclist was a foreseeable user presents a triable issue of fact," Id. at 259.

The court granted NYT's motion for summary judgment, rejecting plaintiffs argument that his operation of the motorcycle on a sidewalk was a foreseeable event:

> [s]uch operation is a violation of § 1225-a of the vehicle and traffic law. Upon this record, the court, even assuming that NYT was negligent in failing to remove the hanging wires, is unable to conclude that plaintiffs cycling on the sidewalk was foreseeable in the legal sense thereby imposing a dutv of care by NYT towards plaintiff. When plaintiff elected to operate his vehicle on the sidewalk as opposed to . [on the roadwavl, he proceeded at his risk, Plaintiff was not a pedestrian or bicyclist. The fact that NYT may have owed such classes of users of the sidewalk a duty of care could not be translated as extending such duty to plaintiff. Absent the existence of a duty of care, an action in negligence based upon a breach of duty does not lie."

Id. at 259-260 (emphasis added). See also, Morel1 v. City of Breaux Bridge, 660 So. 2d 882 (La. App. 1995), writ denied, 666 So.2d 321 (La. 1996). There, the Louisiana Court of Appeals reversed a judgment in favor of a motorcyclist who was injured after he lost control of his motorcycle while riding along a defective sidewalk. In analyzing the issue of whether the town (which was responsible for maintenance of the sidewalk) created an unreasonable risk of harm to the motorcyclist, the court observed:

> A sidewalk is designed and intended to permit pedestrians to walk free from the perils posed by motorized traffic. The risk of harm to one using this particular sidewalk in the manner for which it was intended and designed is not great. The likelihood of a pedestrian suffering serious injury from the missing section of the sidewalk and the drop-off is small because they could be seen and avoided by one traveling at a walking or running speed; similarly, the magnitude of harm one would expect a pedestrian to suffer would be relatively small compared to that suffered by Mr. Morell.
>
> A sidewalk is not intended or designed to serve as a path for motorcycles, especially motorcycles traveling at a high rate of speed. A motorcyclist

> using the sidewalk in the manner Mr. Morell did presents a great danger both to the pedestrians for whom the sidewalk was designed and to the vehicle operator. Had Mr. Morell been a pedestrian, he would not have traveled as fast as he did, and the drop-off would neither have caused him to lose control nor have produced so grievous an injury. His use was clearly not one for which the sidewalk was intended. .

Id. at 884 (emphasis added).

Although Morell involves a discussion of negligence principles under Louisiana law, the foregoing practical observations apply directly to the foreseeability analysis contemplated by McCain. FPL's guy wire was easily visible to persons using the bike path in the manner for which it was intended and the "zone of risk" to such persons is not great since the guy wire could be seen and avoided by one travelling at a walking or bicycling speed. Naturally, the magnitude of harm associated with avoidance of the guy wire by persons lawfully using the bike path would be relatively small compared to the harm PERIERA complains of As the Morel1 court noted, pedestrian or bike paths are not intended or designed for use by motorcycles travelling at a high rate of speed and the motorcyclist unlawfully using such paths not only endangers persons lawfully on the path but also the motorcyclist himself. To hold FPL liable on these facts "would make it an insurer of . . [motorcyclists] who act in disregard of their own safety and that of others." Metropolitan Dade Countvv. Colina, 456 So. 2d 1233, 1235 (Fla. 3d DCA 1984), review denied, 464 So. 2d 554 (Fla. 1985).

The facts of this case are also analogous to those presented in Fla. Power & Light Co. v. Macias, 507 So. 2d I 113 (Fla. 3d DCA 1987), review dismissed, 573 So. 2d 1060 (Fla. 1987), review denied, 518 So. 2d 1276 (Fla. 1987). There, plaintiff was injured when the car in which she was traveling left the roadway out of control and hit a utility pole. Plaintiff sued FPL, contending that

FPL was liable for her injuries as a result of negligent placement and maintenance of the utility pole. At the close of trial, the trial court denied FPL's motion for directed verdict and entered judgment for plaintiff On appeal, the Third District held that the accident was of "an extraordinary nature" and therefore was not "legally foreseeable to FPL [who] owed no duty to guard against it." Id. at 1116. The court reasoned that:

> a utility pole owner. such as FPL. has been said to owe the same duty as a possessor of land who creates an artificial condition thereon . [s]ince the chance that a vehicle in the ordinary course of travel will deviate from the roadway and collide with a pole is only a remote possibility, under certain circumstances it is not a legally foreseeable event [t]hus, merelv placing or maintaining a utility pole in close proximitv to a roadway does not create a dutv on the part of the utilitv company.

Id. at 1115 (citations omitted) (emphasis added)."

Like the plaintiff in Macias, PERIERA seeks to impose liability upon FPL merely by virtue of its placement of the utility pole and guy wire in proximity to the bicycle path at issue in this case. However, as the Third District recognized in Macias, FPL is not obligated "to guard against extraordinary exigencies" resulting from the unforeseeable situation of an intoxicated motorcyclist

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2 PERIERA maintained in briefs to the Fourth District that FPL should be held to a heightened standard of care in connection with location and maintenance of its lines, poles and equipment. FPL does not dispute that utility companies, when engaged in transmitting current, are held to a higher degree of care. However, this principle does not apply in all instances. Review of applicable case law establishes that the higher standard of care is to protect those who use or encounter electricity, which obviously has the unquestioned power to harm, *E.g.*, *McCain*, 593 So, 2d at 504 ("By its very nature, power generating equipment creates a zone of risk that encompasses all persons who forcseeably may come in contact with that equipment . .[I]f there is any general and foreseeable risk of injury through the transmission of electricity, the courts are not free to relieve the power company of this duty." (emphasis added); SEC *also*, *Fla. Power & Light* IX. v. *Bridgeman*, 182 So. 9 I 1 (Fla. 1938) ("those engaged in transmitting current for domestic USC arc not insurers . . , [but] they are held to a high degree of care") (citations and emphasis omitted). This is the precise reason that the duty imposed upon power companies -- with regard to transmission of current -- is a heavy one. However, in this case, the transmission of electrical current had absolutely nothing to do with either the incident or PERIERA's injuries.

operating his vehicle, at night and without a light, on a bicycle path in direct violation of a statute prohibiting such operation. Id. at 1116. See also, Speigel v. Southern Bell Telephone and Telegraph Co., 341 So. 2d 832, 833 (Fla. 3d DCA 1977) (affirming summary judgment in favor of utility pole owner where plaintiff sued for fatal injuries occurring when her automobile collided with the pole; a utility company has "no obligation to guard against extraordinary exigencies created when a vehicle leaves the travelled portion of the roadway out of control").

B. **PERIERA Was A Tresmsser**

By virtue of his violation of Fla. Stat. § 3 16.1995, PERIERA essentially was a trespasser on the bike path. Thus, FPL's only duty was "to avoid wilful and wanton injury to the person and, if the trespasser's presence is known, to warn of dangerous conditions not open to ordinary observation." Fla. East Coast Rv. Co. v. Southeast Bank. N.A., 585 So. 2d 3 **14, 3** 16 (Fla. 4th DCA 1991); see also, Wood v. Camp, 284 So. 2d 691, 693-694 (Fla. 1973) ("It is unreasonable to subject an owner to a 'reasonable care' test against someone who isn't supposed to be there and about whom he does not know. The unwavering rule as to a trespasser is that the property owner is under the duty only to avoid wilful and wanton harm to him and upon discovery of his presence to warn him of known dangers not open to ordinary observation,") (emphasis added). , [illegible], Macias, SO7 So. 2d at 111 S (,'A utility pole owner, such as FPL, has been said to owe the same duty as a possessor of land who creates an artificial condition thereon"); and compare, Webb v. Glades Elec. Co-OP., Inc., 521 So. 2d 258 (Fla. 2d DCA 1988) (utility company which installed guy wire directly over cow path in a pasture owed cowboy a duty to warn of danger associated with guy wire, since cowbov's presence on cow path was foreseeable). No evidence in the record even suggests, much less supports, the conclusion that "wilful and wanton injury" is an issue in this case. Likewise, 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.

Close analysis of the facts of McCain supports this proposition. McCain, the operator of a mechanical trencher, requested that a Florida Power employee inspect an area to determine the location of any underground electrical cable. While in an area the Florida Power employee designated as safe -- i.e., in an area where McCain had every right to be -- McCain's trencher struck a buried cable resulting in McCain's electrical shock and consequent injury. Because McCain was rightfully in the vicinity of the underground cable, he was legitimately within the "zone of risk" created by Florida Power's equipment. Contrastingly, PERIERA was in an area in which he was not expected, or even allowed, to be. He was legally prohibited from operating his motorcycle on the bike path. Consequently, PERIERA was a trespasser, outside any "zone of risk" created by FPL and FPL owed no duty to PERIERA.

II. Comparative Negligence Is Not An Issue In This Case

Bypassing the threshold legal question of whether (and why) FPL owed PERIERA a duty, the Fourth District noted the general principle that violation of a traffic statute "is prima facie evidence of negligence, not negligence per se," (App. F, p. 1), citing de Jesus v. Seaboard Coastline Railroad Co., 28 I So. 2d 198 (Fla. 1973), and concluded that PERIERA's violation of Fla. Stat. § 3 16.1995 should be considered as evidence of negligence." However, examination of the cases relating to statutory violations as evidence of negligence reveals that the issue typically arises where

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3 FPL never maintained -- and does not now maintain -- that PERIERA's violation of Fla. Stat. §3 16.1995 constituted negligence per se (or comparative negligence); FPL's position is that since it never owed PERIERA a duty, the degree to which he was negligent is irrelevant.

the defendant violates a statute.[4] The comparative negligence cases involving statutory violations by a plaintiff are simply inapposite. This is best illustrated by the Fourth District's misplaced reliance on its opinion in City of Tamarac v. Garchar, 398 So. 2d 889 (Fla. 4th DCA 1981), disapproved, Seaboard Coastline Railroad Co. v. Addison, 502 So. 2d 1241 (Fla. 1987).

There, Garchar's vehicle struck a large boulder in the median, located six feet from the road. The road and median were maintained by the city, which was found to be negligent in (i) its design, construction and maintenance of the road and (ii) failing to remove the boulder. The relevant issue before the Fourth District in Garchar was whether the trial court erred by denying a requested jury instruction relating to comparative negligence in connection with Garchar's purported violation of a statute prohibiting driving on the median. The Fourth District concluded that "the trial court did not err in rejecting the requested charges" on the statutory violation.[5] Id. at 894. This Court disapproved Garchar to the extent it conflicted with the ruling that "violation of a traffic ordinance is evidence of negligence, and that when there is evidence of such a violation a requesting party is entitled to have the jury so instructed," Addison, 502 So.2d at 1242.

4 *E.g., Winemiller v. Feddish,* 568 So. 2d 483 (Fla. 4th DCA 1990) (bicyclist who was injured when he struck coral rock in swale of defendant homeowner's property was entitled to jury instruction regarding defendant's violation of ordinance prohibiting placement or maintenance of coral rocks near public right of way); *Chimerakis v. Evans,* 221 So. 2d 735, 736 (Fla. 1969) (defendant's violation of a traffic ordinance in automobile accident case "was prima facie of negligence which should have been submitted to the jury along with other evidence in the case, including defendant's admission of guilt."); *de Jesus,* 281 So. 2d 198 (defendant railroad's violation of statute requiring railroads to warn automobile drivers of approaching trains constituted negligence per *se); see also, Gabriel v. Tripp,* 576 So. 2d 404 (Fla. 2d DCA 1991) (plaintiff who allegedly contacted sexually transmitted disease from defendant could state cause of action for negligent transmission of sexually transmitted disease based upon defendant's violation of statute making transmission of sexually transmitted disease a first degree misdemeanor).

5 In its opinion *sub judice*, the Fourth District indicated that in ***Garchar*** it "rejected the city's argument **that** it **owed no duty** to plaintiff." Although the Fourth District held that the city owed plaintiff a duty, the basis for such holding was that the city was responsible for maintenance of the road and median. *Garchar, 398* So.2d at 892.

The critical facts distinguishing Garchar (and other comparative negligence cases) from this case are that (i) Garchar was lawfully operating his vehicle on a roadway; (ii) the city unquestionably owed motorists like Garchar a duty to properly design and maintain the road and median; and (iii) the evidence established that the defective design of the road created "the effect of channeling vehicular traffic onto the median. . [T]his was arguably the intentional creation of a dangerous condition rather than a mere negligent act." Id. at 893. In other words, Garchar found himself travelling on the median due to the Citv's negligence, not due to a choice he made to violate the traffic statute. The facts of Garchar are thus distinguishable from the instant case since PERIERA was not unwillingly or unwittingly channeled into driving his motorcycle on the bike path; instead, he consciously chose to do so in violation of Fla. Stat. § 3 16.1995. The Fourth District erred by concluding that PERIERA's violation of the statute "does not relieve FPL of a duty as a matter of law" (App. F, p. 2) (emphasis added); as a matter of law, FPL **never owed PERIERA a duty**.

The following discussion in the Garchar opinion demonstrates the foregoing distinction:

> It is clear that governmental entities may have a duty to exercise reasonable care to maintain travelled portions of highways in a safe condition. . , [Relying on law] that a City owes no duty to provide pedestrians with reasonably safe parkways and roadways, [the citvl reasons that if a median strip need not be made safe to walk upon, then it surely need not be made safe to drive upon This leads to appellant's first point on appeal asserting the non-existence of any duty to provide crashworthy areas adiacent to roadwavs. Such cases are simplv not applicable where. as here, the City knew that due to misdesign and improper maintenance, cars were being channelled into driving over the median,

Garchar, 398 So.2d at 893 (citations omitted) (emphasis added).

Furthermore, the theory that PERIERA's violation of Fla. Stat. § 3 16.1995 is evidence of negligence to be considered in a comparative negligence analysis overlooks the fundamental

purpose of the statute. Fla. Stat, § 3 16.1995 does not mandate "how" a vehicle is to be operated (e.g., speeding, turning, passing, etc.). Instead, the statute explicitly regulates where a vehicle may, or in this case, may not be operated and expressly prohibits operation of motor powered vehicles on bicycle paths. Violations concerning how a vehicle is operated may relate to proximate cause and comparative negligence, but violations concerning where a vehicle may be operated are threshold duty issues. Unlike Garchar, PERIERA was never operating his vehicle in a place where he was permitted to do so. Accordingly, the appropriate analysis is not at the causation level, but instead is at the threshold duty level.

III. PERIERA's Actions Were The Sole Proximate Cause Of His Injuries

The Fourth District opined that although PERIERA's "violation of the statute may be evidence of his negligence, FPL would still have to show that the violation of the statute was a proximate cause of the injury." (App. F, P. 1). This finding presupposes that FPL owed PERIERA a duty; to the extent the Fourth District reached such a conclusion, no explanation is given. Even if FPL were deemed to owe PERIERA a duty, it is undisputable that PERIERA's violation of the statute was the sole proximate cause of his alleged injuries; obviously, if PERIERA had not been operating his motorcycle unlawfully on the bike path, he would not have encountered FPL's guy wire. The facts *sub judice* warrant application of the principle that even if FPL was negligent in maintaining the utility pole and guy wire and such negligence was the factual cause of PERIERA's injuries, FPL's "negligence simply provided the occasion for the negligence of another." Dep't of Transportation v. Anglin, 502 So, 2d 896, 898 (Fla. 1987).

Under these circumstances, reasonable persons could not differ on the proximate cause issue and FPL should not be held liable as a matter of law. Anglin, 502 So.2d at 899; see also. Hahn v. Amcar, Inc., 584 So. 2d 1089, 1092 (Fla. 5th DCA 1991) ("The law is well settled in this state that a remote condition or conduct which furnishes only the occasion for someone else's negligence is not a proximate cause of the result of the subsequent negligence. . . . The determination *vel non* of proximate cause as matter of law is a policy decision that the range of danger is too remote to be reasonably foreseeable"), quoting Mathews v. Williford, 3 16 So. 2d 480 (Fla. 2d DCA 1975) and Barati v. Aero Industries, 579 So. 2d 176 (Fla. 5th DCA 1991).

Metropolitan Dade County v. Colina, 456 So. 2d 1233 (Fla. 3d DCA 1984), review denied, 464 So. 2d 554 (Fla. 1985), demonstrates application of the foregoing principle to facts similar to those presented here. Martha Colina was a passenger in a vehicle being driven by Mr. Colina; storms had caused power outages and the traffic light at the subject intersection was out. Dade County had not placed traffic control signs at the intersection nor had it dispatched a repair crew. Mr. Colina approached the intersection, stopped consistent with Fla. Stat. § 316.1235 (requiring all motorists to stop at an intersection where traffic lights are inoperative) and then proceeded ahead of other approaching vehicles, rather than yielding, as required by Fla. Stat. § 3 16.123(2)(a). One of the approaching vehicles did not stop (in violation of Fla. Stat. § 3 16.1235) and collided with the Colina vehicle, resulting in Mrs. Colina's death. Mr. Colina sued Dade County and Masferrer, the driver of the other vehicle; the jury apportioned negligence 75% to Masferrer and 25% to the county.

Dade County appealed, arguing that the trial court erred in refusing to grant its motion for directed verdict, The Third District agreed and reversed, finding that "reasonable people could

[not] differ on the question of whether the county's omission to act was a proximate cause of Mrs. Colina's death." Id. at 1234. The court observed that "although he realized the intersection presented a danger and that Masferrer might not stop, Mr. Colina proceeded across the intersection hoping to beat the oncoming vehicles. He would be expected, as a matter of law, to cross the intersection only when it was reasonably safe to do so." Id. at 123 5. Thus, "[a]ny negligence on Dade County's part simply provided the occasion for the actions of Masferrer and Colina, which together were the proximate cause of Mrs. Colina's death . both Masferrer and Colina could see that the traffic light was not functioning and. by complying with statutory reauirements. could have avoided the collision." Id. (emphasis added), citing Banat v. Armando, 430 So. 2d 503 (Fla. 3d DCA 1983), review denied, 446 So. 2d 99 (Fla. 1984).

Similarly, PEFUERA was expected, as a matter of law, to comply with statutory requirements; had he done so, he would have avoided the collision with FPL's equipment. See also, Pearce v. State. Dep't of Transportation, 494 So, 2d 264 (Fla. 1st DCA 1986) (failure of "off going" gate to come down, even if due to negligence of DOT, was not the proximate cause of plaintiffs injuries where plaintiff ignored warning signals and attempted to drive car over opening drawbridge; DOT had no duty to guard against plaintiffs failure to heed warning signals); Barati v. Aero Industries, Inc., 579 So, 2d 176 (Fla. 5th DCA 1991), review denied, 591 So. 2d 180 (Fla. 1991) (mechanic who was injured while repairing tarpaulin pulling mechanism on trailer had no product liability claim against manufacturer of mechanism where injuries resulted from mechanic's improvident choice of repair method; affirming summary judgment in favor of manufacturer); Banat v. Armando, supra (truck owner's negligence in leaving hydraulic lift in rear of truck down while operating truck in traffic furnished the occasion for injury to passenger in car which crashed into rear

of truck when car's brakes failed, but was not a proximate cause of injury as a matter of law since original negligence was remote and brake failure was a superseding cause of plaintiffs injuries); Ruiz v. Taracoma Townhomes Condo. Ass'n, 525 So. 2d 445 (Fla. 3d DCA 1988) (affirming summary judgment against plaintiff where record conclusively demonstrated that the sole proximate cause of plaintiffs injuries was the negligence of a third party).

CONCLUSION

Following Powell, the trial court properly determined that PERIERA's motorcycling on the bicycle path in violation of Fla. Stat. § 316.1995 was unforeseeable as a matter of law and therefore FPL owed no duty to PERIERA. The opinion of the Fourth District expressly and directly conflicts with the opinion of the First District in Powell. For the reasons set forth above, FPL submits that the reasoning of the First District is correct and should be the law of the State of Florida. Accordingly, FPL requests that this Court accept jurisdiction of this cause and resolve the conflict between Powell and the Fourth District's opinion in the instant case by remanding this case to the trial court with instructions to reinstate the final summary judgment in favor of FPL.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief was served by U.S. Mail upon THOMAS E. BUSER, ESQ., 700 Southeast Third Avenue, Courthouse Law Plaza, Suite 100, Fort Lauderdale, Florida 333 16; WALTER WOLF KAPLAN, ESQ., One East Broward Boulevard, Suite 700, Fort Lauderdale, Florida 33301, and SCOTT A MAGER, ESQ., Mager & Associates, P.A., One East Broward Boulevard, Barnett Bank Tower, Seventeenth Floor, Fort Lauderdale, Florida 33301, this 27th day of December, 1996.

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