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,

REPLY 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 to FPL's Initial Brief are designed as "App. __"; citations to the Appendix to this Brief are designated as "R-App. __".

ARGUMENT

A. There is No Record Evidence of Prior Accidents Involving The Subject Guy Wire

Periera globally contends that FPL is under a duty to prevent the injuries inevitably resulting when an intoxicated motorcyclist unlawfully operates his motorcycle on a sidewalk, at night and without a light. The factual backbone of this contention (in all of its forms) is Periera's erroneous assertion that FPL knew of two purported prior bicycle accidents involving the subject guy wire. [Answer Brief, pp. 1,3,4 (fn.1),11,12,13,14 (fn.5),16,17,19]. To support these arguments, Periera relies solely upon the deposition testimony of Martha Murray. Id.

Contrary to Periera's assertions, there is no record evidence of any notice to FPL regarding any such accidents. **The record before the trial court does not include the deposition of Martha Murray.** Periera filed the Murray deposition on August 4, 1995, two months after entry of summary judgment against Periera and one month after Periera filed his notice of appeal from the summary judgment. R-App. A. Neither the deposition itself nor any excerpts therefrom were in the record prior to or at the time of entry of judgment. Id.

It is fundamental that an appellate court will not consider evidence which was not presented to the trial court; this principle "is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court." Altchiler v. State, Dep't of Profl Regs., 442 So.2d 349, 350 (Fla. 1st DCA 1983). The reason for this rule is that:

> [a]n appeal has never been an evidentiary proceeding; it is a proceeding to review a judgment or order of a lower tribunal based upon the record made before the lower tribunal. An appellate court will not consider evidence that was not presented to the lower tribunal because the function of the appellate court is to determine whether the lower tribunal committed error based on the issues and evidence before it.

Hillsborough County Bd. of County Comm'rs v. Public Employees Relations Comm'n, 424 So.2d 132, 134 (Fla. 1982) (citations omitted)(emphasis added).

Since the Murray deposition was not filed until after the trial court lost jurisdiction[1/], under no scenario could the deposition be part of the record upon which the trial court based its decision. See also, Fla. R.Civ.P. 1.510(c) (party opposing summary judgment must serve opposing affidavits at least two business days prior to hearing); see also, Liberman v. Rhyne, 248 So.2d 242, 245 (Fla. 3d DCA 1971), cert. denied, 252 So.2d 798 (Fla. 1971) ("The only documents, which may be considered by the court on a motion for summary judgment are those which have been filed at the time of the motion unless the court reserves jurisdiction in order to permit additional pleadings, affidavits or discovery to be taken and filed"); Dep't of Revenue v. B&L Concepts, Inc., 612 So.2d 720, 722 (Fla. 5th DCA 1993) (trial court properly declined to consider depositions in opposition to summary judgment where depositions were "untimely filed on the date of the hearing").

Moreover, the order granting summary judgment does not refer to the deposition or contain any findings related thereto; in fact, if the trial court did consider the deposition, it did not consider the material persuasive, as evidenced by its finding that 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)(emphasis added). Naturally, it follows that the Fourth District could not consider the deposition?'

1/ It is noteworthy that FPL's motion for summary judgment was filed March 7, 1995 and the hearing thereon occurred May 12, 1995 (R-App. A); Periera took Murray's deposition (and the same was transcribed) in September 1992 -- nearly three years before the summary judgment hearing.

2/ In its answer brief to the Fourth District, FPL objected to Periera's reliance on the deposition; it is unclear whether the Fourth District considered the deposition to be part of the record.

Accordingly, the Murray deposition has no relevance to the issues before this Court and all references thereto should be stricken or, at least, ignored as being outside the record.

FPL expects Periera to argue that by virtue of references to the Murray deposition in Periera's Memorandum in Opposition to FPL's Motion for Summary Judgment, the Murray deposition was before the trial court. However, no portion of the Murray deposition which was discussed in the Memorandum is included within the record; the Memorandum does not even quote excerpts or attach pages of the deposition. "Factual matters originating in a memorandum of law are unproven utterances documented only by an attorney and are not facts that a trial court or . . . [an appellate] court can acknowledge." Lanahan Lumber Co.. Inc. v. McDevitt & Street Co., 611 So.2d 591, 592 (Fla. 4th DCA 1993) (citation omitted); see also, Blimpie Capital Venture, Inc. v. Palms Plaza Partners, Ltd., 636 So.2d 838,840 (Fla. 2d DCA 1994) (trial and appellate courts are "precluded from considering as fact unproven statements documented only by an attorney"); First Nat'1 Bank in Ft. Lauderdale v. Hunt, 244 So.2d 481, 482 (Fla. 4th DCA 1971) (exhibits to a motion for summary judgment "are not a proper part of the record to be presented to , . , [the appellate] court in support of the lower court's findings of fact where the exhibits were never admitted in evidence").

Even if the Murray deposition was in the record, there is no evidence that FPL received actual notice of the prior alleged accidents. Indeed, Ms. Murray testified that she did not think she reported the incidents to the proper personnel:

> Q. After those instances where people got hurt by this guy wire, had you ever contacted Florida Power & Light and requested that they either place some markings on it or move the guy wire to make it safer?
>
> A. I recall. mentioning it to them but I honestly don't believe that I was talking to the right department at the time.
>
> Q. Who did you call?

A. I talked to the people who had installed it, I don't know, the halogen light or street light on that same pole to light up my yard.

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Murray Deposition, p. 10.

Finally, "evidence of prior accidents is admissible only if it pertains to the use of the same type of appliance or equipment under substantially similar conditions" and if the prior accidents are "not too remote in time." Frazier v. Otis Elevator Company, 645 So.2d 100, 101 (Fla. 3d DCA 1994); see also, Railway Express Agency, Inc. v. Fulmer, 227 So.2d 870,873 (Fla. 1969) ("Evidence of the occurrence or nonoccurrence of prior accidents is admissible only if it pertains to the use of the same type of appliance or equipment under substantially similar conditions... [and the accidents are] not remote in time").

There is no evidence that the circumstances surrounding the purported prior accidents were similar to those surrounding Periera's accident; instead, Ms. Murray's testimony establishes that the purported prior accidents occurred under entirely different circumstances than those ***sub judice***. Specifically: (i) the parties in both accidents were using different equipment -- i.e., riding bicycles (which are permitted on bicycle paths) as opposed to motorcycles (which are not permitted on bicycle paths); (ii) both incidents occurred during daylight hours; and (iii) there is no evidence that the allegedly injured parties (both of whom were small children) were intoxicated. Furthermore, there is no evidence as to when the alleged accidents occurred so there can be no determination as to whether the events are too remote in time.

For each and all of the foregoing reasons, Ms. Murray's testimony has no relevance whatsoever to a determination of whether and to whom FPL owed a duty with regard to the subject guy wire.

B. Powell Was Not Wrongly Decided

Powell v. State, Dep't of Transportation, 626 So.2d 1008 (Fla. 1st DCA 1993), review denied, 639 So.2d 980 (Fla. 1994) was decided correctly and is in direct conflict with the Fourth District's opinion in the case ***sub judice***. In Powell, the First District applied the rationale articulated by this Court in McCain v. Fla. Power Corn., 593 So.2d 500 (Fla. 1992) and held as a matter of law that DOT owed motorcyclists no duty to make sidewalks safe since Fla. Stat. § 316.1995 prohibits motorcycle traffic on sidewalks.

Periera suggests that the First District may have improperly analyzed whether DOT could have foreseen the specific manner in which plaintiffs injuries occurred, contra McCain. Answer Brief, p. 7. The Powell opinion lends no support to this assertion and in fact directly contradicts it, as the First District expressly found that, in light of Fla. Stat. § 316.1995, a motorcyclist was outside DOT's foreseeable zone of risk with respect to the sidewalk. "DOT had no duty to foresee, as likely to happen, the use of a sidewalk by a motorcyclist." Powell, 626 So.2d at 108; accord, Rice v. Fla. Power & Light Co., 363 So.2d 834, 389 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 460 (Fla. 1979) (where FPL had no notice of individuals flying model airplanes with electrical conductors and exposed overhead lines were clearly visible from the ground,, "it would be beyond the bounds of reason to require FPL to foresee" electrocution of plaintiffs decedent when model airplane hit lines.).

Periera also attempts to distinguish Powell from the case at bar on the ground that in Powell, DOT apparently had no notice of any defects in the sidewalk prior to the accident?/ Based on the extra-record testimony of Martha Murray, Periera erroneously contends that, unlike the DOT in Powell, in this case FPL was on notice of a potential dangerous condition associated with the guy wire. As established above, there is no record

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3/ Periera's suggestion is unsupported; the Powell opinion does not indicate whether there was -- or was not -- evidence of prior accidents.

evidence -- just as there apparently was no record evidence in Powell -- that FPL was aware of any dangerous condition associated with the guy wire. Thus, the facts of this case are easily reconciled with the facts of Powell and the trial judge correctly determined that pursuant to Powell, FPL owed Periera no duty as a matter of law.

Periera states that the "impropriety" of the Powell decision is best illustrated by the Fourth District's holding in City of Tamarac v. Garchar, 398 So.2d 889 (Fla. 4th DCA 1991), disapproved, Seaboard Coastline Railroad Co, v. Addison, 502 So.2d 1241 (Fla. 1987). However, Periera's assertion that the Garchar "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 travelling on the median" (Answer Brief, pp. 2,6) misstates the holding of Garchar.

In Garchar, the evidence established that the defendant city knew a particular roadway was defectively designed and maintained[4/] so that "vehicular traffic was charmelled or led into the median strip." Id. at 892. Garchar sued the city for injuries he suffered when his car left the roadway and collided with a large boulder in the median strip.[5/] Following entry of judgment for Garchar, the city appealed.

4/ Significantly, Garchar did not involve the question of whether the city owed motorists a duty to maintain the roadways on which vehicles could lawfully travel; that issue was never in dispute. Similarly, FPL does not dispute that it may owe a duty to persons lawfully using the bike path, such as pedestrians and bicyclists.

5/ Interestingly, Periera agrees that Garchar was lawfully operating his vehicle on the roadway but erroneously contends that "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 the statute when the defendant's negligence caused injuries." Answer Brief, p. 6. The flaw in Periera's logic is obvious -- Garchar was lawfully operating his vehicle on the roadway when his vehicle was channelled into the median due to the City's negligence; Periera was unlawfully operating his vehicle on the bike path when he collided with the guy wire due to his own negligence.

The Fourth District concluded that the trial court did not err in rejecting requested jury instructions on comparative negligence with regard to Garchar's purported violation of Fla. Stat. § 316.090 prohibiting driving on the median. Id. at 894. This Court, in Seaboard Coastline v. Addison, SO2 So.2d 1241 (Fla. 1987), disapproved Garchar to the extent it conflicted with the ruling that a plaintiffs violation of a traffic ordinance is evidence of negligence, and "when there is evidence of such a violation a requesting party is entitled to have the jury so instructed." Id. at 1242.

Nowhere in Garchar (or Addison) is there any holding that the city owed Garchar a duty to provide Garchar .a duty of care *vis a vis* the median; Garchar's purported violation of Fla. Stat. § 316.090 had nothing to do with the issue of what duty the city owed Garchar? Unlike the instant case, Garchar involved issues of comparative negligence, not duty, and is of absolutely no precedential value to these facts.

C. As a Matter of Law. FPL Owed Periera No Duty

In his zeal to avoid the civil consequences of his criminal actions, Periera has confused factual issues relating to proximate cause with legal issues relating to duty. Periera contends that "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." Answer Brief, p. 8. This argument overlooks the distinction

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6/ To the extent Periera relies on Garchar to establish that FPL owes a duty to motorcyclists using the bike path in violation of Fla. Stat. § 316.1995, Periera is hoisted by his own petard. The Fourth District expressly found that the city did not owe motorists a duty to make medians safe for vehicles. The city had maintained that since a municipality owes pedestrians no duty to provide safe roadways, it should not owe Garchar a duty to provide a crashworthy median strip. The Fourth District agreed: "[T]here is no duty required of a public authority to provide a crashworthy median strip; however, this is simply not the issue presented in this case ... [since] the city knew that due to misdesign and improper maintenance, cars were being channeled into driving over the median." Id. at 892-893. In stark contrast to the facts of Garchar, Periera was not channeled into the bike path by any independent force (except, perhaps, demon rum).

between duty and proximate cause. "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, 593 So.2d at SO4 (emphasis in original); see also, Powers v. Ryder Truck Rental. Inc. 625 So.2d 979, 980 (Fla. 1st DCA 1993) ("Duty exists as a matter of law and is not a factual question for the jury to decide...foreseeability as it relates to proximate cause, however, is a specific factual question as to what extent a defendant's conduct foreseeably and substantially caused the specific injury that actually occurred").

Absent a legal determination of duty, the factual inquiry of whether and to what extent a party's conduct foreseeably and substantially caused injury is irrelevant -- duty "is a minimal threshold legal requirement to opening the courthouse doors, whereas . . . [proximate cause] is part of the much more specific factual requirement that must be proved to win the case once the. courthouse doors are open." McCain, 593 So.2d at SO2 (emphasis in original). Oblivious to the foregoing distinction, Periera leapfrogged into a factual proximate cause analysis, wholly failing to address the legal issue of whether FPL owed a duty to Periera as a matter of law.

As the Powell court properly held, persons operating motorcycles on sidewalks (or bicycle paths) in violation of Fla. Stat. § 316.1995 (1987) are outside the foreseeable zone of risk with regard to the sidewalk. See also, Knapp v. New York Tel. Co., 615

N.Y.S.2d 257, 259, 161 Misc.2d 878 (Sup. 1994)[7]; Morell v. City of Breaux Bridge, 660 So.2d 882 (La. App. 1995), writ denied, 666 So.2d 321 (La. 1996).

Periera's reliance on Webb v. Glades Electrical Co-Op. Inc., 521 So.2d 258 (Fla. 2d DCA 1988) is misplaced. There, Webb, a cowboy, was riding his horse and pursuing a cow through a pasture where defendant had installed a guy wire "directly over the easily recognizable cow path." Id. at 259. The obvious distinction between Webb and the case *sub judice* is that the defendant had every reason to expect cowboys to be riding horses on cow paths in the pasture; contrastingly, FPL had no reason to expect that Periera would be riding a motorcycle on a bicycle path in direct violation of a statute prohibiting such activity. Moreover, the pre-McCain Webb 'court did not address the issue of duty as a legal threshold to a negligence claim. The Webb court properly found that "utilities have a duty to exercise care, both in the location or construction and in the use and maintenance of lines, poles and equipment," but then analyzed duty in proximate cause terms:

> The foreseeability of an injury is a prerequisite to the imposition of a duty upon a defendant . . . It is not necessary that the exact nature and extent of the injury, or the precise manner of its occurrence, be foreseen; rather, it is essential only that some injury occur in a generally foreseeable manner as a likely result of the negligent conduct . . . [Webb's allegations] were adequate to raise an issue of foreseeability to be determined by the trier of fact.

Id. at 520-521, citing Padgett v. West Fla. Elec. COOP., 417 So.2d 764 (Fla. 1st DCA 1982).

7/ The Knapp court was confronted with the same argument Periera makes to this Court; i.e., that a bicyclist could have suffered the same injury as a motorcyclist even though a bicyclist would lawfully be travelling on the path. However, the issue before this Court is not whether a *bicyclist* was within FPL's foreseeable zone of risk with regard to the guy wire; the issue is whether a *motorcyclist, operating his vehicle in violation of Fla. Stat. § 316.1995,* was within FPL's foreseeable zone of risk. To paraphrase the Knapp opinion, when Periera elected to operate his motorcycle on the bicycle path as opposed to on the roadway, he proceeded at his own risk. He was not a pedestrian or bicyclist and the fact that FPL may have owed those users a duty of care does not establish a duty of care to Periera. Id. at 259-260.

Periera's reliance on Padgett, supra, is likewise misplaced. In Padgett, another pre-McCain case, plaintiff's decedent was electrocuted after his car struck a power pole. The issue presented was whether the power company's alleged negligence was the proximate cause of the decedent's injuries ("Whether any negligence has occurred . . . turns on whether such negligence can be considered the proximate cause of the accident") Id. at 766. The Padgett court's decision to reverse a summary judgment in favor of the defendant power company was based on its determination that there was "a question of fact whether acts of the appellee constituted the proximate cause of Tommy Padgett's death." Id. at 765.

Crislip v. Holland, 401 So.2d 1115 (Fla. 4th DCA 1991), review denied sub nom., 411 So.2d 380 (Fla. 1991) is also distinguishable from the instant case. The issue there was whether injuries plaintiff sustained when she was ejected from a vehicle and hurled into a utility pole in which the city had installed a spike "were a foreseeable consequence of the purportedly negligent acts of the defendant city." Id. at 1116. The Fourth District reasoned that "[i]f the plaintiffs injuries were not a foreseeable consequence of the city's conduct, then the city cannot be held liable for such injuries," and determined that the answer to this question was for the trier of fact. Id. at 116-1117. Like Webb and Padgett, Crislip is a factual proximate cause analysis, not the legal duty analysis contemplated by McCain.

Periera expansively contends that "the violation of any statutory directive would preclude a complainant from any recovery, notwithstanding the obvious culpability of the person responsible for the injury," and catalogues a parade of hypothetical injustices. Answer Brief, pp. 5-6. None of Periera's examples, however, has any bearing on the present situation, since each of the examples involves a fact based comparative negligence analysis, as opposed to a threshold legal determination of duty.

D. Periera's Actions Were the Sole Proximate Cause of His Iniuries

This Court has held that where a defendant's negligence[8/] furnishes only the occasion for the negligence of another, as a matter of law and policy, the original negligent actor should not be held liable as a matter of law. Dep't of Transportation v. Anglin, 502 So.2d 896 (Fla. 1987); see also, Hohn v. Amcar. Inc., 584 So.2d 1089 (Fla. 5th DCA 1991). As was the case in Anglin, FPL's conduct, even if negligent, did not set in motion a chain of events resulting in Periera's injuries; the guy wire's presence simply provided the occasion for the injuries inevitably resulting from Periera's own negligence -- illegally operating his motorcycle on a sidewalk, at night without a light and while intoxicated. None of the foregoing facts is in dispute, and since reasonable persons could not differ on the issue of the true cause of Periera's injuries, FPL should not be held liable as a matter of law. Id. at 899; see also, McCain, 593 So.2d at 504 (where reasonable persons can differ on proximate causation, a jury must decide the issue but "where the facts are unequivocal, such as where the evidence supports no more than a single reasonable inference," the issue must be decided as a matter of law) (citations omitted).

Periera argues that Pearce v. State, Dep't of Transportation, 494 So.2d 264 (Fla. 1st DCA 1986) and Metropolitan Dade County v. Colina, 456 So.2d 1233 (Fla. 3d DCA 1984), review denied, 464 So.2d 554 (Fla. 1985) are distinguishable from the instant

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8/ Periera contends that "the issue of comparative negligence is ultimately beyond the scope of this appeal." Answer Brief, p. 14). FPL agrees with Periera that comparative negligence should not be an issue in this appeal. FPL has never maintained -- and does not now maintain -- that Periera's violation of Fla. Stat. § 316.1995 constituted comparative negligence; FPL's position is that since it never owed Periera a duty, the degree to which he was negligent is irrelevant. However, the Fourth District opined that Periera's violation of Fla. Stat. § 316.1995 should be considered as evidence of comparative negligence. It is precisely this suggestion that reveals the flaw in the Fourth District's analysis -- like Periera does here, the Fourth District bypassed the question of whether a duty exists at all and proceeded directly to a causation inquiry.

case because the plaintiffs in those cases were given warnings in the form of traffic lights[9/], which the plaintiffs apparently ignored. This argument is factually unsupported (since there is no evidence indicating whether or not any prohibitory signs were posted on the bike path) and legally unfounded. Just like the plaintiffs in Colina and Pearce, Periera absolutely= given a "warning" against his operation of a motorcycle on the bicycle path -- the legislature decidedly warned all motorcyclists of the dangers of operating their vehicles on bike paths when it enacted Fla. Stat. § 316.1995 (1987) which unequivocally prohibits such activity. It defies logic for Periera to contend that had there been a "red light" prohibition against his operation of the motorcycle on the bike path, the causation analysis would differ.

As this Court has observed, "[T]he policy of the law will of course not allow tort liability to attach to all conduct factually 'caused' by a defendant." Anglin, 502 So.2d at 899. *Amicus* has fully briefed the policy considerations surrounding the facts of this case and rather than belabor the point, FPL simply adopts and incorporates the position of the Florida Defense Lawyers Association, as set forth in pp. 9-14 of its brief.

9/ In fact, Colina concerned a nonfunctioning traffic light whose utility as a warning device is open to serious question.

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 Reply Brief was served by U.S. Mail upon THOMAS. E. BUSER, ESQ., 700 Southeast Third Avenue, Courthouse Law Plaza, Suite 100, Fort Lauderdale, Florida 33316; WALTER WOLF KAPLAN, ESQ., One East Broward Boulevard, Suite 700, Fort Lauderdale, Florida 33301; PAUL R. REGENSDORF, ESQ., Fleming, O'Bryan & Fleming, P.A., 500 East Broward Blvd., 7th Floor, Ft. Lauderdale, Florida 33394; RICHARD A. BARNETT, ESQ., 121 South 61st Terrace, Suite A, Hollywood, Florida 33023; and SCOTT A. MAGER, ESQ., Mager & Associates, P.A., One East Broward Boulevard, Barnett Bank Tower, Seventeenth Floor, Fort Lauderdale, Florida 33301, this 3rd day of March, 1997.

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