IN THE SUPREME COURT
STATE OF FLORIDA

FLORIDA SUPREME COURT CASE NO. SC02-1033

BELLSOUTH TELECOMMUNICATIONS, INC.,
Petitioner,

v.

5DCA CASE NO. 5D01-1805

LINDA MEEKS, PERSONAL REPRESENTATIVE OF THE ESTATE OF HERBERT J. MEEKS, DECEASED,
Respondent.
/

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The question certified to this Court relates to the Fifth District Court of Appeal's determination that Florida's Wrongful Death Act does not limit the recovery of a minor child's claim of lost parental companionship and mental pain and suffering for the wrongful death of a parent to the period of minority as defined in the act. (Slipsheet at 13-14).

[1] The claim arises out of Herbert Meeks' death on December 15, 1997, when a rotted out BellSouth telephone pole fell across a rural road in St. Augustine, causing his electrocution. The question certified relates only to the damages recoverable on behalf of Kevin Meeks, son of Herbert Meeks. Kevin Meeks was 24 at the time of his father's death, a minor under the Act.

The Fifth District Court of Appeal reversed the trial court's decision which limited Kevin's claim for loss of parental companionship until only his twenty-fifth birthday. Thereafter, the Fifth District certified the following question, finding it to be one of great public importance:

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[1] The plaintiff's complaint alleged negligence by both BellSouth and Florida Power & Light Company ("FPL"). After reaching a settlement with plaintiff, Florida Power & Light Company was dismissed as a party. (R VII:1271).

ARE THE DAMAGES RECOVERABLE BY A MINOR CHILD PURSUANT TO SECTION 768.21(3), FLORIDA STATUTES, LIMITED TO THE PERIOD OF MINORITY?

(Slipsheet at 14).

BellSouth Telecommunications, Inc. ("BellSouth") seeks review in this Court and has further requested that the Court address an altogether different issue, outside its discretionary review, and also reverse the Fifth District's considered opinion that summary judgment in the underlying action was inappropriate due to the existence of numerous factual issues. The plaintiff's amended complaint for the wrongful death of Herbert J. Meeks alleges BellSouth owned the pole which carried the electrical wires, and failed to maintain said pole, thereby breaching its duty to the public at large and specifically causing the death of Mr. Meeks. (R 1:19-24). Mr. Meeks was electrocuted when BellSouth's rotted pole fell, allowing electrical lines to come in close proximately to the ground. (R II:392-397; R I:112, 117-120; R II: 273; R IV:673; R IX:1684). The Appellate Court found evidence in the record showing that BellSouth had a duty to inspect and maintain the pole in a reasonably safe condition. (Slipsheet at 5).

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[2] For the sake of specificity, the citations are to the Slipsheet Opinion of Meeks v. BellSouth, reported at 27 Fla.L.Weekly D679 (June 13, 2002).

On the day of the accident, Herbert Meeks had left his home, proceeding west on Poa Boy Farms Road, at approximately 5:30 p.m., to run an errand for a family member. (R II:490; R I:115). Sadly, Herbert Meeks never reached his destination. As he was traveling on Poa Boy Farms Road his path was blocked by a downed BellSouth telephone pole which was suspended perpendicular across the road, approximately one to three feet above the ground, by two electrical lines carrying over 13,000 volts. (R II:392-405; R I:112, 117-120, 187-90, 197-99). The parties stipulated that the pole fell across the road on the date of the accident due to its rotten base. (R II:273; R IV:687-88, 730).

Herbert Meeks stopped and exited his vehicle approximately 50 to 100 yards from the pole. (R II:399-404). Unknown to Mr. Meeks, the saturated ground was alive with electricity, due to the close proximity of the electrical wires. (R VI:1009-12, 1025-32; R IV:809-10). Mr. Meeks was violently killed while approximately 10 to 15 feet from the downed pole, when the electrical current entered through his boots. (R VI:1008-12, 1040; R III:624-25, 628, 641; R IV:808-09, 813).

[3]

As the Fifth District recognized, the rotten pole, BellSouth pole number 5, was owned by BellSouth at the time of the accident. (Slipsheet at 5). (R I:25-29, 48-53, 71-73, 118-19; R IV:673; R IX:1684-85). Plaintiff adduced abundant record evidence to support this finding including the ownership tag on the pole, the markings and equipment on the pole, as well as BellSouth's own plats.

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[3] For the first time during four years of litigation, BellSouth now concedes there is no dispute regarding the cause of Mr. Meeks' death. (Merits Brief, page 5). Prior to submission of its brief on the merits, BellSouth had strenuously maintained Mr. Meeks had been struck by lightening! (R XII:2204).

(R I:118-20; R XI:2104-05, 2111, 2124-25; R XIII:2237; R VIII:1373, 1537, 1541, 1544; R IX:1684-85). BellSouth admitted having installed the pole in 1952. (R I:63-68, 155-58; R II:273).

Sometime prior to Herbert J. Meeks' death, BellSouth had removed its overhead telephone lines from the pole. (R II:273). Although BellSouth has asserted that it removed all lines from that pole and every other pole in the line since the 1970's, the record evidence does not support this claim. (Merits Brief at 5, 24). Rather, the record demonstrates BellSouth's own witnesses could not even indicate where the original pole line began or ended. (R XI:2113-14). With respect to the removal of the aerial telephone lines, the record reveals that BellSouth uses two types of aerial lines, one referred to as a "cable," one referred to as a "service wire." (R XI:2115-23). BellSouth's records show only when overhead telephone cables are added or removed, not when overhead *service* wires are added or removed. (R XI:2120-22, 2127-28, 2134-35). Many of the areas on Poa Boy Farms Road were fed with service wires. (R XI:2120-22, 2127-28, 2134-35). The only BellSouth witness on the subject had no recollection as to when service wires were removed on Poa Boy Farms, and further admitted that BellSouth keeps no records at all in this regard. (R VII:1299-01; R X:1867-68; R XI:2120-22, 2134; R VIII:1376-77). A local farmer, however, recalled that BellSouth's aerial telephone lines ran along a major portion of the Poa Boy Farms Road pole line as late as the 1990's. (R XI:2045).

Sometime before Mr. Meeks' death, BellSouth allowed Florida Power & Light Company (hereinafter referred to as "FPL") to attach electrical lines to this BellSouth pole, and continue its use, through a written contract called a Joint Use Agreement (JUA). (R VII:1162-89; R II:322-339). Since at least 1961, FPL and BellSouth have allowed the use of each other's poles through a JUA, while maintaining individual ownership of their respective poles. (R II:322-39; R IX:1693-94; R VII:1162-

89).[4] The purpose of a JUA in generic terms is to set out the rules for the players, as it provides for both the collection of licensing fees as well as maintenance responsibilities. (R VII:1175-79; R IX:1672-75, 1693, 1696; R VII:1217-19). The scope and impact of Joint Use Agreements in the utility industry are enormous, involving millions of dollars in revenue, as well as covering every joint use pole in the State of Florida. (R IX:1664, 1674, 1677-78, 1718-19; R VIII:1549).

Generally, the owner of a joint use pole may collect licensing fees, and in exchange, is responsible for pole repair and maintenance. (R IX:1672-73, 1696). The record evidence demonstrates that BellSouth was collecting a licensing fee for every joint use pole it owned, which included pole number 5. (Slipsheet at 7, ftnt. 8; R IX:1718; R XI:2104-05, 2111,2124-25).

[5]

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[4] The 1961 Joint Use Agreement applied to "all poles of each party that, as of this date, are used jointly by both parties." See Article II of the May 1, 1961 Joint Use Agreement. (R II:325). The agreement further provided that the *owner* of said pole was required to maintain its joint pole in a safe and serviceable condition. (R II:331) (emphasis added). The 1975 agreement contains similar language. (R VII:1175-76). The evidence conclusively established that this pole was a joint use pole under both the 1961 and 1975 agreements, as the parties stipulated both BellSouth and FPL placed their service on that pole in 1952. (R II:273).

[5] Contrary to BellSouth's assertions, the record provides ample support for the Fifth District's finding that BellSouth was collecting a licensing fee for the pole.(Slipsheet at 7,ftnt 8).

Unequivocally, Earl Christian, the BellSouth Joint Administrator, testified that BellSouth collects $61 per pole, per annum, under the JUA for the 240,000 BellSouth telephone poles that are used by FPL, amounting to some $14,640,000 annually, as follows:

Q: What is that rate:

A: It's … this looks like its $61. The power rate of $61. And then the "power owes" is the amount of annual rents that the power company would owe us, and the "BST owes" is the annual rent that we would

The 1975 JUA, which was enacted subsequent to the 1961 Agreement, was in effect at the time of Mr. Meeks' death in 1997. (R IX:1693-94). The JUA between BellSouth and FPL, which governed pole number 5, specifically addressed pole maintenance and licensing fees.

[6] (R IX:1693, 1696; R VII:1175-79; R II:323-339). Section 8.1 of the 1975 JUA, entitled "Maintenance of Poles and Attachments" required the pole *owner* to maintain the pole. (R VII:1175-76; R IX:1696).

BellSouth not only gave FPL written permission to use its poles under the JUA, but BellSouth further agreed to maintain the pole unless BellSouth *abandoned* the pole pursuant to the JUA. Contrary to the various assertions of BellSouth, the record evidence does not support its claim of abandonment.

[7] "Pole abandonment" is a term of art under the JUA. (R II:333; R VII:1176, 1189). Abandonment occurs when the owner of a joint use pole removes its equipment from a pole, and notifies the remaining utility that it must take over the pole if it desires to continue to use it. (R

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owe them. … (R IX:1718).

As BellSouth corporate representative Jerry Brown made clear, BellSouth plats show it owned the pole at issue at the time of the accident. (R XI:2104-05, 2111, 2124-25).

[6] Article II of the 1975 Joint Use Agreement made it clear that the Joint Use Agreement encompassed <u>all</u> poles in Florida, including the pole at issue. <u>See</u> 1975 Joint Use Agreement, pg. 4, Section 2.1. (R VII:1168-69).

[7] Although BellSouth asserts numerous times in its Merits Brief that BellSouth abandoned the pole, the vast weight of the record evidence indicates to the contrary. (Merits Brief at 2, 6). BellSouth conceded to the Fifth District Court of Appeal that the abandonment theory was ill conceived, but now attempts to raise the same argument again. (Slipsheet at 6, ftnt. 4).

IX:1669, 1696-99; R IV:692-93; R II:333; R VII:1176). The JUA provides strict procedures to be followed, including written notice, to any utility with lines remaining on a pole that it has been abandoned by its owner. (R I:120; R IV:692-93; R II:333; R VII:1176, 1189).

[8]

In addition to service of a formal notice of abandonment, physical changes to the pole also have to take place to effect an abandonment, as utility poles are identified in the field by their pole brand and tag, and their cut at the top of the pole. (R IX:1684-85, 1743-45; R I:119-20; R VIII:1381-82). Upon abandonment of any pole by BellSouth, under its own policies and the industry custom, BellSouth was required to remove all equipment belonging to its company from the pole, including identifying tags, brands and any facilities.[9] Id. (R IX:1625-26, 1743-45; R IV:696; R I:119-20).

As the Fifth District recognized, the written notice is critical to FPL, because without it, FPL would have no way of knowing whether it was required to assume maintenance of an individual pole, thereby preventing the type of rot which led to Mr. Meeks' death. (Slipsheet at 4); (R IV:696-97, 700, 734-35;

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[8] See Article IX, Paragraph A, of the 1961 Joint Use Agreement, entitled "ABANDONMENT OF JOINTLY USED POLES". (R II:333). The 1975 Agreement has similar requirements under Article IX, Section 9.1. (R VII:1176).

[9] "Facilities" is a general term used in the telephone industry to include items such as cable, strand, thru bolts, J-hooks, pairs and other equipment. (R IX:1591-92, 1624).

R IX:1698-99). FPL employees testified that they do not assume that just because BellSouth has removed its wires that BellSouth has abandoned a pole, because FPL has no way of knowing what BellSouth's future intent might be for that pole. (Slipsheet at 4; R IV:696-97, 700, 734-35). There are strong financial disincentives for BellSouth to ever abandon a pole, because although it relieves BellSouth of the maintenance responsibilities, it also discontinues BellSouth's right to collect massive licensing fees. (R IX:1701; R VII:1176). After receiving proper notice from BellSouth, the JUA obligates FPL to decide either to remove its equipment from the pole, or assume responsibility for the pole. (R IV:692-93; R VII:1176). If FPL decides to assume ownership, maintenance and inspection of the pole, FPL would then place its own ownership tag upon the pole. (R IV:692-93, 696).

With respect to pole number 5, there is no record evidence to even suggest that pole number 5 was ever abandoned by BellSouth under the JUA, or that FPL ever assumed ownership or control over it. (R XII:2188-89; R X:1790-94; R IV:673, 696; R I:119-20). In fact, FPL expressly denies ever having assumed ownership of, or responsibility for the pole. (R I:119-20). BellSouth attempts to infer in its statement of facts that the JUA at issue was modified through a course of conduct, thus allowing BellSouth to abandon a pole through removal of its wires. (Merits Brief at page 6). Aside from this being an obvious factual question for the jury, only one provision of the JUA is pertinent, which allows for either party to prepare supplemental operating routines or working practices, as they *mutually agree*. (R VII:1184) (emphasis added).

[10] The record is devoid of any evidence indicating that there were any supplemental operating or working routines prepared, or ever consented to by FPL. (R IX:1669-70, 1690-91; R I:119-20; R IV:673, 693, 696). For their part, FPL denies this "course of conduct" assertion, and has consistently maintained that BellSouth was responsible for maintenance and owned the pole.(R I:119-20; R IV:673, 693, 696).

BellSouth circuitously argues in its Merits Brief, citing to the 1975 JUA, that "[o]nce a pole is abandoned BellSouth has no authority to connect, remove, relocate, change or modify the pole." (Merits Brief at 6). That begs the question in this case, because the record evidence shows that BellSouth did not abandon the pole pursuant to the JUA in the first instance, and BellSouth concedes as much. (R XII:2188-89; R X:1790-94; R IV:674, 696; R I:119-20; Merits Brief, pg. 6). FPL never received any written notice indicating BellSouth abandoned the pole, there was no change in the ownership information on the pole or BellSouth plats, nor did FPL accept any inspection or maintenance responsibilities. (R IV:674, 696; R I:119-20).

As the Appellate Court recognized, the issue of pole ownership is crucial in

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[10] Article XIX of the 1975 Joint Use Agreement, entitled "Supplemental Routines and Practices" provided as follows: "Nothing herein shall preclude the parties of this Agreement from preparing such supplemental operating routines or working practices as *they mutually agree* to be necessary or desirable to effectively administer the provisions of this Agreement". (R VII:1184) (emphasis added).

determining the responsibility of FPL *vise vi* BellSouth. (Slipsheet at 5.) The owner of a pole is required to maintain it, irrespective of whether another utility has wires on it, absent a written agreement to the contrary. (Slipsheet at 5; R VII:1175; R II:331). BellSouth's own Joint Use Administrator admitted that the owner of the pole is responsible for maintenance, even where the only lines attached belong to a different utility. (R IX:1696, 1712). BellSouth has admitted that in direct disregard of its duty, and in spite of its knowledge that all poles will eventually rot, it performed no inspections or maintenance of the pole at issue in the 25 years prior to Mr. Meeks' death, although it was well past the pole's useful life. (R I:63-68, 155-58; R VIII:1536-37; R IX:1608-10, 1682, 1731).

BellSouth does not have any procedure in place statewide in Florida for inspecting poles or replacing them and has nothing budgeted for pole maintenance. (R IX:1612, 1682, 1731, 1608-10; R VIII:1536-37). BellSouth simply continues to allow the use of all its poles, regardless of their condition, unless a person who happens to be working on the pole reports it is unfit for use, or until it falls over. (R IX:1608-10; R VIII:1536-37). Although BellSouth records indicate that it performed substantial work on Poa Boy Farms Road in the area of rotted pole number 5 in the years 1971, 1973, 1979, 1980, 1994 and 1995, unfortunately for Mr. Meeks, BellSouth did not fulfill its duty to inspect or maintain pole number 5. (R XI:2107, 2115-17, 2120; R XIII:2237).

BellSouth asserts in its Merits Brief that FPL did not treat pole number 5 as a Joint Use Pole, but the record demonstrates otherwise. (Merits Brief at pg. 6). FPL has consistently denied ownership of or any responsibility for the maintenance of pole number 5. (R I:118-20, 135-36; R IV:680-81, 725, 734). Unlike BellSouth, prior to the 1990's, FPL did have a formal inspection program for its poles.[11] (R IV:678, 723-25). Pole number 5, however, was never inspected or maintained by FPL, because as the testimony showed, it was a BellSouth pole. (R IV:673, 680-81, 725; R I:118-20, 135-36). Although FPL replaced many poles along Poa Boy Farms Road, this was only done after first requesting permission from BellSouth to do so, or in emergency situations. (R IV:673-74, 708; R I:133-34). BellSouth itself also installed many additional

[11] BellSouth had been contacted by the same pole inspection company, Osmose, prior to Mr. Meeks' death, but chose not to have inspections performed. (R IX:1726-29).

poles on Poa Boy Farms Road in the 1980's, pursuant to the JUA, at the request of FPL. (R XI:2131-33).

In reversing the lower court's summary judgment, the Fifth District held that as owner of the pole, BellSouth had a duty to inspect and maintain it in a reasonably safe condition. (Slipsheet at 5).[12] The Fifth District correctly held that absent a contract providing to the contrary, the fact that other utilities had wires on it was not sufficient to relieve the owner of the duty to maintain it in a reasonably safe condition. (Slipsheet at 6). As to the lower court's holding that a "bailment" existed, the Fifth District found that material questions of fact existed as to whether or not that was the case. (Slipsheet at 7).

The Fifth District went on to reverse the trial court's prior order, regarding the claim of the minor child Kevin Meeks, holding that the damages recoverable for a minor child's claim for loss of parental consortium, pain and suffering under the wrongful death statute exists for the child's entire life. (Slipsheet at 9).

[12] The original trial judge also found BellSouth should be denied summary judgment based upon the existence of material factual issues. (R VII:1274-75). After the assignment of a different judge, BellSouth renewed its motion. (R XI:2014).

SUMMARY OF THE ARGUMENT

The Fifth District correctly held that where a minor has a claim for the loss of parental companionship, pain and suffering under the wrongful death statute, the minor's damages are not limited to the period of minority, in accord with the plain and unambiguous language of the controlling statute, namely §768.21(3). The legislature did not put any temporal limitation on a minor child's recovery for loss of parental companionship, pain and suffering following the death of a parent. Rather, the legislature mandated that a minor child can recover throughout his lifetime for the loss, in consideration of the joint life expectancies of the child and parent.

With respect to BellSouth's second argument addressing the Fifth District's reversal of the Final Summary Judgment, this Court should decline to review the issue, because it is outside the scope the certified question and does not formulate a basis for this Court's discretionary review. In viewing the record in the light most favorable to plaintiff, there was ample legal and factual support for the Appellate Court's decision. BellSouth, as the owner of the pole, had a common law duty, as well as a contractual obligation to maintain the pole that caused the death of Mr. Meeks. BellSouth did not abandon the pole, or create a bailment. A bailment cannot be created as a matter of law, without the express or implied consent of either party to the bailment.

BellSouth was further actively negligent in its failure to inspect and properly tag its poles. The sufficiency of BellSouth's actions in maintaining, identifying, and inspecting pole number 5 present questions for a jury.

LEGAL ARGUMENT

Standard of Review

The Fifth District Court of Appeal's decision regarding Florida's Wrongful Death Act presents a purely legal question and as such, is subject to a *de novo* review standard. See Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000); Putnam County Envtl. Council, Inc. v. Board of County Commissioners, 757 So. 2d 590, 594 (Fla. 5th DCA 2000); Allstate Ins. Co. v. Rush, 777 So. 2d 1027 (Fla. 4th DCA 2000).

I. THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE WRONGFUL DEATH STATUTE ALLOWS A MINOR CHILD TO RECOVER LOST COMPANIONSHIP, MENTAL PAIN AND SUFFERING, FOR THE DEATH OF A PARENT, THROUGHOUT THE CHILD'S LIFETIME

The Fifth District Court of Appeal correctly held that under Florida's Wrongful Death Act a minor child can recover throughout his life for the loss of parental companionship, as well as pain and suffering. (Slipsheet at 8). As the Appellate Court noted, the interpretation of this section of the current Wrongful Death Act with respect to this issue is one of first impression. (Slipsheet at 8). However, at least one other appellate court, the Third District Court of Appeal, in Stresscon International, Inc. v. Helms , 390 So. 2d 139 (Fla. 3d DCA 1980) tangentially addressed the issue, indicating that based upon the clear statutory mandate, it would reach the same result as the Fifth District in the case *sub judice*. (Slipsheet at 9, citing Stresscon, 390 So. 2d at 141 (Fla. 3d DCA 1980)).[13]

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[13] Most earlier cases interpreting the Wrongful Death Statute have little, or no, precedential value, as they are interpreting versions of the Wrongful Death Statute which were not in place at the time of Mr. Meeks' death. Cinghina v. Racik, 647

In its statutory analysis, the Fifth District Court was mindful of the legislature's intent when enacting the Wrongful Death Act, noting it was "remedial and shall be liberally construed." (Slipsheet at 8, citing Fla. Stat. §768.17; see also, Golf Channel v. Jenkins, 752 So. 2d 561, 565-56 (Fla. 2000)). This Court, in Golf Channel v. Jenkins, in its analysis of a remedial whistle blower statute, provided a brief instruction as to when it is appropriate for a court to interpret statutory provisions. Golf Channel v. Jenkins, 752 So. 2d 561, 564 (2000). The first principle of statutory construction is that legislative intent must be determined primarily from the language of the statute itself. Golf Channel, 752 So. 2d at 564; (citing McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998); St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982)). Where the statute is plain and unambiguous, there is no need for

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So. 2d 289 (Fla. 4th DCA 1994), provides a helpful discussion of the prior statutes and the revisions they have undergone, in arriving at the current compensatory scheme. Id. at 290.

judicial interpretation. Golf Channel, 752 So.2d at 564 (2000) (citing Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992)). Where, however, related statutes which must be read together create an ambiguity, statutory construction is required. Golf Channel, 752 So. 2d at 564. As this Court went on to note "[i]f from a view of the whole law, or from other laws *pari materia*, the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, is in fact the will of the Legislature." Id. at 564 (citing Forsythe, 604 So. 2d 452, 454) (quoting Van Pelt v. Hilliard, 75 Fla. 792, 799, 78 So. 693, 695 (1918)). Moreover, where language in a statute is subject to more than one reasonable interpretation, it is necessary to resort to principles of statutory construction. Rollins v. Pizzarelli, 761 So. 2d 294, 297-98 (Fla. 2000) (citing Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992)).

In its analysis of the statute, the Fifth District began with the clear statutory language as required under sound canons of statutory construction. (Slipsheet at 9). The term "survivor" is defined under the Wrongful Death Statute to include the decedent's spouse, children, parents, and blood relatives, as well as adoptive brothers and sisters when dependent upon the decedent for support and services. Fla. Stat. §768.18(1) (1997). All of the deceased's children are thereby considered "survivors" under the Wrongful Death Act in accord with §768.18. Fla. Stat. §768.18(1) (1997) (Slipsheet at 9). "Minor children" are specifically defined as children "under 25 years of age, notwithstanding the age of majority." Fla. Stat. §768.18(2) (1997) (Slipsheet at 9). Kevin Meeks, born December 6, 1973, is unquestionably a "minor child" under Florida's Wrongful Death Act inasmuch as he was under the age of 25 at the time of his father's death. (R VII:1251).

The types of damages recoverable by each category of survivor are set forth in §768.21, which provides, in relevant part, as follows:

> (1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.
>
> ….
>
> (3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury.
>
> (4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.

Fla. Stat. §768.21(1), (3) and (4) (1997).

As the Fifth District Court found, **§**728.21(3) provides a starting date, "from the date of injury", as to the commencement of a minor's claim for lost parental companionship, instruction, and guidance and for mental pain and suffering. (Slipsheet at 9). However, §768.21(3) provides no ending date for this category of damages. (Slipsheet at 9).

With respect to purely economic damages, including support and services, the period of minority of a healthy minor child is one of several relevant factors that the legislature mandated were to be considered by the trier of fact in determining the amount of damages. See Fla. Stat. §768.21(1) (1997). Even under subsection 1, however, there is no indication that the legislature intended that the damages for the loss of support and services end the day a minor child reaches the age of 25, rather, the legislature intended that jurors consider the period of minority as one factor, as it pertains to economic damages.

However, insofar as it relates to mental pain and suffering under subsection 3 of the statute, there is absolutely no statutory mandate that the age of majority be considered at all. See Fla. Stat. §768.21(3) (1997). The fact that even adult children have a lost parental consortium claim in the event there is no surviving spouse demonstrates that the legislature recognized that the loss of parental consortium for any minor child continues well into the future. If the legislature intended that a minor child's lost parental consortium claim, after it was vested, would end at a particular point, they could easily have put in a limiting time period, as they did in subsection 1. (Slipsheet at 13). See Fla. Stat. §768.21(1) and (3) (1997). The District Court correctly interpreted the age limitation as intended by the legislature, merely as a qualifying factor which permits a minor child to claim this category of damages, and once established, to allow recovery over the lifetime of the child, with consideration of the deceased parent's life expectancy had the death not occurred. (Slipsheet at 14).

In reaching its decision, the Fifth District Court further noted the jury instruction to be given in this regard, Florida Standard Jury Instruction, 6.6 (g) was instructive. (Slipsheet at 10). It provides as follows:

> Wrongful Death Damages Recoverable for Estate and Survivors-Elements
>
> * * * *
>
> 6.6(g)
>
> The loss by [name of all eligible children] of parental companionship, instruction, and guidance, and [his][her][their] mental pain and suffering as a result of the decedent's injury and death. In determining the duration of such losses, you may consider the [joint life expectancy of the decedent and [the surviving child] [each of the surviving children]] [life expectancy of [the surviving child] [each of the surviving children]] together with

all the other evidence in the case.

See Slipsheet at 10, Fla. Std. Jury Instr. (Civ.) 6.6(g).

The Fifth District further found the committee notes persuasive. (Slipsheet at 10). The committee notes indicate that 6.6(g) was revised in 1987 to recognize that "joint life expectancy" is not proscribed by §768.21 (3) as the only measure of a child's future loss, and that the evidence may support a finding of longer or shorter duration. (Slipsheet at 10); see also In Re Standard Jury Instructions Civil Cases, 522 So. 2d 364, 368 (Fla. 1988).

BellSouth's argument that the standard jury instruction promulgated by this Court is not persuasive because it predates legislative changes in 1990 is disingenuine. (Merits Brief at 11, ftnt 5). The enactment of the amendment in 1990 to §768.21(3) did not effect the Fifth District's analysis as the amendment merely increased the right to recovery of a parental consortium loss to include adult children in the event of no surviving spouse, but did absolutely nothing to change or modify the definitions or recovery rights concerning "minor children" as defined in the Act. See 1990 Fla. Laws Ch. 14, §768.18.; See also Mizrahi v. North Miami Medical Center, LTD., 761 So. 2d 1040, 1042 (Fla. 2000) (citations omitted).

Although the Florida Supreme Court did not directly address the issue at hand, this Court has allowed minor children to recover for the loss of parental companionship, instruction, and guidance and for mental pain and suffering, without limiting damages under § 768.21(3) to only those periods of time prior to the minor child turning 25 years of age. See e.g. Angrand v. Key, 657 So.2d 1146 (Fla. 1995). The Third District Court of Appeal briefly addressed the current issue in Stresscon International, Inc. v. Helms, 390 So. 2d 139 (Fla. 3d DCA 1980), which the Fifth District also mentions as illustrative. (Slipsheet at 9). In addition to challenging the verdict for being excessive, the defendant in Stresscon argued that the jury should not have been allowed to award damages for pain and suffering to the surviving children computed over the joint life expectancies of the children and father. Id. at 141. The defendant urged that the damages under §768.21 (3) were allowable only if computed over the children's remaining period of minority. Id. Although the Third District stopped short of a full blown analysis, it did note that the statutory language did not support this view. Id.

The Fifth District also considered the interpretation that other courts have given to the statutory language instructing that damages were to run "from the date of injury." (Slipsheet at 12); Fla. Stat. §768.21 (3) (1997). Both subsection (4) and subsection (3), of Florida Statute §768.21, have identical language indicating that damage awards were to run "from the date of injury". (Slipsheet at 12); Fla. Stat. §768.21 (3) and (4) (1997). Subsection (4) of Florida Statute §728.21 mandates that "[e]ach parent of a deceased minor child may also recover for mental pain and suffering *from the date of injury*." Fla. Stat. §768.21 (4) (1997) (emphasis added); (Slipsheet at 12). In Gross Builders Inc. v. Powell, 441 So. 2d 1142 (Fla. 2d DCA 1983), which reviewed the meaning of the "from the date of injury" language when construing a parent's recovery for the loss of a minor child, the Second District queried whether a jury should consider a parent's mental pain and suffering for the loss of a minor child over their joint life expectancies, rather than the period of the child's minority. Id. at 1143-44. The Second District held that the jury should consider the joint life expectancies of both the children and decedent, not the children's period of minority. Id. at 1144. See also Roberts v. Holloway, 581 So. 2d 619 (Fla. 4th DCA 1991). Finding the opinions in Stresscon *supra*, and Gross Builders, in agreement, the Fifth District construed §768.21(3) together with the other sections of the wrongful death statute so as to bring each of them into harmony with one another. (Slipsheet at 11).

If BellSouth's argument that the Fifth District Court of Appeal's analysis of the statute was inappropriate due to the "clear" language contained therein were correct, it would mean that the majority of Florida's appellate courts (the Second, Third, and Fifth Districts) are unable to recognize "clear" language. (Merits Brief at 13). The three appellate courts who have addressed the statute disagree with the interpretation espoused by BellSouth. (Slipsheet at 9); Stresscon International, Inc. v. Helms, 390 So. 2d 139, 141; Gross Builders, Inc., 441 So. 2d at 1143-44. Conversely, to ascribe to the view espoused by BellSouth would require one of two absurd results. Under the view previously espoused by BellSouth in front of the Fifth District Court of Appeal, it would require a minor child's claim be limited to the period of minority while an adult child would be entitled to recover for the entire period of his or her lifetime. (Slipsheet at 11). This would be true even if they were in the same family, assuming there was no surviving spouse. To adopt the current view promoted by BellSouth, this Court would be forced to ignore the clear language of the statute, as well as the language in the related statutes, manufacturing an ending date for a minor's loss of parental consortium claim which is not there and which the legislature did not intend to place in §768.21(3).

BellSouth's reliance on Cruz v. Broward County School Board, 800 So. 2d 213 (Fla. 2001) is perplexing. Cruz involved a claim for a loss of filial consortium, where the child was disabled, and had nothing to do with the wrongful death statute. (Merits Brief at 16). Similarly, BellSouth's reference to Mizarahi v. N. Miami Med. Center, Ltd., 761 So. 2d 1040 (Fla. 2000) is misplaced, since there, this Court was considering an equal protection challenge to the language of §768.21 (8) which prohibited adult children from recovering in a wrongful death action stemming solely from medical practice. Id. at 1041. Ironically, what Mizarahi does make clear, is that the Legislature will limit the right to recovery with unequivocal statutory language when it intends to do so.

If BellSouth's interpretation of the statute were to prevail, it would dramatically alter Florida's Wrongful Death Act. From this day forward, the claims of minor children would have dramatically less value than those of an adult child. As the Fifth District noted,

> "[W]e find nothing in the record or in the law to indicate that the broken heart of a minor child caused by the grievous loss of a parent heals any faster than the broken heart of an adult child, or of a spouse who mourns the loss of a husband or wife. Moreover, we find no basis in the provisions of §768.21(3) that requires disparate treatment of minor children, adult children, or spouses who seek damages for mental pain and suffering for the loss of a loved one. We conclude, therefore, that damages recovered by a minor child pursuant to §768.21(3) should be calculated based on the joint life expectancy of both the deceased parent and the child. Thus in the instant case, unobstructed by age limitations, the jury will have the ability to view through the prism of their life experiences the full measure of recompense due a son for the loss of his father."

(Slipsheet at 13-14).

Applying BellSouth's interpretation would not only impose an illogical new limitation under Florida Statute §768.21(3), which is not currently present, nor intended by the legislature, but it would mean that Florida's current Jury Instruction Guide is a nullity, because there is no such limiting instruction in the Florida Standard Jury Guides in civil cases.

The Wrongful Death Act, as correctly interpreted by the Fifth District, makes clear that once a minor child's recovery right vests for the loss of parental companionship as well as pain and suffering, it continues throughout the child's life. In the event that this Court decides to accept this case, the Court is urged to uphold the decision of the Fifth District.

II. THIS COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER THE SUMMARY JUDGMENT ISSUE AS IT IS OUTSIDE THE SCOPE OF THE CERTIFIED QUESTION

As a general rule, it is clear that even if this Court decides to review the certified question, it may nonetheless decline to address the summary judgment issue raised by BellSouth, which is outside the scope of the certified question and does not formulate a basis for this Court's discretionary review. Major League Baseball v. Morsani, 790 So. 2d 1071, 1080, ftnt. 26 (Fla. 2001). This Court generally declines addressing a claim that is not first subjected to the crucible of the jurisdictional process set forth in Article V, section 3, Florida Constitution. Id. See also Angrand v. Key, 657 So. 2d 1146, 1148, ftnt. 3 (Fla. 1995).

The first issue, concerning the age limitation placed on Kevin Meeks' ability to recover damages for the death of his father, is entirely unrelated and separable from the rather mundane issues of pole ownership and bailment. The Appellate Court found fact issues concerning ownership of the pole and also held that FPL cannot be made a party to a "bailment" as a matter of law, without their knowledge or consent. Petitioner's attempt to use this Court's discretionary jurisdiction on the minor child's issue as a springboard to this Court for reversal on the contractual issues is not in accord with this Court's usual policy, and absent compelling circumstances, which are not here present, should be rebuffed.

III. THE FIFTH DISTRICT CORRECTLY HELD THAT BELLSOUTH, AS OWNER OF THE POLE, HAD A DUTY TO INSPECT AND MAINTAIN IT

The Fifth District Court of Appeal correctly held that BellSouth, as owner of the pole that caused Mr. Meeks' death, had a duty to maintain the pole, precluding summary judgment. (Slipsheet at 5). BellSouth argues it owed no duty to plaintiff, under either an abandonment, bailment, or some other theory, which BellSouth fails to specify. (Merits Brief at 25). As the Fifth District noted, such theories are mutually exclusive, as previously conceded by BellSouth in front of the appellate court. (Slipsheet at 6, ftnt 4). The record evidence demonstrated that BellSouth owned the pole at the time of the accident, and as such, had a duty to inspect and maintain it in a reasonably safe condition. (Slipsheet at 6). Judge Weinberg, the original trial court judge, had previously denied BellSouth's summary judgment motion on these same grounds.

As a general rule, where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or to see that sufficient precautions are taken to protect others from the harm that the risk poses. McCain v. Florida Power Corporation, 593 So. 2d 500, 503 (Fla. 1992) (citing Kaisner v. Kolb, 543 So. 2d 732, 735 (Fla. 1989) (citing Stevens v. Jefferson, 436 So. 2d 33, 35 (Fla. 1983)). As the risk grows greater, so does the duty, because the risk perceived defines the duty that must be undertaken. McCain, 593 So. 2d 503 (citations omitted). As the McCain opinion notes, the Restatement (Second) of Torts, recognizes four sources of duty: (1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of the case. Id. (citing Restatement (Second) of Torts §285 (1965)). The statute books and the case law, in other words, are not required to catalog and proscribe every conceivable risk in order for it to give rise to a duty of care. McCain, 593 So. 2d at 503. Rather, each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. Id. This requirement of reasonable, general foresight is the core of the duty element. Id. Accordingly, the trial and appellate courts cannot find lack of duty, if a foreseeable zone of risk more likely than not was created by the defendant. Id.

The Florida Supreme Court has previously recognized that a telephone company "is held to take notice and have knowledge that wooden telephone line poles with one end to the ground, do rot beneath the surface, and such decay does not happen suddenly…" Peninsular Telephone Company v. James Dority, 128 Fla. 106, 116, 174 So. 446, 450 (Fla. 1937). Accordingly, it is the duty of the company using such poles to exercise all ordinary and reasonable care and diligence to maintain the safety of the poles by appropriate and sufficient examination and inspection of the condition of the poles being used, including the parts above and below ground. Id. at 450. (See also Webb v. Glades Elec. Coop., Inc., 521 So. 2d 258, 259 (Fla. 2d DCA 1988)).

In addition to the common law duty owed by BellSouth, it also had a contractual duty to maintain the pole. The various District Courts of Appeal have recognized that breach of a maintenance contract may give rise to a negligence cause of action.

[14] As noted by the Fifth District Court of Appeal in its opinion, the JUA holds BellSouth liable for this

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[14] See Johnson v. Lance, 790 So. 2d 1144 (Fla. 1st DCA 2001) (Court held duty existed to decedent where man was killed due to negligence of electrical company in fulfilling contract for traffic light maintenance); Juno Industries, Inc.

rotted pole which caused the electrocution and death of Mr. Meeks. (Slipsheet at 3).

Nor is this new law, inasmuch as Florida Courts have long recognized that redress for personal injuries caused by the negligent performance of a contractual duty may be properly sought through a tort action. Gallichio v. Corporate Group Serv. Inc., 227 So. 2d 519, 520-21 (Fla. 3d DCA 1969) (citations omitted); Maryland Maintenance Service, Inc. v. Palmieri, 559 So. 2d 74, 76 (Fla. 3d DCA 1990), rev. den., 574 So. 2d 142 (Fla. 1990)(citations omitted). The defendant's liability extends to all persons foreseeably injured by his failure to use reasonable care in the performance of a contractual promise. Maryland Maintenance Service, Inc., 559 So. 2d at 76 (citations omitted).

The position taken by Florida Courts is also in accord with the Second Restatement of Torts. In Hill v. United States Fidelity and Guaranty Co., 428 F. 2d 112 (5th Cir. 1970), cert. den., 400 U.S. 1008 (1971) the federal appellate court reviewed whether the trial court, in a diversity action, correctly

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v. Heery International, 646 So. 2d 818 (Fla. 5th DCA 1994)(Court recognized that breach of a contractual obligation to provide professional engineering services could provide the basis for a negligence claim in a personal injury action, without privity of contract); City of Coral Gables v. Prats, 502 So. 2d 969 (Fla. 3d DCA 1987) (Court found liability against city in slip and fall action where city had contractual obligations to protect against hazards); Gelman v. Miami Elevator Co., 242 So. 2d 156 (Fla. 3d DCA 1970) (Court found final summary judgment improper where the plaintiff sued the maintenance company of an elevator in negligence for personal injuries); Ragsdale v. Mount Sinai Medical Center of Miami, 770 So. 2d 167 (Fla. 3d DCA 2000) (Court held that Mount Sinai's liability extends to persons foreseeably injured by its failure to use ordinary care in performance of its contractual promises); Gallichio v. Corporate Group Serv. Inc., 227 So. 2d 519 (Fla. 3d DCA 1969) (Court reinstated complaint of dry-dock workman injured by collapsing ladder against third party safety inspector, despite lack of privity, on basis of negligent performance of contractual duty).

dismissed a personal injury complaint under Florida law. Id. at 114. The plaintiff hotel guest alleged that the defendant, who had contracted with the hotel to perform safety inspections, had negligently undertaken those inspections, resulting in a fire which injured plaintiff. Id. at 115. The Hill court concluded that a cause of action existed under Florida law, because one who could be foreseeably injured by the negligent performance of a contractual duty had the right to maintain an action against the negligent performer, even in absence of privity. Id. The Hill court went on to analyze the State of Florida's law, and found it synonymous with the Second Restatement of Torts, which provides as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.
>
> Comment e. to that subsection provides:
>
> e. Reliance. The actor is also subject to liability to a third person where the harm is suffered because of the reliance of the other for whom he undertakes to render the services, or of the third person himself, upon his undertaking. This is true whether or not the negligence of the actor has created any new risk or increased an existing one. Where the reliance of the other, or of the third person, has induced him to forego other remedies or precautions against such a risk, the harm results from the negligence as fully as if the actor had created the risk.

Hill, 428 F.2d at 115, quoting Restatement (Second) of Torts, § 324A (1965).

The JUA in effect between FPL and BellSouth at the time of Mr. Meeks' death had similar contractual maintenance requirements, which anticipate BellSouth's liability in tort. Article VIII of the

1975 Joint Use Agreement provided that the owner of the pole was required to maintain it in a safe and serviceable condition. (R VII:1176). The JUA further contemplates injuries to third parties, in event the poles are not maintained in accordance with the contract. (R VII:1180).

The record evidence overwhelmingly establishes that BellSouth breached its common law, as well as contractual duties, as the pole was allowed to rot. (R II:273; R IV:687-88, 730). BellSouth never maintained or inspected the pole at issue, which was 45 years old at the time of Mr. Meeks' death. BellSouth's own corporate representatives agree that BellSouth has the responsibility to maintain the poles it owns. (R IX:1696; R VII:1217-19).

Additional evidence in the record showed that although pole number 5 had electrical wires on it, the pole was not inspected or maintained by FPL. FPL, in fact, had an inspection program, but did not inspect this pole specifically because it was a BellSouth pole and it was BellSouth's responsibility to do so under the Joint Use Agreement. (R IV:680-81, 725-26; R I:118-20, 135-36).

[15] Thus, BellSouth's contractual undertaking of pole maintenance, and failure to do

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[15] The JUA is also relevant as it defines the extent to which the pole owner maintains control over the instrumentality, and thus is responsible for maintenance under simple lessor/lessee principles. See Craig v. Gate Maritime Properties, Inc., 632 So. 2d 375 (Fla. 1st DCA 1994).

so, significantly increased the risk to the deceased.

There is little doubt that Mr. Meeks was a foreseeable plaintiff. The JUA, by its own indemnity provisions, recognizes that harm will result to third parties if the pole maintenance provisions are breached. (R VII:1180). Mr. Meeks was traversing a public road when he was killed. He was electrocuted when a rotted pole, carrying live lines with 13,200 volts of electricity, broke, placing the lines in proximity to the ground. Where BellSouth allows poles, carrying electrical lines adjacent to public roadways, to rot, injury to travelers along that road is certainly foreseeable.

Contrary to BellSouth's assertion, the existence of the duty does not change because Mr. Meeks died from the electrical current that the rotted pole caused to be placed into the ground near where he was standing, rather than being "strangled" by the wires. (Merits brief at 26). As this Court noted in McCain, it is immaterial that the defendant could not foresee the precise manner in which the injury occurred or its exact extent. McCain, 593 So. 2d at 503 (citing Restatement (Second) of Torts §435 (1965)). The question for the 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 504. Where the zone of risk is foreseeable, it gives rise to a coextensive duty of care as a matter of law. McCain, 593 So. 2d at 504.

Although BellSouth repeatedly maintains that it had "no control" over the pole at the time of the accident, the contract itself demonstrates that material questions of fact exist regarding this issue. (Merits Brief at 24; Slipsheet at 7). The only way that BellSouth could have given up its control of the pole, ability and right to reconnect to the pole, as well as its right to collect licensing fees, was if BellSouth formally abandoned the pole under the JUA, which all parties concede did not happen.

As the Fifth District found, the entire basis for BellSouth's assertions rest upon disputed issues of material fact, including whether BellSouth had the right to reattach to the pole under the JUA, whether FPL accepted the pole, whether BellSouth delivered to pole to FPL with the intent of giving FPL exclusive use and possession of the pole and whether BellSouth was collecting a licensing fee. (Slipsheet at 7). Jury questions also exist as to the extent to which BellSouth still maintains telephone lines or equipment on that pole, or any pole in the pole line at the time of the accident, when Bellsouth removed its telephone service wires, and under what circumstances FPL replaced poles.

It does not seem capable of serious dispute that when BellSouth leases its telephone poles to be used to carry high voltage electrical lines, and thereafter fails to inspect or maintain those poles, its conduct creates a foreseeable zone of risk. The use of rotted poles, which ultimately will place live electrical lines in proximity to the ground where they can cause harm, clearly increases the danger to the public. The law clearly will and does impose a duty upon BellSouth when it fails to inspect and maintain those poles, with full knowledge that those poles will eventually rot. In the event this Court considers the issue, the Fifth District's opinion should be upheld.

IV. THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT QUESTIONS OF FACT EXIST AS TO THE CREATION OF A BAILMENT

The Fifth District Court of Appeal also reversed the summary judgment order on the basis that material questions of fact exist regarding the creation of a bailment, making summary judgment improper. (Slipsheet at pg. 7).[16] A bailment is a contractual relationship among the parties in which the subject matter of the relationship is delivered temporarily to and accepted by one other than the owner. (Slipsheet at 7); S & W Air Vac Systems, Inc. v. Department of Revenue, State of Florida, 697 So. 2d 1313, 1315 (Fla. 5th DCA 1997) (citing 5 Fla. Jur. 2d, Bailments § 1 (1978)). Among the chief features of a bailment are the degree to which possession, custody and control of the subject matter are surrendered by the bailor to the bailee. S & W Air Vac Systems, 697 So. 2d at 1315. It is the general rule that there must be such a full transfer, actual or constructive, to the bailee as to exclude possession of the owner and all other persons and give to the bailee, for the time being, sole custody and control thereof. Id. (citing Monroe Systems for Business v. Intetrans Corp., 650 So.

[16] The Fifth District Court of Appeal, although not disposing of the issue, had serious reservations as to whether a telephone pole was personalty or a fixture to reality, and if the latter, whether such could even constitute the subject of a bailment. See Slipsheet at 8, ftnt. 5.

2d 72, 76 (Fla. 3d DCA 1994), rev. den., 659 So. 2d 1087 (Fla. 1995)). The parties to a bailment contract expressly set the point at which delivery will be deemed to have been completed. 5 Fla. Jur. 2d, Bailments § 2 (2000). There must also be an acceptance of the subject matter by the bailee. 5 Fla. Jur. 2d, Bailments § 2 (2000) (citing Rudisell v. Taxicabs of Tampa, Inc., 147 So. 2d 180 (Fla. 2d DCA 1962)).

In determining whether a particular transaction creates a bailment or some other contractual relationship, it is necessary to ascertain the intention of the parties. 5 Fla. Jur. 2d, Bailments § 3 (2000). The court must construe the contract between the parties as a whole, weighing all of its terms and provisions in connection with the reasonable and natural results of its performance. 5 Fla. Jur. 2d, Bailments § 3 (2000) (citing 8 Am. Jur. 2d, Bailments § 15). The question of whether a bailment has been established is a question of fact for the trier of fact. 5 Fla. Jur. 2d, Bailments § 31 (2000).

As the Fifth District Court of Appeal found, in the case before this Court, material questions of fact exist regarding every issue relevant to the existence of a bailment. For example, there was absolutely no evidence of any delivery of the pole from BellSouth to FPL. (Slipsheet at 7). Rather, BellSouth simply left the pole with the knowledge that FPL still had wires on it. (Slipsheet at 7). There was no evidence whatsoever of any contractual relationship between FPL and BellSouth other than the JUA. The JUA, by its clear terms, does not contemplate a bailment situation, as the pole owner retains all control and maintenance responsibility. (R VII:1175-79). There is not a scintilla of record evidence that indicates there is any other express contract other than the JUA, nor any other implied contract. To the contrary, both FPL and BellSouth have consistently taken the position that the JUA applied to the situation at bar. (R I:118-22; R VIII:1374-75, 1411-12; R IX:1693; R XI:2032).

As the Fifth District noted, despite BellSouth's repeated claims it had no control over the pole, the record evidence showed otherwise. (Merits Brief at 24; Slipsheet at 7). BellSouth was not only collecting licensing fees, but also had the right to reattach to its poles at any time under the JUA. (Slipsheet at 7). The Fifth District's opinion is amply supported by the record evidence, as the JUA, under section 14.4, specifically gave BellSouth the right to use its pole, or to allow other third parties the right to use the pole whenever it wanted. (R IX:1673-77; R VII:1164-1189). BellSouth at all times prior to the accident had legal control over the pole, under the JUA, and all indicia of ownership, namely the BellSouth tag and cross-arm, remained on the pole, showing it as a BellSouth pole. (R I:118-20). BellSouth's own employees indicated that unless there was a formal notice of abandonment pursuant to the JUA, BellSouth could use a pole again, without seeking permission, even after removing lines. (R IX:1615-17, 1621). Moreover, FPL never considered the pole abandoned, merely because BellSouth removed its wire, nor did it ever take control over the pole, as it did not know BellSouth's future intent for the pole. As discussed previously, the record evidence indicates BellSouth never abandoned the pole under the JUA, and thus, always retained the right to control it, reattach to it, and collect licensing fees.

Contrary to BellSouth's claim that it had no wires on any pole in the pole line, the record evidence showed that BellSouth had equipment attached to the pole line, including overhead lines and underground taps. (R I:132). BellSouth's assertion in their brief that it never replaced any poles, nor was it requested to do so by FPL, is contradicted by the actual testimony. (Merits Brief at 24). The record reveals that BellSouth installed additional poles at the request of FPL, and that FPL did ask it to replace poles. (R XI:2128-33; R IV:673-74, 708; R I:133-34; R XIII:2237).

Due to the existence of numerous questions of material fact, in fact the existence of a bailment is a jury question under Florida Law, in and of itself, it is clear that the Fifth District correctly held that summary judgment was inappropriate.

CONCLUSION

For the foregoing reasons, Respondent prays that this Court enter an Order approving the decision of the Fifth District on their interpretation of Florida Statute §768.21(3), in Meeks v. BellSouth, 27 Fla.L.Weekly D679 (June 13, 2002), and deny discretionary jurisdiction as to Petitioner’s remaining issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits of Respondent has been furnished to Richard G Gordon, Esq. and John R. Hargrove, Esq., 500 E. Broward Blvd., Suite 1000, Fort Lauderdale, Florida 33394 via U.S. Mail and Robert B. Sendler, Esq., 700 Universe Blvd., Juno Beach, Florida 33408, via U.S. Mail, this 22nd day of July, 2002.

Robert P. Avolio, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is submitted in either Times New Roman 14 point font or Courier New 12 point font, in accord with the Fla.R.App.P. 9.210(a)(2), this 22nd day of July, 2002.

Robert P. Avolio, Esq.