LAW OFFICES OF HEINRICH GORDON HARGROVE WEIHE & JAMES, P.A. **M** FORT LAUDERDALE, FLORIDA 33394-3092

IN THE SUPREME COURT
STATE OF FLORIDA

FLORIDA SUPREME COURT CASE NO. SC02-1033

4DCA CASE NO. 5D01-1805

BELLSOUTH TELECOMMUNICATIONS, INC.,

Petitioner,

vs.

LINDA MEEKS,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

I

THE CASE

The certified question before the Court relates to the measure of statutory loss of consortium damages recoverable by a minor child for the death of a parent under Florida's Wrongful Death Act.[1] Respondent's husband, Herbert Meeks, was electrocuted by downed Florida Power & Light ("FP&L") electric wires, which were suspended from a rotted-out pole under FP&L's

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[1] The Florida Wrongful Death Act is codified in Florida Statutes §§ 768.16-27. The definitions statute, § 768.18, reads in relevant part:

> (2) "Minor children" means children under 25 years of age, notwithstanding the age of majority.

The damage statute itself, namely § 768.21, reads in relevant part:

> All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:
>
> (1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or 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.
>
> (2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.
>
> *(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.

(Emphasis added)

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exclusive use. The pole had been previously owned by petitioner BELLSOUTH TELECOMMUNICATIONS, INC., but it was abandoned by BELLSOUTH in the early 1970's. No telephone lines whatsoever were on the pole at the time of its collapse.

Plaintiff originally sued both FP&L and BELLSOUTH, but FP&L settled for $1,300,000.00. (R:1312) The sole liability theory as to BELLSOUTH turns on whether the passage of time (twenty four years between BELLSOUTH's abandonment and the accident in issue) shifted the legal duty to FP&L, who maintained exclusive use of the collapsed pole pursuant to a 1975 "Joint Use Agreement" between the two utilities.[2]

The decedent is survived by his wife and two children from a prior marriage -– a daughter who was 28 at the time of the accident and a son who was 24. (Slipsheet at 2) Because the Florida Wrongful Death Act defines a "minor" as a person under 25 years of age, see Florida Statutes § 768.18(2), the 24 year old son was one year short of his legal majority at the time of the occurrence. It is this remaining year of minority which triggered the certified question.

The case proceeded through discovery with the trial court eventually entering summary judgment in favor of BELLSOUTH on the basis that a bailment had occurred, thereby relieving

[2] See discussion infra at pages 5-6.

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BELLSOUTH of the duty to maintain or repair the abandoned pole. Prior to filing its summary judgment motion, however, BELLSOUTH moved to strike the adult daughter's claim and to limit the minor son's claim under the express terms of § 768.21(3). That section provides, *inter alia*, that in the event of the wrongful death of a parent, a minor child always has the right to recover loss of consortium damages, but an adult child's right to recover is totally eliminated if there is a surviving spouse. Because there was a surviving spouse, MEEKS conceded that under the express wording of § 768.21(3), the adult daughter had no claim. (R:1291) A dispute arose, however, regarding the measure of the minor's damages. BELLSOUTH asserted that § 768.21(3) limits the minor child's right to recover for the period of minority, while MEEKS claimed that a minor's damages would extend over the minor's entire life expectancy. The trial court agreed with BELLSOUTH's construction and so ruled.[3] On appeal, the Fifth District reversed holding that a minor is entitled to recover for life. It stated:

> [W]e find no basis in the provisions of section 768.21(3) that requires disparate treatment of minor children, adult children, or spouses who seek damages for mental pain

[3] The trial court did not strike any part of Kevin Meeks' claim for lost support and services, which are recoverable under Florida Statutes § 768.21(1), so that point was not an issue on appeal.

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> and suffering for the loss of a loved one. We conclude, therefore, that damages recovered by a minor child pursuant to section 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.
>
> We certify to the Florida Supreme Court the following question as one of great public importance:
>
> > 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) Review was then sought in this Court.

II

THE FACTS

There is no dispute in this case regarding the cause of death. Mr. Meeks was electrocuted when he came in contact with FP&L's wire which fell from a rotted-out pole exclusively used by FP&L. No BELLSOUTH lines or wires even existed on the downed pole, much less contributed in any way to the accident.

The collapsed pole was part of a line of fourteen poles installed in 1952. (R11:2041-42) While BELLSOUTH originally had telephone lines on the entire line of poles where the accident occurred, including the downed pole, it had removed all such lines in the early 1970's. (R1:73, R2:270, R5:1401, R10:1816,

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1823-27, 1867) Shortly thereafter, and specifically in January of 1975, BELLSOUTH entered into a "Joint Use Agreement" with FP&L under which they would both use certain utility poles throughout the state for efficiency and mutual convenience. (R7:1164-89) The 20-page Agreement covered many issues from pole relocation and replacement to maintenance and abandonment. It also expressly contemplated that the parties could modify the terms through the course of their conduct. (R7:1184) While the agreement specified certain procedures for a formal abandonment of a jointly used pole, the undisputed evidence disclosed that it was not the practice of BELLSOUTH or FP&L to follow any formal procedures. (R4:713-14, R8:1555, R10:1867) In the case of BELLSOUTH, a pole was deemed abandoned if BELLSOUTH no longer maintained telephone wires on it. (R8:1541; R9:1706-10)

In this case, the record established that once BELLSOUTH removed all telephone lines from the downed pole, as well as from every other pole in the pole line, neither BELLSOUTH nor FP&L treated the downed pole or any other pole in the line as being "jointly" owned or used; that for over twenty years preceding the accident the only wires on the poles were FP&L electrical wires; and that only FP&L used the poles and replaced them as they became deteriorated. (R11:1980) Once a pole was abandoned, BELLSOUTH had *no authority* to connect, remove, relocate, change or modify any of them. (R7:1164-89) Given

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these undisputed facts, the trial court found that a bailment had occurred and held as a matter of law that:

> BellSouth owed no duty to the Plaintiff in this case, nor to the public at large, to maintain or repair the utility poles after it ceased its use of the poles, and turned the exclusive use over to Florida Power and Light.

(R11:2042) On appeal, the Fifth District found that the trial court erred in finding a bailment as a matter of law. The court said:

> [T]here are material questions of fact as to whether a bailment relationship existed between BellSouth and FPL. ... Therefore, the trial court erred in entering summary judgment in favor of BellSouth on the bailment theory.

(Slipsheet at 7-8; footnote and citations omitted)

Having reversed the summary judgment on liability, the analysis then turned to the minor's damages. Noting in particular that a parent's right to recover for loss of a child is not measured by the child's minority under § 768.21(4),[4] the court reasoned that there should be no such measure for the child's right to recover for loss of a parent. It therefore concluded that:

> If the Legislature intended that a minor child's claim for lost parental consortium, after it vested, would end at a particular point, it could have easily inserted a

[4] See note 1, supra.

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> limiting period in section 768.21(3), as it did in section 768.21(1). Since it did not, the obvious intent of the Legislature is that no such limitations period should be applied to section 768.21(3) claims.

(Slipsheet at 13)

On rehearing, BELLSOUTH contended that the decision gives much broader meaning to a minor's right to recover than the clear wording of the statute allows. Rehearing was denied, and discretionary review was then sought based upon the certified question.

STANDARD OF REVIEW

Statutory construction presents a legal question and is therefore reviewed *de novo.* See, e.g., Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000).

SUMMARY OF ARGUMENT

In a wrongful death case where there is a surviving spouse, a minor's damages are limited to the period of minority by the plain and unambiguous language of the controlling statute, namely § 768.21(3). The right to recover beyond the period of minority exists only where there is no surviving spouse, in which case *all* children -- minor and adult children alike -- have vested recovery rights. In this case, the Fifth District evidently convinced itself that the legislature really did not intend to limit a minor's damages under § 768.21(3) to the

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period of minority when there is a surviving spouse and improperly construed an otherwise clear statute to comport with what it deemed to be the equities of the situation. The reasoning in this Court's decision in Cruz v. Broward County School Board, 800 So. 2d 213 (Fla. 2001), is instructive if not totally dispositive. Cruz holds that while the *scope* of consortium damages may be judicially broadened, it is not appropriate for a court to broaden the definition of the class to be protected. That is a legislative function. The real point, however, is that no construction is necessary. Here "minor" means what it says. "Plain meaning" should prevail, and recovery should be so limited.

Because this Court has jurisdiction to determine the certified question, BELLSOUTH urges it to review the "duty" issue as well. The collapsed pole was abandoned by BELLSOUTH some 24 years prior to the incident, and the trial court correctly found that the record supported BELLSOUTH's position. The decedent was electrocuted by a downed FP&L wire which fell from a collapsed pole under the exclusive use and control of FP&L. Moreover, the decedent's estate has settled with FP&L for $1.3 million so there is no uncompensated loss. Simply put, BELLSOUTH had no control over the premises, and the lapse of time eliminated any duty to third persons as a matter of law.

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ARGUMENT

I

THE TRIAL COURT WAS CORRECT IN STRIKING THE DAMAGE CLAIM OF THE DECEDENT'S MINOR CHILD FOR THE PERIOD FOLLOWING HIS AGE OF MAJORITY

The "plain meaning" of § 768.21(3) limits a minor's damages where there is a surviving spouse. Kevin Meeks was 24 years old when his father died. Since there was a surviving spouse in this case, Kevin's wrongful death damages were limited by the clear wording of § 768.21(3), which states:

> 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.

(Emphasis added) Based upon this clear wording, the trial court correctly limited Kevin Meeks' claim for lost parental companionship and for mental pain and suffering to the remaining period of his minority which, by statute, ended at age 25. See Florida Statutes § 768.18(2)(1997). Because there was a surviving spouse, Kevin Meeks had just short of a one-year measure of damage.

On appeal, the Fifth District determined that the statute was ambiguous and decided to interpret it, concluding that the minor's claim should extend for his entire life expectancy. Unfortunately, the court's erroneous decision creates dangerous

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precedent throughout this state on a legislative enactment which it has inappropriately construed. First, the statute is clear so no judicial interpretation is necessary. And second, even if judicial interpretation were proper, the construction given to the statute expands a narrowly defined extension of the common law beyond permissible limits.

A. No Ambiguity.

Under § 768.21(3) a minor child may well have the measure of damages extended beyond minority, but that limited circumstance exists under the express wording of the statute *only* where there is no surviving spouse. Under that scenario, *all* children of the decedent are entitled to recover based upon full life expectancies, rather than the limitation of minority. [5] But once there is a surviving spouse, as in this case, an adult child has no right of recovery, and a minor child's right is measured solely by the period of minority.

Citing to this Court's decision in Donato v. American Telephone & Telegraph Co., 767 So. 2d 1146 (Fla. 2000), the Fifth District correctly recited the maxim that "it is the

[5] Regarding the duration of recovery, the Fifth District notes in its opinion that it "find[s] instructive the standard jury instructions promulgated by the Florida Supreme Court." Reliance on Standard Jury Instruction 6.6(g) is unavailing because it predates the "orphan" language added to § 768.21(3) in 1990. Moreover, standard jury instructions are not intended to change the substantive law controlling in any case. Aetna Life Ins. Co. v. Fruchter, 283 So. 2d 36 (Fla. 1973).

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intent of the Legislature which is the polestar that guides us in our inquiry." (Slipsheet at 10) Having said that, however, the Fifth District goes on to ignore the teaching of Donato -- that legislative intent is best determined from the language of the statute itself, so when language is clear the interpretative function stops. In the Court's own words:

> [T]he primary source for determining legislative intent is the language chosen by the Legislature to express its intent. As we stated in Holly v. Auld, 450 So. 2d 217 (Fla. 1984),
>
> > [w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.
>
> Id. at 219 (quoting A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931)). More importantly, we are precluded from construing
>
> > an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.
>
> Id. (quoting American Bankers Life Assurance Co. v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968)).

Donato, 767 So. 2d at 1150-51; see also United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989). This Court continues to acknowledge the "separation of powers" issue in this context in

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order to keep judicial interpretation from preempting legislative function. In Florida Department of Revenue v. Florida Municipal Power Agency, 789 So. 2d 320 (Fla. 2001), for example, the point is made that:

> Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.

Id. at 323.

The lesson of Donato is clear. Despite what a court may determine in its own view to be a "better" view of the statute's meaning, judicial interpretation is inappropriate were language is clear. Unfortunately, the Fifth District ignored this principle and chose instead to analyze what it thought the legislature probably meant, or should have meant. Its analysis begins with a flawed concern that adopting BELLSOUTH's position would be unfair because "an only child who is 24 years old would be allowed a recovery period of one year, but an only child who is an adult child would be allowed a recovery period for life." (Slipsheet at 11-12) This point totally overlooks the significance of a surviving spouse and that oversight is the key to understanding the Fifth District's substance.

"Minor" is a separately defined term which has contextual significance in § 768.21(3). In plain English, the legislature

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has decided -- for better or worse -- that a minor *always* recovers whether or not there is a surviving spouse. Adult children may only recover, however, when there is no surviving spouse. No legislative justification is needed to sustain this interpretation. But if one were needed to support the legislature's decision to limit a minor's recovery when there is a surviving spouse, it can be found in the general principle that "[o]nce a child reaches the age of majority, *a metamorphosis occurs and such child attains the privileges and responsibilities of an adult citizen*." See Ellis v. Golconda Corp., 352 So. 2d 1221, 1227 (Fla. 1st DCA 1977) (emphasis added).

That there was a surviving spouse in this case is more than an incidental fact, but apparently its significance was lost on the Fifth District. Indeed the parties themselves stipulated that because Mrs. Meeks survived her husband, the decedent's adult daughter had no right to recover, so there was no legal or factual basis for the Fifth District to compare the relative equities of an adult child's measure of recovery with a minor child's measure. In this case, the court was searching for excuses to justify the application of a new meaning which it had no right to do. See 48A Fla. Jur. 2d Statutes § 110; see also, Modder v. Am. Nat'l Life Ins. Co. of Texas, 688 So. 2d 330, 333 (Fla. 1997) (where language of statute is clear, court is not

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permitted to resort to rules of statutory construction); Zuckerman v. Alter, 615 So. 2d 661, 663 (Fla. 1993) (legislature is deemed to have expressed its intent through words in statute; if clear, words must be construed in their plain and ordinary sense); Holly, supra, at 219 ("it is not the court's duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court").

Had the legislature intended for the fortuitous event of minority to trigger a lifetime of recovery, it would have said so. The fact that it did not indicates a clear intent to prohibit such recovery. In fact, nothing in this record or in the wording of the statute even suggests, much less establishes, that the use of the word "minor" was in any sense meant to trigger a formula of lifetime recovery for anyone fortunate enough to be in a protected class at the time of the unfortunate circumstance of a parent's death. This very point was made in an analogous context in Cruz v. Broward County School Board, 800 So. 2d 213 (Fla. 2001) -- an informative decision which puts the issue before the court in proper perspective.

B. Cruz and the Narrow Scope of Consortium Recovery.

The issue in Cruz was a parent's right to recover for loss of consortium damages arising from a *minor child's* permanent disability. While Cruz dealt with the parents' recovery right, the case is instructive particularly because of the historical

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underpinnings of consortium claims. At common law, the parents' right was narrowly tailored to permit only a father to recover. A mother had no right of action unless the child was illegitimate or she had become entitled to the minor child's services through the death of the father or a decree awarding custody. W. Prosser & W. Keeton, The Law of Torts § 125 at 935 (5th Ed. 1984). In Florida, the scope of recovery has been expanded by statute, but since the statutory right is in derogation of the common law, the statutes are necessarily construed in a narrow fashion. Cruz makes this point clear.[6]

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[6] As the Court knows, the common law is adopted and enforced in Florida unless it is inconsistent with constitutional or statutory laws. Florida Statutes § 2.01. No statute will be interpreted to change or modify common law rules by implication unless such implication of change is clear or necessary to give full effect to the statute and the public policy which it fosters. See In re Levy's Estate, 141 So. 2d 803 (Fla. 2d DCA 1962); see generally Gates v. Foley, 247 So. 2d 40 (Fla. 1971). This Court recently stated in Major League Baseball v. Morsani, 790 So. 2d 1071 (Fla. 2001), in this regard:

> [A] statute enacted in derogation of the common law must be strictly construed and ... even where the legislative acts in a particular area, the common law remains in effect in that area unless the statute specifically says otherwise:
>
> > The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.
>
> Thorber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990).

Morsani, 790 So. 2d at 1077-78.

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The parents in Cruz sought damages from the Broward County School Board for a four-year period covering the time when the disabled son was 15 through the time he was 19 -- one year past the applicable age of majority. The case stemmed from allegations that the school board was negligent in failing to provide adequate supervision resulting in the minor being injured in an altercation with another student. The jury awarded the minor in excess of $2.6 million for the injuries sustained and $3.5 million to the mother for loss of filial consortium.

The trial court reduced the mother's award to $1 million, ruling that damages should only cover the four year period between the date of injury and the date of trial. In a unanimous *en banc* ruling, the Fourth District reversed and remanded for a new trial on the basis that the school board was entitled to have an independent neurological examination. The Fourth District also ruled that under the common law, future loss of familial consortium should be calculated only until the minor attained majority. Broward County School Bd. v. Cruz, 761 So. 2d 388 (Fla. 4th DCA 2000).

While recognizing that this Court in United States v. Dempsey, 635 So. 2d 961 (Fla. 1994), determined that loss of consortium for an injured child was expanded from "services" and "earnings" to include "love" and "affection", Cruz, 761 So. 2d

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at 395, the Fourth District appropriately refused to read Dempsey "as a license to abandon all the common law in this area." Id. at 396. It therefore limited the *length* of recovery to the end of the child's minority. Id. Agreeing with the Fourth District, this Court instructively stated:

> We did nothing in Dempsey to change that rule of limitation... Indeed in Florida, a parent is not entitled to any claim for damages when an adult child incurs personal injuries due to the tortious conduct of another. It would make little sense to allow for damages into the adulthood of a child in the one instance but not the other. Accordingly, we hold that under Dempsey, the parents' claim is limited to the child's minority.

Cruz, 800 So. 2d at 217. The key point in Cruz, of course, is that consortium claims involving minors –- whether in favor of the parent *or* the child -– are narrowly defined extensions of the common law. As such, they must be scrupulously interpreted.

Donato and Florida Department of Revenue make it clear that there can be no departure from "plain meaning" simply because a court is concerned that the legislature likely meant something else. The rule was restated in Rollins v. Pizzarelli, 761 So. 2d 294 (Fla. 2000), holding that "[a]n interpretation of a statutory term cannot be based on [a] court's own view of the best policy." Id. at 299; Holly, 450 So. 2d at 219. Rollins also reaffirmed the rule that statutory provisions modifying the common law must always be narrowly construed. Id. at 300.

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Nevertheless, the Fifth District took that improper step because it effectively decided that the legislature must have intended there should be no distinction between a minor child's claim and an adult child's claim whether or not a surviving parent exists. What the legislature *did* say in plain English in § 768.21(3) is that recovery of lost parental companionship damages are available *only to minor children* of a decedent where there is a surviving spouse. That provision is a legislative extension of the common law. It is not an ambiguous term. It is a rule of limitation. And it must be applied as written.

Based on Cruz and Dempsey, a court may not broaden a minor's recovery to include adulthood where there is a surviving spouse unless and until the legislature clearly says so. To make the point abundantly clear, this Court determined in Dempsey that social and economic changes sometimes dictate the necessity for judicial extensions or modifications to the common law, so there may be judicial extensions or modifications of consortium claims where policy circumstances so dictate. Dempsey, 635 So. 2d at 964; see also Gates v. Foley, 247 So. 2d 40 (Fla. 1971). Thus, a court may broaden recoverable damages from concepts of "services and earnings" to "love and affection", but it may not broaden the definition of the class to be protected from "minor" to "adult". In Zorzos v. Rosen, 467 So. 2d 305 (Fla. 1985), for example, a child's right of consortium in a non-death case was

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rejected on the basis that § 768.21(3) cannot be read beyond its "wrongful death" scope as a policy statement allowing such recovery. Despite inherent judicial ability to recognize policy driven changes in the common law, the limits placed on a statutory right to recover "strongly suggest that the legislature has deliberately chosen not to create such cause of action." Id. at 307. In this case, the term "minor" cannot be expanded to allow recovery beyond its statutorily defined meaning. Should a change in the scope of a minor's recovery be socially or morally necessary, the issue must be directed to the legislature, not to the courts.

In an analogous context, this Court upheld the constitutionality of § 768.21(8)'s preclusion of adult children from recovering for nonpecuniary damages in an action for a parent's death due to medical malpractice. Mizrahi v. N. Miami Med. Center, Ltd., 761 So. 2d 1040 (Fla. 2000). While the issue in Mizrahi is different than the one presented here –- whether a statute could create a right of action for many while excluding the right for others based on healthcare costs –- the opinion is instructive. This Court recognizes that under the common law an emancipated adult child was not entitled to recover damages for the death of a parent. It then states that § 768.21(3) extended the common law to permit such recovery, but only where there is no surviving spouse. Mizrahi, 761 So. 2d at

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1041. The relevance of Mizrahi is evident. Where there is a surviving spouse, an adult child has no consortium rights of recovery at all. Moreover, and as a necessary corollary, a minor child's consortium rights end when the minor child reaches the statutory age of adulthood.

Sorting this all out, a single point emerges. The Wrongful Death Act makes a clear and unambiguous statement regarding a minor child's length of recovery where there is a surviving spouse. The measure of damages cuts off at the age of majority. No rule of construction and no case even suggests -- much less holds -- to the contrary. If the certified question were not accepted by this Court and the Fifth District's opinion were left to stand, an unintended and very major glitch would exist as binding precedent regarding consortium rights of minors. The Court is therefore urged to accept this case and rule in favor of BELLSOUTH's interpretation.

II

THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT IN FAVOR OF BELLSOUTH

Having jurisdiction to consider the certified question, this Court has jurisdiction over all issues in this case. G.W.B. v. J.S.W., 658 So. 2d 961, 964 (Fla. 1995); Feller v. State, 637 So. 2d 911, 914 (Fla. 1994). BELLSOUTH therefore requests that the Court review the "duty" issue since it is dispositive of the

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entire proceeding.

The existence of a legal duty of care in a negligence action is a question of law. See McCain v. Fla. Power Corp., 593 So. 2d 500, 502 (Fla. 1992). It was therefore proper for the court to resolve this case by way of a summary judgment. See, e.g., Ponte v. CSX Transp., Inc., 736 So. 2d 790 (Fla. 3d DCA 1999) (affirming summary judgment in favor of defendant claiming no duty to warn as a matter of law); see also Bryant v. Lucky Stores, Inc., 577 So. 2d 1347, 1349 (Fla. 2d DCA 1990) (defendant entitled to summary judgment in negligence action where no duty owed to plaintiff); Cutler v. St. John's United Methodist Church, 489 So. 2d 123, 125 (Fla. 1st DCA 1986) (same). The Fifth District has nevertheless effectively recast the "duty" issue as one of "proximate cause" creating a fact question for trial. But as this Court explained in McCain, the threshold legal issue of "duty" is distinct from the "proximate cause" issue:

> The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others. The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred.

Id. at 502.

The trial court correctly recognized the distinction and

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properly resolved the "duty" issue as a matter of law. It concluded that BELLSOUTH owed no duty to MEEKS for the collapse of a utility pole which the record conclusively showed as being within the exclusive control of FP&L where the incident occurred. While the Fifth District reversed for factual findings relating to the issue of whether or not a bailment existed,

[7] that concern is irrelevant to the duty issue based upon the undisputed facts of record. First of all, BELLSOUTH had no control over the collapsed utility pole. The record discloses that BELLSOUTH had no telephone wires on the pole which collapsed or on any other pole in the pole line at the time of the accident; that during the 24-year period prior to MEEKS' accident *only* FP&L used that pole line; and that FP&L routinely replaced poles in the pole line as they became deteriorated during that entire 24-year period *without any notification to BELLSOUTH*.[8]

Whether this case is analyzed under a "bailment" theory, an "abandonment" theory, or any alternate theory, it is this

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[7] See, e.g., Dickson v. S. Cal. Edison Co., 288 P. 2d 310 (Cal. Ct. App. 1955) (utility not liable for accident caused by defective brakes of pole-carrying truck which had delivered to a third party, then used and maintained by that third party for some twenty months prior to accident).

[8] The statement on page 7 of the opinion that "BellSouth was apparently collecting a licensing fee for the pole" is not supported by any record evidence.

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undisputed lack of control by BELLSOUTH for such a substantial period of time prior to the accident which supports the conclusion that BELLSOUTH owed no duty to the decedent. The Restatement (Second) of Torts § 452(2) explains the point. Under § 452(2) there is no duty to prevent harm where "because of the lapse of time or otherwise, the duty to prevent harm to another threatened by *the actor's negligent conduct is found to have shifted from the actor to a third person*." (Emphasis added) Section 452(2) instructively provides the following illustration of how this rule of law operates:

> The A Railroad negligently turns over to its connecting carrier B Railroad a freight car, the door of which is in defective and dangerous condition. B Railroad operates the car on its own line over a period of six months, during which time it negligently fails to inspect the car and discover the defect. At the end of that time it turns the car over to C Railroad. D, who is an employee of C Railroad, without any negligence of his own, is injured when the door falls on him. A Railroad is not liable to D.

Restatement (Second) of Torts § 452(2), Illustration 9.

In the comment to § 452(2), subparagraph (f) thereof, the point is made that circumstances may be such that as a result of time passage responsibility for the prevention of harm passes to a third party. There being no dispute whatsoever on the facts supporting this theory, the trial court's ruling should not have been reversed. Indeed, the weight of authority both in Florida

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and in sister states recognizes the lack of control concept in analogous contexts. See, e.g., Brown v. Suncharm Ranch, Inc., 748 So. 2d 1077 (Fla. 5th DCA 1999) (affirming summary judgment on basis that defendant had no possession, custody or control of premises at time of accident); accord Brock v. Rogers & Babler, Inc., 536 P.2d 778 (Alaska 1975) (affirming summary judgment on basis that defendant lacked control and was therefore "no longer in a position to prevent" harm); Olson v. City of Bellevue, 968 P.2d 894 (Wash. App. 1998) (affirming summary judgment where defendant was no longer in control of unsafe roadway); Rogers v. Grunden, 589 N.E.2d 248 (Ind. App. 1992) (affirming summary judgment where defendant was not in control of power lines).

This is not a case where the decedent was strangled by telephone wires. In fact, he did not even come in contact with the downed pole. *He was electrocuted by FP&L's live wires and his survivors settled with FP&L for a substantial recovery.* A defendant's liability is defined by a "foreseeable zone of risk" -- not by which defendant refuses to settle. See, e.g., McCain v. Fla. Power Corp., 593 So. 2d 500 (Fla. 1992); see generally Levy v. Fla. Power & Light Co., 798 So. 2d 778 (Fla. 4th DCA 2001). Lapse of time and lack of control exonerate BELLSOUTH as a matter of law. It owed no duty to the decedent. The trial court's final summary judgment should therefore be reinstated.

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CONCLUSION

The damage statute in issue is clear and unambiguous. Where there is a surviving spouse, the only child who recovers in a parent death case is a *minor* child. And the minor's recovery in such a case is measured by the remaining period of minority. The Fifth District had no right to interpret the statute and apply its own "spin" on what the statute ought to mean. Where a statute is clear, no judicial construction is proper. Regarding the issue of "duty", the passage of time, coupled with the lack of control of the downed pole, exonerates BELLSOUTH from any legal duty to the decedent. The Fifth District's decision should be reversed and the case remanded to the trial court with appropriate instructions to enter judgment in favor of BELLSOUTH.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of _____, 2002 to: Robert P. Avolio, Esquire and Tracy L. Markham, Esquire, AVOLIO & HANLON, P.C., 2730 U.S. 1 South, Suite J, St. Augustine, FL 32086 and to Robert B. Sendler, Esquire, 700 Universe Boulevard, Juno Beach, FL 33408.

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