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

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC02-1033

4DCA CASE NO. 5D01-1805

BELLSOUTH TELECOMMUNICATIONS, INC.,

Petitioner,

vs.

LINDA MEEKS,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

The Fifth District has ruled that a minor child's recovery for pain and suffering damages under Florida Statutes § 768.21(3) is not limited to the period of minority. If that decision were left to stand, an anomalous result would follow. In any wrongful death case where there is a surviving spouse, a surviving child could recover pain and suffering damages *for life* if his parent were to die on the day before his 25th birthday.[1] That same child, however, would receive *nothing* if his parent were to die on the next day when the child turns 25.[2]

The issue of the minor's damages is the subject of the certified question, but the entire case is now before the court, so BELLSOUTH also seeks review of the Fifth District's ruling on "legal duty."[3] In this regard, MEEKS has attempted to hold BELLSOUTH, a provider of *telephone* services, liable for the death of her husband because he was allegedly *electrocuted* by downed FPL *electric wires*. In fact, FPL assumed responsibility for the accident and paid MEEKS $1.3 million. A separate discussion of this duty issue follows the analysis of the certified issue relating to damages.

I

DAMAGES UNDER § 768.21(3)

The issue certified by the Fifth District is whether "damages recoverable by a minor child pursuant to section 768.21(3), Florida Statutes, [are] limited to the period of minority." Meeks v. Fla. Power &

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[1] A "minor" child for purposes of § 768.21(3) is defined as a child "under 25 years of age." See § 768.18(2), Fla. Stat.

[2] As noted below, adult children have *no claim* under § 768.21(3) where there is a surviving spouse.

[3] See, e.g., Fulton County Administrator v. Sullivan, 753 So. 2d 549, 553 (Fla. 1999). This Court routinely addresses issues beyond a certified question, so long as these other issues "have been properly briefed and argued and are dispositive of [the] case." See, e.g., Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982); see also Savona v. Prudential Ins. Co. of America, 648 So. 2d 705, 707 (Fla. 1995).

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Light Co., 816 So. 2d 1125, 1133 (Fla. 5th DCA 2002). Both statutory construction and common sense would suggest that they should be.

The Fifth District has held that a minor's damages under the statute are recoverable for life, thereby construing the statute in such a way that an unreasonable result has been created. See Allstate Ins. Co. v. Rush, 777 So. 2d 1027, 1032 (Fla. 4th DCA 2000), *rev. dismissed*, 790 So. 2d 1101 (Fla. 2001). The Wrongful Death Act defines a "minor" child as a child "under 25 years of age." Florida Statutes § 768.18(2). According to the Fifth District, Kevin Meeks, who was 24 years old at the time his father died, is entitled to a *lifetime* recovery of pain and suffering from BELLSOUTH. Yet Kevin's older sister receives nothing *because there was a surviving spouse in this case*. In fact, MEEKS conceded in the trial court that under the *express* wording of § 768.21(3), Mr. Meeks' adult daughter has *no* claim under this circumstance.

So while the Fifth District specifically stated that it did not believe that there should be "disparate treatment of minor children [and] adult children", it has nevertheless created the very problem in this case that it was ostensibly trying to cure. Moreover, the Fifth District did not address the significance of the surviving spouse in its analysis even though this is the operative fact which limits recovery in this case only to the "minor" child. By contrast, where there is *no* surviving spouse, § 768.21(3) provides that "all" children of the decedent recover without any differentiation between "minor" and "adult" children.

In its initial brief, BELLSOUTH explained three essential reasons why a lifetime recovery for MEEKS' minor son is improper. *First*, the statute's use of the word "minor" is clear on its face, particularly since the statute itself specifically defines a "minor" as meaning a child "under 25 years of age." Florida Statutes § 768.18(2). Accordingly, § 768.21(3) can *only* be interpreted to mean that recovery would end when the child reaches 25 years of age. Under Florida law, this "plain meaning" interpretation of the statute controls and renders the rules of statutory construction inapplicable. See, e.g., Donato v. American Tel. & Tel. Co., 767 So. 2d 1146 (Fla. 2000).

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Second, consortium rights of a minor were not recognized at common law. Therefore, the creation of such a claim by the legislature is necessarily circumscribed by the precise words used in the statute. See, e.g., Major League Baseball v. Morsani, 790 So. 2d 1071 (Fla. 2001). The legislature specifically chose to use the word "minor", so the right created is limited to the period of minority. Under Morsani, had the legislature intended to change the common law by creating a lifetime of consortium recovery for a minor child, it would have had to do so in *explicit* terms.

Third, the Fifth District's interpretation is contrary to the teaching of Cruz v. Broward County School Board, 800 So. 2d 213 (Fla. 2001). Dealing with the "mirror image" of this case -- namely, a parent's recovery for loss of consortium of a minor child –- this Court held in Cruz that a parent's recovery should be calculated *only* for the period until the minor reaches majority. Persuaded by the fact that there was no corresponding right for the parent to recover for injuries to an adult child, this Court explained:

> 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 in the other.*

Id. at 216 (emphasis added). The reasoning in Cruz applies here. Where there is a surviving spouse, an adult child has *no claim* under § 768.21(3). It would therefore make little sense to extend a minor's claim into adulthood.

MEEKS' entire analysis travels under the faulty premise that Kevin's right to recover for life somehow "vested" for life due to his fortuitous status as a minor on the day his father died. (Respondent's Brief at 27) This "vesting" concept, however, is directly at odds with a sound legal principle. "[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). Indeed, the very holding in Cruz recognizes the legal significance of a minor reaching the age of majority. (See BELLSOUTH's Brief at 16-19)

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In addition, MEEKS has incorrectly relied on the doctrine of liberal construction, on other inapplicable statutory provisions, and on outdated authorities to make her case -– each of which is separately discussed below.

A. Liberal Construction Does Not Create Rights

MEEKS points to the fact that § 768.21(3) contains a starting date for recovery (*i.e.*, "from the date of injury") but no ending date. She therefore concludes that this means a lifetime recovery for her now-adult son because the Wrongful Death Act is to be liberally construed. Liberal construction, however, does not ignore "plain meaning." The statutory definition of the word "minor" supplies this ending date (when the minor reaches 25 years old), so no statutory construction is needed. Otherwise stated, where the meaning of a statute is clear, the interpretative function ceases. See In re Griffith, 206 F.3d 1389, 1393 (11th Cir. 2000). In this case, there is simply no reason to engage in an "interpretative function" at all. "Minor" means "minor."

While a court may be permitted to engage in liberal construction as to the type of damages that are recoverable once the right has been created, see, e.g., United States v. Dempsey, 635 So. 2d 961 (Fla. 1994), it cannot engage in liberal construction as a pretext to create rights which do not otherwise exist. For example, the court cannot broaden the definition of the class to be protected from "minor" to "adult", as MEEKS urges. See, e.g., Zorzos v. Rosen, 467 So. 2d 305 (Fla. 1985).

As explained in the initial brief, the common law did not recognize *any* consortium rights of a child. In adopting § 768.21(3), however, the legislature modified the common law to create a consortium right for a *minor* child –- and *only* a minor child –- for loss of a parent *where there is a surviving spouse*. In light of the presumption in Florida that the common law remains in effect except to the extent it has been explicitly changed by the legislature, see, e.g., Major League Baseball v. Morsani, 790 So. 2d 1071, 1077-78 (Fla. 2001), only one conclusion is appropriate. The minor child's right to recovery is limited to the period of minority. Had the legislature intended to change the common law to permit a child's recovery

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to extend through adulthood, it would have had to say so in *explicit* terms. No such right can be read into the plain meaning of the statute.

B. Other Statutory Provisions Irrelevant

MEEKS points to the fact that subsection (1) of § 768.21 –- allowing a survivor to recover economic losses for support and services –- specifically states that the court may consider the "period of minority" in computing the duration of future economic losses. According to MEEKS, the legislature's failure to include any corresponding reference to the "period of minority" in subsection (3) means the court is precluded from considering the period of minority in connection with consortium recovery. Such statutory construction, however, is impermissible since the plain meaning of the statute controls. By so arguing, MEEKS has unwittingly undermined her own position. The very factor she asks this court to consider in calculating damages -– namely, the joint life expectancy of the decedent and his child -- is *also* listed in subsection (1) but is not mentioned in subsection (3). Under her logic, the court could not adopt her calculation of damages either.

It should also be noted that the analogy which MEEKS attempts to draw between the economic damages set forth in subsection (1) and the consortium damages set forth in subsection (3) is not appropriate. Economic losses by their very nature are far more susceptible to consideration of identifiable factors than the more abstract losses relating to consortium. There is nothing that can be read into the legislature's omission of a list of factors in subsection (3).

C. Reliance on Outdated Authorities

MEEKS' remaining authorities on the certified issue are of no assistance. In Stresscon International, Inc. v. Helms, 390 So. 2d 139 (Fla. 3d DCA 1980), for example, the court specifically stated that the § 768.21(3) issue had been waived and *that it therefore was not engaging in any analysis of the issue.* Moreover, that case involved the 1977 version of the statute which predated the significant 1990 amendment that added "surviving spouse" verbiage to the statute –- language which, as noted, is pivotal

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to the analysis here.

[4] MEEKS' further reliance on the 1987 Standard Jury Instruction 6.6(g) is unavailing for the very same reason. In any event, standard jury instructions are not intended to change substantive law. Aetna Life Ins. Co. v. Fruchter, 283 So. 2d 36 (Fla. 1973).

MEEKS' reliance on the 1983 decision in Gross Builders, Inc. v. Powell, 441 So. 2d 1142 (Fla. 2d DCA 1983), is likewise misplaced. That case involved a different statutory provision (§ 768.21(4)) which relates to a parent's recovery for a deceased child. While the court did conclude that a parent may recover for the wrongful death of a child over their joint life expectancies, that result is fundamentally at odds with this Court's more recent decision in Cruz v. Broward County School Board, 800 So. 2d 213 (Fla. 2001). As explained, Cruz held that a parent's recovery for filial consortium arising from injuries to a child is limited to the period of minority — a point which is fully consistent with BELLSOUTH's position here. As such, the certified question should be answered in the affirmative.

II

NO LEGAL DUTY

MEEKS has attempted to impose liability on BELLSOUTH in this case under both a common law duty and a contractual duty. The electrocution death of Mr. Meeks is certainly tragic, but it hard to imagine that an abandoned utility pole could serve as a basis for imposing a perpetual duty on BELLSOUTH in favor of the public at large under the circumstances of this case. Because of the potentially dangerous precedent created by the Fifth District, the following discussion is offered with the hope that this court will reverse that ruling.

A. No Common Law Duty

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[4] Contrary to MEEKS' assertion on page 22-23 of her brief, nothing in Angrand v. Key, 657 So. 2d 1146 (Fla. 1995), indicates that the court allowed recovery of damages under § 768.21(3) without limiting damages to the period of minority.

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As explained in its initial brief, BELLSOUTH owed no duty to MEEKS as a matter of law because the undisputed evidence of record established that it had relinquished total control over the utility pole at issue (as well as the entire pole line) to FPL some 24 years prior to the accident in which MEEKS was allegedly electrocuted. Given this undisputed lack of control for such a substantial period of time, responsibility shifted as a matter of law to FPL to prevent this accident.

[5] See Restatement (Second) of Torts § 452(2). Otherwise put, such facts place this accident outside of BELLSOUTH's foreseeable zone of risk.[6] See McCain v. Fla. Power Corp., 593 So. 2d 500 (Fla. 1992).

The only response offered by MEEKS on this point appears on pages 31-32 of her brief. In that passage, she argues that a telephone company is charged by law with knowledge that wooden poles will deteriorate over time, so BELLSOUTH had the continuing duty to examine and inspect the condition of the pole which led to Mr. Meeks' death. In so arguing, MEEKS completely overlooks the undisputed circumstances of this case -- namely, that BELLSOUTH relinquished control of the pole in issue (as well as the entire pole line) some 24 years earlier to another utility, which has been exclusively using and maintaining these poles ever since. (Initial Brief at 5-7) To impose liability on BELLSOUTH under such circumstances could potentially trigger the very type of unlimited liability which McCain intends to prevent. Moreover, it would promote substantial duplication of effort between two utilities that have cooperated for

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[5] In footnote 5 of her brief, MEEKS cites to evidence which she claims demonstrates that at the time of the accident, BELLSOUTH was paying a licensing fee to FPL for the very pole at issue. It is significant to note that her cited evidence does not show any such thing.

[6] The trial court granted summary judgment on a "bailment" theory. As explained in the initial brief, however, whether this case is analyzed under "bailment", "abandonment" or any other specific theory, the basic issue is whether BELLSOUTH owed a legal duty to MEEKS, so that is how the issue has been framed here. (See Initial Brief on Merits at 25-26)

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decades in a manageable fashion as to the hundreds of thousands of utility poles across the state and would create unnecessary expense which ultimately would be borne by their customers.

As reflected in Levy v. Florida Power & Light Co., 798 So. 2d 778 (Fla. 4th DCA 2001), such policy considerations are necessarily a part of the "zone of risk" analysis. In affirming summary judgment for FPL, the court in Levy explained:

> Duty is an allocation of risk determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed. The capacity to bear or distribute loss is a factor to consider in allocating the risk. We appreciate that relieving the [utility] of liability may leave the loss on the shoulders of the individual plaintiff who may be ruined by it. But the imposition of tort liability on those who must render continuous service of this kind to all who apply for it under all kinds of circumstances could also be ruinous and the expense of litigation and settling claims over the issue of whether or not there was negligence could be a greater burden to the rate payer than can be socially justified.

Levy, 798 So. 2d at 780 (citations omitted).

The circumstances of the accident which gave rise to this suit cannot be overlooked. According to MEEKS, her husband was electrocuted by FPL wires. As the record reflects, those wires were hanging on a utility pole that BELLSOUTH turned over to FPL's exclusive control some 24 years earlier. This situation does not pass the McCain/Levy "zone of risk" threshold. While BELLSOUTH owes no legal duty to MEEKS, she has not been left without a remedy. She looked to the responsible party, FPL, which paid her $1.3 million for her loss. Accordingly, the court is urged to reinstate the final summary judgment for BELLSOUTH.

B. No Contractual Duty

MEEKS urges that a Joint Use Agreement which FPL and BELLSOUTH entered into in 1975 establishes BELLSOUTH's contractual duty to protect third parties. As the face of that agreement reflects, however, its very purpose was merely to enable these two utilities to share facilities for their mutual benefit. To that end, it covers such things as relocation, replacement, maintenance, and abandonment of poles

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throughout the state which are jointly used by the two utilities.

While there are maintenance and indemnification provisions in the agreement, a review of those provisions *in context* reveals that they are merely incidental to the main purpose of the undertaking and therefore create no contractual duty to the public. On this point, the decision in Arenado v. Fla. Power & Light Co., 523 So. 2d 628 (Fla. 4th DCA 1988), *rev. dismissed*, 541 So. 2d 612 (Fla. 1989), is particularly instructive. In that case, the plaintiff was injured in an automobile accident at an intersection where the overhead traffic signal had been rendered inoperable due to FPL's transmission line having gone down. The plaintiff sought to hold FPL liable for breach of a contractual duty flowing from FPL's contract to provide electricity to the city. Quoting Justice Cardozo's often cited and seminal decision in H.R. Moch Co. v Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928), the court expressly rejected this "third party beneficiary" theory, explaining:

> More than this, however, must be shown to give a right of action to a member of the public not formally a party [to the contract]. The benefit, as it is sometimes said, must be one that is not merely incidental and secondary .... It must be primary and immediate in such a sense and to such a degree as to bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost.

Arenado, 523 So. 2d at 628-29. To hold otherwise expands the "zone of duty" beyond reasonable limits. Moch, 159 N.E. at 899.

Consistent with these principles, each of MEEKS' authorities on the contractual duty issue involve either government or private contracts entered into for the *primary* purpose of performing services for the *intended* benefit of third parties. As noted, nothing of the sort is present here.

MEEKS' further reliance on the parties' alleged failure to follow formal abandonment procedures under the Joint Use Agreement is misplaced. It is axiomatic that a contract may be modified by the conduct of the parties. In fact, Article XIX of the Joint Use Agreement specifically recognizes that BELLSOUTH and FPL could alter routines or procedures under their omnibus agreement as they saw fit and at any time

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they chose. And as the record reflects, neither FPL nor BELLOUTH ever followed any type of formal abandonment procedures. Rather, they would simply deem a pole abandoned by BELLSOUTH once BELLSOUTH removed all of its wires from that pole. This is precisely what the undisputed record shows -- as of 1974 BELLSOUTH had removed all of its telephone wires from the pole at issue as well as from every other pole in the line. Since the record does not contain a shred of evidence to the contrary, this forms no basis for MEEKS to defeat summary judgment. See Landers v. Milton, 370 So. 2d 368 (Fla. 1979).

CONCLUSION

For these reasons, BELLSOUTH requests that the court answer the certified question in the affirmative and quash the Fifth District's decision with instructions to reinstate the trial court's final summary 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 August, 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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CERTIFICATE OF COMPLIANCE WITH FONT SIZE

The undersigned hereby certifies that the font of this brief is Courier New 12.

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