

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC05-2074

BLANCA MARIA INCIARTE and
JESUS GUILLERMO INCIARTE, as
Co-Personal Representatives of the
Estate of EDGARD JESUS INCIARTE,
deceased,

Lower tribunal No.: 3D04-829

Petitioners,

vs.

HORSEPOWER ELECTRIC, INC., ET AL.,

Respondents.

**RESPONDENT, FLORIDA POWER & LIGHT
COMPANY-S, AMENDED BRIEF ON JURISDICTION**

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TABLE OF CONTENTS

Table of Citations	ii, iii
Statement of the Case and Facts	1
Summary of Argument	2
Argument.....	3, 4, 5, 6, 7
Conclusion	7
Certificate of Service	8
Certificate of Compliance	9

TABLE OF CITATIONS

Cases

<i>Callejas, etc., et al., v. Horsepower Electric, Inc.,</i> 911 So. 2d 150 (Fla. 3d DCA 2005).....	1, 7
<i>Clay Electric v. Johnson</i> 873 So. 2d 1182 (Fla. 2003).....	3, 5
<i>Duff v. Florida Power & Light Co.</i> 449 So. 2d 843 (Fla. 4 th DCA 1984).....	4
<i>Florida Star v. B.J.F.,</i> 530 So. 2d 286 (Fla. 1988)	3
<i>Glazer v. Florida Power & Light Company,</i> 689 So. 2d 308 (Fla. 3d DCA 1997)	5
<i>Goldberg v. Florida Power & Light Co.,</i> 899 So. 2d 1105 (Fla. 2005)	3
<i>Hoffmann v. Leavenworth Light, Heat & Power Co.,</i> 138 P. 632 (Kan. 1914)	4
<i>Hulett v. Central Illinois Light Co.,</i> 403 N.E. 2d 790 (Ill. 3d DCA 1980)	4
<i>Jenks v. Hill,</i> 504 F. Supp. 1130 (W.D. Okla. 1981)	4
<i>McCain v. Florida Power Corp.,</i> 593 So. 2d 500 (Fla. 1992)	3, 5
<i>Pacheo v. Florida Power & Light Co.</i> 784 So. 2d 1159 (Fla. 3d DCA 2001)	4
ii	
<i>Smith v. Florida Power & Light Company,</i>	

857 So. 2d 224 (Fla. 2d DCA 2003)	4
<i>The Kroger Company v. Appalachian Power Company</i> , 422 S.E. 2d 757 (Va. App. 1992)	4
<i>Virginia Power v. Daniel</i> 119 S.E. 2d 246 (1961)	4
<i>White v. Orlando Utilities Commission</i> , 156 So. 2d 879 (Fla. 2d DCA 1963)	2, 3, 4
<u>Florida Constitution</u>	
Art. V, § 3(b)(3), Fla. Const.	3
<u>Florida Rules of Appellate Procedure</u>	
Fla. R. App. P. 9.030	2, 3
Fla. R. App. P. 9.330	6

STATEMENT OF THE CASE AND FACTS

On December 10, 2000, Edgard Inciarte and Miguel Callejas were electrocuted when they stepped into an energized puddle of water surrounding a street light. A wire inside the pole had frayed, energizing the pole and the water. It is undisputed that the streetlight pole which was located on the Northeast corner of West Flagler Street and 102nd Avenue in Miami-Dade County was owned and maintained by Miami-Dade County. Florida Power & Light Company (“FPL”) supplied the electricity to the pole; however, it did not own, maintain, design or control the pole and had no contractual or other obligation regarding the pole. FPL had no knowledge of the frayed wire located inside the pole. It is also undisputed that FPL’s only participation in this project consisted of providing the electrical service to the subject street light circuit at the service point, or ~~A~~point of delivery. From that point on, all wiring, fusing, grounding, light poles and fixtures were owned and maintained by Miami-Dade County.

Based on this undisputed evidence and the well settled law of the State of Florida, the trial court granted FPL’s summary judgment and the Third District Court of Appeals affirmed the trial court’s decision. *Callejas, etc., et al., v. Horsepower Electric, Inc.*, 911 So. 2d 150 (Fla. 3d DCA 2005).

SUMMARY OF ARGUMENT

The Third District Court of Appeals was correct in affirming the summary

judgment in favor of Florida Power & Light Company (FPL). FPL supplied the electricity to the subject pole; however, it did not own, maintain, design or control the pole and had no contractual or other obligation regarding the pole. FPL had no knowledge of the frayed wire located inside the pole.

Florida law clearly holds that “where wiring or other electrical appliances on private premises are owned and controlled by the owner or occupant of such premises, a company which merely furnishes electricity is not responsible for the insulation or condition of such wiring or appliances and is not responsible for injuries caused by their defective condition...” *White v. Orlando Utilities Commission*, 156 So. 2d 879 (Fla. 2d DCA 1963).

There is no conflict involved in the instant case and any Florida cases. Indeed, the law throughout the nation is consistent with Florida law. Additionally, the Petitioners’ arguments that the Third District Court failed to review the record and the undisputed facts is improper for a motion to invoke discretionary review. See Fla. R. App. P. 9.030(2)(iv).

ARGUMENT

Fla. R. App. P. 9.030(2)(iv), specifically states that to invoke discretionary review in this Court, the appellate court’s lower opinion must *expressly and directly*

conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law. See also, *Florida Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988), which held that the Florida Supreme Court has the final and inherent power to determine what constitutes express and direct conflict, and that review under *Article V, § 3(b)(3), Fla. Const.* (requiring express and direct conflict) is unavailable “where the opinion below establishes no point of law contrary to a decision of th[e Supreme] Court [of Florida] or another district court.” *Id.* at 289. Here, the Petitioners have not met this jurisdictional requirement.

The Third District Court in its opinion clearly pointed out that the cases relied on by the Petitioners, *Clay Electric v. Johnson*, 873 So.2d 1182 (Fla. 2003), *Goldberg v. Florida Power & Light Co.*, 899 So.2d 1105 (Fla. 2005) and *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992), are distinguishable from the facts of the instant case.

The only Florida case which involved the same issues as the instant case, *White v. Orlando Utilities Commission*, held that:

“where wiring or other electrical appliances on private premises are
3
owned and controlled by the owner or occupant of such premises, a company which merely furnishes electricity is not responsible for the insulation or condition of such wiring or appliances and is not responsible for injuries caused by their defective condition ...”

156 So. 2d 879, 881 (Fla. 2d DCA 1963). As the opinion recognized, this has been the long settled law of the State of Florida. It has also been the long settled law throughout the nation. See *The Kroger Company v. Appalachian Power Company*, 422 S.E. 2d 757 (Va. App. 1992); *Virginia Power v. Daniel*, 119 S.E. 2d 246 (Va. 1961); *Hulett v. Central Illinois Light Co.*, 403 N.E. 2d 790 (Ill. 3d DCA 1980); *Hoffmann v. Leavenworth Light, Heat & Power Co.*, 138 P. 632 (Kan. 1914) and *Jenks v. Hill*, 504 F. Supp. 1130 (W.D. Okla. 1981).

The Petitioners' argument that the Third District Court's opinion is in conflict with *Smith v. Florida Power & Light Co.*, 857 So. 2d 224 (Fla. 2d DCA 2003), *Pacheo v. Florida Power & Light Co.*, 784 So. 2d 1159 (Fla. 3d DCA 2001) and *Duff v. Florida Power & Light Co.*, 449 So.2d 843 (Fla. 4th DCA 1984) is completely without merit as these cases involved the operation of equipment, a measuring tape and an antenna near power lines owned, controlled and maintained by FPL. In the present case, it is undisputed that the street light pole at issue was not owned, maintained, designed or controlled by FPL, and FPL had no contractual or other obligation regarding the pole.

The Petitioners' argument that the Third District Court's opinion is in conflict with *McCain v. Florida Power Corporation*, 593 So. 2d 500 (Fla. 1992), *Clay*

Electric Cooperative Inc. v. Johnson, 873 So. 2d 1182 (Fla. 2003) and *Glazer v. Florida Power & Light*, 689 So. 2d 308 (Fla. 3d DCA 1997) is equally without merit.

In *McCain v. Florida Power Corporation*, 593 So. 2d 500 (Fla. 1992), the Plaintiff was injured when he came into contact with an underground cable owned and maintained by Florida Power Corporation after an employee of Florida Power Corporation affirmatively advised the Plaintiff that it was safe to trench in the area where the injury occurred.

The court in *Glazer v. Florida Power & Light*, 689 So. 2d 308 (Fla. 3d DCA 1997) held that Florida Power & Light Company would only have a duty to warn if it possessed superior and compelling knowledge of the dangers imposed. Finally, in *Clay Electric Cooperative Inc. v. Johnson*, 873 So. 2d 1182 (Fla. 2003), Clay Electric entered into a contract with Jacksonville Authority to maintain the streetlights and was paid for this service (as was Horsepower Electric, Inc. in the instant case).

Moreover, the Petitioners' arguments that the Third District Court failed to

5

review the record and the undisputed facts is improper for a motion to invoke discretionary review and is more appropriate for a Motion for Rehearing. Fla. R. App. P. 9.330(a), provides as follows:

...A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or

misapprehended in its decision, and shall not present issues not previously raised in the proceeding.

The Petitioners filed their Motion for Rehearing and Clarification, Motion for Rehearing En Banc and Motion to Certify Questions of Great Public Importance and Conflict to the Florida Supreme Court, all of which were denied by the Third District Court of Appeal.

Additionally, the affidavits referred to in Petitioners' brief do not, contrary to their argument, evidence any knowledge or notice by FPL of the *specific problem* with the subject street light pole. A general knowledge that *any wire has a potential of fraying* and a general knowledge that *street light poles, whether aluminum, metal or concrete are not airtight*, certainly does not place upon FPL the burden of inspecting a street light pole not owned, controlled or maintained by it.

The trial court found that the incident occurred because frayed wire *inside the aluminum light pole* had energized the pole as well as the puddle surrounding it and that FPL had *no knowledge of the frayed wiring inside the County's street light*

6

pole. The wiring was only visible once the access panel had been removed and the wires pulled out.

The Third District Court of Appeal affirmed the summary judgment in favor of FPL, stating in its opinion that “the undisputed facts show . . . that a wire inside the

pole had frayed. . . Although FPL supplied the electricity to the pole, it did not own the pole and had no contractual or other obligation to maintain it. Moreover, FPL did not have any knowledge of the frayed wire inside the pole.” *Callejas, etc., et al., v. Horsepower Electric, Inc.*, 911 So. 2d 150, 151 (Fla. 3d DCA 2005). It is clear from the trial court’s order and the opinion of the Third District Court of Appeal, that the affidavits filed by the Petitioners were insufficient and created no duty on the part of FPL.

CONCLUSION

The Petitioners are inappropriately re-arguing their previous motions filed in the appellate court. There is no conflict in the law, and the opinion rendered by the Third District Court correctly follows the long settled law of this State and throughout the nation. The Respondent respectfully submits that this Court should deny jurisdiction in the absence of any direct and express conflict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief uses 14-point Times New Roman type
in compliance with Fla. R. App. P. 9.210(a)(2).

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