DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 4D23-0113

OSVALDO LOPEZ,

Appellant,

v.

FLORIDA POWER & LIGHT CO.,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases

Statutes

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ARGUMENT

I.

THE TRIAL COURT IMPERMISSIBLY DIRECTED A VERDICT ON THE DUTY ISSUE IT RAISED SUA SPONTE

FPL posits that a trial court may—after a jury verdict in favor of a plaintiff necessarily premised on the existence of a legal duty—direct a verdict for the defense on the duty issue, even where the defense made no challenge to the duty issue in its post-trial motions. Even if that general premise is accepted, however, the unique circumstances of this case make it wrong and reversible for the trial court to sua sponte direct a verdict finding no duty of care. That is because the trial court had during trial affirmatively found the existence of a duty and so ruled.

After Plaintiff rested, FPL began its argument for a directed verdict. Tr. 429. The ground for that motion was "[i]mpermissible stacking of inferences to establish negligence." Tr. 430. Defense counsel cited a case on its inference-stacking argument and the trial court made the following findings:

> THE COURT:· This case is constantly cited to me, so -- okay. So what we have is Ebersole.· You know, Ebersole testified that the easement, which ***FPL has a duty to keep the lines free in the easement***, not on personal property -- it was the (indiscernible) -- thinking about this it's not, it's on an easement. So ***they have a duty***.

Tr. 430 (emphasis added).

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The adversary system under which our courts operate should not countenance the trial court becoming an advocate for one side and raising grounds to overturn a jury's verdict that the Defendant did not see fit to raise itself. Therefore, the trial court's determination that FPL had no duty should be reversed.

II.

THIS COURT SHOULD REVERSE THE TRIAL COURT'S ORDER ON THE DUTY ISSUE BECAUSE SEVERAL SOURCES OF LAW GIVE RISE TO A DUTY ON THE PART OF UTILITIES TO USE DUE CARE TO PREVENT ELECTROCUTIONS OF TREE TRIMMERS

A. Standard of Review and Introduction: FPL Owed Duty of Care Under Several Sources:

On the merits, the trial court erroneously determined that FPL had no duty of care to the Plaintiff. That duty arose under a variety of circumstances, including the inherently dangerous activity involved, FPL's franchise with the State of Florida, the non-delegable duty arising under applicable statutes and regulations including the National Electric Safety Code.

B. Duty Under Common Law for Inherently Dangerous Activity:

This Court should reject FPL's argument that the non-delegable duty arising from employment of independent contractors to perform inherently dangerous activities does not give rise to liability unless the injury occurs "in the ***course of the performance*** of the inherently dangerous work." See

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Answer Brief at 58 (emphasis in original). It is absurd to advance the position that a principal's liability for the negligent acts of an independent contractor depends solely on the temporal proximity between the contractor's negligent actions and the resulting injury. The notion that a principal may be liable for the negligent acts of an independent contractor only where the injury occurs while the contractor is actively engaged in the work—but that the principal is immune from liability for a dangerous condition created by the contractor that remains following the termination of actual work—is frankly disingenuous.

Appellee cites in support of its temporal proximity argument *Madison v. Midyette,* 541 So. 2d 1315 (Fla. 1st DCA 1999). Although that case does contain language limiting liability for the acts of independent contractors to dangerous conditions caused "as a result of the performance of the work contracted for between the independent contractor and the employer," the requirement that the injury be "***as a result*** of the performance of the work" is not the same as a requirement that the injury be expected ***during*** the performance of the work." Here the evidence is that the dangerous condition was caused by the work performed (or not properly performed) by Asplundh. Mr. Lopez did not need to be injured during the Asplundh tree trimming process in order for FPL to be liable for the acts of its contractor. The judgment below should be reversed.

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FPL hopes to persuade this Court that it owed no duty of care to Mr. Lopez by mischaracterizing Appellant's argument. Appellant does not argue that a utility company owes a duty to the "general public" no matter what the circumstances, even as to those who unforeseeably expose themselves to powerlines like the man who flew a model airplane into such a line in *Rice v. Fla. Power & Light Co.,* 363 So. 2d 834 (Fla 3d DCA 1978). As illustrated by the fact that many court cases over the years arose from electrocutions involving fruit picking, tree trimming, and similar circumstances of vegetation maintenance reflects that FPL was on notice of the foreseeability of such incidents that give rise to a common law duty of care. *See, e.g., McCoy v. Fla. Power & Light Co.,* 87 So. 2d 809 (Fla. 1956) (decedent electrocuted while pruning trees near FPL's high voltage lines); *Lopez v. Fla. Power & Light Co.,* 501 So. 2d 1339 (Fla. 3d DCA 1987) (wrongful death action arising out of electrocution of person picking avocados from tree adjacent to power lines with 16-foot metal rod).

The cases cited by FPL recognizing the lack of duty based on unforseeability have nothing to do with people trimming vegetation next to powerlines. *See Biglen v. Fla. Power & Light Co.,* 910 So. 2d 405 (Fla 4th DCA 2005) (no duty to protect the plaintiff from electrocution where he was injured while operating an aerial lift with a boom that he raised so high as to

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bring it in contact with power lines installed before 1985 when the property was vacant). One of the cases relied upon throughout FPL's brief favors the Appellant. In *Smith v. Fla. Power & Light Co.,* 857 So. 2d 224 (Fla. 2d DCA 2003), the court recognized that in "*McCain [v. Florida Power Corp.,* 593 So. 2d 500 (Fla. 1992)] the court categorized the types of cases in which the courts recognize that power companies owe a duty to those injured by coming into contact with its powerlines. One of those categories of cases is that involved here of "cases in the . . . category [which] involves circumstances where the power company has knowledge of existing conditions or recurring activities in proximity to the company's lines that foreseeably create a risk of injury." *Id.* at 231. Trimming vegetation next to power lines, picking fruit from trees next to power lines, and other similar activities have long been recognized as circumstances where the power company has knowledge of the foreseeable risk of injury.

In the present case, a common law duty was owed because "persons in the circumstances of the particular plaintiff were as a matter of law within a foreseeable zone of risk created by the defendant power company," as is the standard for finding such a duty in this Court's decision of *Rehab. Ctr. at Hollywood Hills, LLC v. Fla. Power & Light Co.,* 299 So. 2d 16, 20 (Fla. 4th

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DCA 2020). FPL owed Mr. Lopez a duty of care and the trial court's ruling to the contrary should be reversed.

FPL argues that it was not on notice of the danger to Mr. Lopez—even if it is on constructive notice of the general risk of harm to tree trimmers operating around powerlines—because it had an inspector visit the premises following the most recent trimming by Asplundh to correct the sparking and arcing condition that was in existence shortly before Mr. Lopez's accident. FPL states that it inspected the work shortly after Asplundh performed its trimming of the ficus hedge "[t]wo or three weeks before the accident," which involved the "scope of the work . . . 'to trim all vegetation near or approaching [upon] powerlines' to FPL standards." *See* Answer Brief at 4-5; R. 436, 564.

However, the jury was free to reject the testimony of FPL's inspector, Daniel Turbet, that the hedge had been trimmed to FPL standards. See R. 564. Because the Plaintiff presented evidence from which the jury could find that the distance between the hedge and the powerlines did not meet FPL's standards a mere couple of weeks following Asplundh's trimming efforts, the jury could easily have found that Mr. Turbet was mistaken when he made the determination that the hedge had been trimmed to specifications.

Further, this Court should reject FPL's argument that it was not on constructive notice of the proximity of the hedge to the power lines. That

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ignores the point that—because the duty of care under the circumstances was a non-delegable duty—the knowledge of Asplundh that it had not properly trimmed the hedges was imputed to FPL.

Thus, under a variety of analyses, FPL owed a duty of care to Mr. Lopez. The trial court errored in concluding otherwise and the judgment below should be reversed.

C. Duty Under FPL's Franchise with State of Florida:

FPL attempts to brush off Appellant's argument that FPL's franchise with the State of Florida gives rise to a non-delegable duty of care. Although admitting that it had such a franchise with the State and admitting that duties imposed by virtue of such franchises are non-delegable, FPL contends that liability for the duty involved in this case could be delegated to its independent contractor, Asplundh because it was a duty of the type "which could be lawfully carried on . . . by private persons without liability for the misconduct of the contractors." *See* Answer Brief at 62. The problem with FPL's argument is that it mistakes the nature of the duty.

Appellee contends that the duty arising by virtue of the franchise is the duty of "cutting trees in a landowner's yard," which it contends "does not require a governmental franchise." *See* Answer Brief at 63. That is not the duty that is created by FPL's franchise.

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Instead, the duty is the duty to create and comply with such vegetation management timing cycles, distances, and specifications to ameliorate the risk of electrocution by persons performing work in and around the vegetation close to electrical lines. The duty is not "cutting trees in a landowner's yard," but it is the duty of protecting tree trimmers (and others foreseeably injured by the proximity of vegetation to powerlines) through timing cycles, cutting distances, and such other criteria as is necessary to render safe the transmission of electricity.

A private person cannot transmit electricity through easements adjacent to private homes. That is the duty that FPL failed to perform safely. Therefore, the duty is non-delegable and Asplundh's negligence is not a defense to FPL.

D. <u>Nondelegable Duty Arising Under Statutes and Regulations:</u>

FPL confusingly argues that "because violations of Section 218 [of the National Electric Safety Code] do not constitute negligence per se, Section 218 does not create an independent tort duty at all." See Answer Brief at 34. That does not make sense. A duty may arise from a statute that does not give rise to a claim of negligence per se, because that duty goes to the public as a whole rather than to a particular class of persons being protected.

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Other utilities and other courts have recognized that Section 218 creates a duty of reasonable care to properly manage vegetation around electrical distribution lines.

The Supreme Court of Montana has recognized that NESC Section 218 not only creates a duty of care, but gives rise to a claim of negligence per se.

In *Department of Natural Resources & Conservation v. Montana Power Co.,* 943 P.2d 1251 (Mont. 1997), the court affirmed a judgment in favor of the power company arising from a fire caused by a tree branch falling into a power line when it was being trimmed. However, that ruling was not based upon the lack of a duty of care, but on the lower court's determination that the DNRC did not establish a breach of that duty. In recognizing such a duty arising from Section 218, Montana's highest court stated as follows:

> The DNRC does not argue on appeal that the District Court misstated the standard of care applicable to MPC pursuant to either the common law or the NESC. The District Court concluded that ***paragraph 218 of the NESC required that MPC trim and remove trees which may interfere*** with ungrounded supply conductors, and that ***failure to follow the requirements of the Code is negligent per se***. The court also concluded that MPC had a heightened common law duty commensurate with the risks involved to maintain its lines. The DNRC agrees with both of these standards.

Id. at 1253-54 (emphasis added).

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Such a duty is recognized by the large utility company supplying electricity in Pennsylvania: Metropolitan Edison Company. In *USAA Cas. Ins. Co., v. Metro. Edison Co.,* 214 U.S. Dist. LEXIS 96512 (M.D. Pa. June 16, 2014), the Plaintiff sued Metropolitan Edison "alleging negligence and willful wanton in misconduct arising from an electrical fire in Ms. Sonnen's home." *Id.* at *1. In the Plaintiff's expert's report, its expert "opined that Met-Ed did not adequately maintain trees and tree branches along the 720 distribution line as required by Rule 218 of the National Electric Safety Code ('NESC') and the Pennsylvania public community commission . . . ." *Id*. Both Metropolitan Edison and the court agreed that Metropolitan Edison owed a duty of care created by NESC Section 218, which had been incorporated into the utility's tariff, just as it has been in Florida:

> In his expert report, Mr. Panunto opines that Met-Ed did not adequately maintain trees and tree branches along the 720 distribution line as required by ***Rule 218*** of the National Electric Safety Code ("NESC") and the Pennsylvania Public Utility Commission ("PPUC").
>
> * * *
>
> ***The parties do not dispute that Met-Ed faces a legally cognizable duty to provide safe and reliable electric service. (See Doc. 71-7, Ex. 7 at 10). The NESC establishes the relevant standard of care for electrical utilities*** and is incorporated into Met-Ed's Tariff. (Doc. 71-13, Salver Dep. 27:4-31:14, Apr. 12, 2013; Doc. 59-3, Ex. 3; Doc. 72 at 4). In particular, Rule 218 of the NESC provides that "[v]egetation that may

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> damage ungrounded supply conductors should be pruned or removed." (Doc. 71-2, Ex. 2 at 2; Doc. 72 at 4). ***Met-Ed recognizes its duty on its website*** and informs its customers that, "[t]o provide safe and reliable electric service for our customers, trees must be properly maintained and kept clear of electric power lines." (Doc. 71-7, Ex. 7 at 14).

Id. at *30 (Emphasis added).

Another court decision recognizing the existence of a legal duty in a public utility arising from NESC Section 218 is the decision of the Court of Appeals of Tennessee in *Allstate Prop. & Cas. Ins. Co. v. Sevier Cnty. Elec. Sys.,* 666 S.W. 3d 401 (Tenn. App. 2022). In that case, the issue was whether Section 218 created a duty of care on the part of a utility's vegetation management contractor, not just on the utility itself. Holding that Section 218 does not impose a duty upon the utility's contractor, the Tennessee court recognized that Section 218 does create a duty of care in the utility itself, as follows:

> In support of their argument that the NESC imposes a statutory duty upon Wolf, ***Plaintiffs rely particularly on Section 218 of the NESC***, which states: "Vegetation that may damage ungrounded supply conductors should be pruned or removed. Vegetation management should be performed as experience has shown to be necessary." Notwithstanding, as Wolf points out, a note to Section 218 provides that "right-of-way limitations" should be considered as one of the "[f]actors . . . in determining the extent of vegetation management required." Another such factor is the "vegetation's location in relation to the conductors." As a second note to Section 218 provides: "It is not practical to prevent all tree-conductor contacts on overhead lines."

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> The trial court determined that the above-referenced NESC provision "imposes no explicit duty on vegetation management contractors," further explaining that although the NESC "may state a standard for utility companies, it does not explicitly impose a duty on contractors." Our consideration of the NESC provisions contained in the appellate record leads to the conclusion that ***it is designed to serve as a "standard (or basis of the standard) of safe practice for public and private utilities in the United States,"*** as stated in its introduction (emphasis added). Accordingly, any duty to prune or remove vegetation that could impact electrical supply lines would lie first and foremost with SCES.

Id. at 420 (emphasis added).

Section 218 of the NESC gives rise to a duty of care which arises under statutes and regulations adopted for safety purposes. Therefore, FPL was under such a duty and the trial court's order to the contrary should be reversed.

III.

THE TRIAL COURT MISTAKENLY RE-WEIGHED THE EVIDENCE AND SUBSTITUTED ITS JUDGMENT FOR THE JURY'S ON WHETHER FPL BREACHED ITS DUTY OWED TO MR. LOPEZ

Appellee's Answer Brief ignores convention by omitting a section to address Appellant's argument that the trial court improperly substituted its view of the weight to be given to the evidence for that of the jury. Instead of addressing Appellant's authorities on that issue, FPL's entire brief is a superficial effort to get this Court to do the same thing. Most of the first twenty

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pages of the Answer Brief involve challenging the weight to be given to the testimony of Plaintiff and his witnesses, as if this were the time for closing argument in a jury trial rather than a case on appeal.

The simple fact remains that the jury found for the Plaintiff and rejected FPL's arguments concerning the weight to be given to the evidence. This Court should resist the temptation to be fooled by FPL's challenges to the accuracy of Plaintiff's expert's opinions—especially since there were no timely objections or motions to exclude those opinions at trial—and argument for a contrary factual finding than that made by the jury. The trial court erroneously substituted its jury for that the jury on the facts and should be reversed.

IV.

THE DIRECTED VERDICT SHOULD BE REVERSED BECAUSE THE JURY VERDICT WAS NOT BASED ON IMPERMISSIBLE STACKING OF MULTIPLE INFERENCES

The jury's verdict in favor of the Plaintiff was not based upon impermissible stacking of inferences. The only fact to be inferred was the fact that naturally flowed from other direct evidence. Much less were there "four key inferences" as claimed by Appellee in its brief. *See* Answer Brief at 50.

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The first alleged inference was Mr. Ebersol's testimony that the ficus branches had not been cut back far enough from the power lines, thereby providing evidence of FPL's breach of its duty of reasonable care. Mr. Ebersol's testimony concerning the height of the powerlines and their proximity to the ficus hedge was not an "inference," but a mathematical calculation made from evidence upon which he reasonably relied. That evidence included detailed measurements that "were FP&L's own measurements" created following the incident. R. 589.

Although FPL in its Answer Brief criticizes the methodology, foundation and conclusions of Mr. Ebersol, it raised no such objections at the time of trial when the jury was considering his testimony. This Court should reject FPL's invitation to join the trial court in weighing that expert testimony, which came in without objection below.

As noted in our initial brief, expert opinion testimony is not "circumstantial" evidence but is "direct evidence." *Smith v. State*, 88 So. 3d 412 (Fla. 4th DCA 2012); *Sloss v. State*, 925 So. 2d 419 (Fla. 5th DCA 2006). Therefore, the evidence of the powerlines' distance from the ficus hedge which supports a finding of FPL's breach of duty was not the first inference, nor any inference at all.

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FPL attempts to make a second inference out of the same subject of the first alleged inference: the distance between the vegetation and the powerlines. FPL in its brief acknowledges that, in the evidence below, "Lopez pointed to Ebersol's testimony that he would have been more than 10 feet away from the lower secondary if the hedge had been cut to FPL standards," but then calls that direct testimony an inference solely because it allegedly "was also based on Ebersol's faulty calculations of the distances involved." Again, no objection was made to those calculations at trial and the jury was able to rely upon Mr. Ebersol's direct testimony, so it was not an inference that the Plaintiff "would not have contacted the hedge if it had been cut to FPL standards."

The third alleged inference—that Mr. Lopez experienced indirect contact with the powerline causing electricity to flow through the cut branch to his pole and enter his body—was not merely based upon inferences from circumstantial evidence. FPL acknowledges the Plaintiff's testimony that he did not touch the wire with his pole. The proposition that a branch touched the wire as it was also touching the cutting pole is the only other possible inference to be drawn from the fact that Mr. Lopez did not touch the wire himself. Because the "indirect contact" theory of the mechanism of injury was the only permissible inference from the evidence, indirect contact became a

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basic fact rather than inference upon which further matters might be stacked. "When a predicate inference is the only reasonable inference that can be made from the evidence, it is no longer an inference but is deemed an established fact." *O'Malley v. Ranger Constr. Indus.,* 133 So. 2d 1053, 1056 (Fla. 4th DCA 2014).

FPL's proposed "fourth" inference it claims would have to be drawn to support liability is that the duration of the contact between the ficus branch, Mr. Lopez's pole, and his body was long enough to cause the burns he sustained. To began with, it does not appear that FPL is making an argument that the burns to Mr. Lopez's body could have been caused by something other than some contact with its powerlines—whether a primary line, a secondary line, through the pole, or otherwise—as opposed to being from some unrelated activity at another time. Instead, FPL seems to be arguing that the directed verdict was proper because the jury could have inferred that the contact was direct between the powerline and Mr. Lopez's cutting tool rather than indirect. However, because the Plaintiff's own testimony was direct evidence that there was no such direct contact, the fact that the burns to Plaintiff's body resulted from such a chain of indirect contact is the only permissible inference that could be drawn, so it is not a stacked inference.

Further, FPL's argument that Plaintiff needed to satisfy this fourth inference is based upon the faulty premise that FPL would not be liable even if the contact between the powerline and his body was direct through his cutting tool. Even if the jury could have found such direct contact, it could have determined that such contact would not have occurred, but-for FPL's failure to properly trim back the ficus hedge. Therefore, even if the mechanism of "indirect contact" was established inferentially, it is not a necessary inference underlying the verdict so the trial court erroneously vacated the jury's verdict.

CONCLUSION

WHEREFORE, the trial court having erroneously directed a verdict by raising, sua sponte, the duty issue; there being several sources of a legal duty applicable here; there being sufficient evidence of a breach of FPL's duty to properly maintain vegetation around its powerlines; and Plaintiff's evidence on the mechanism of causation being admissible direct evidence and not an impermissibly stacked inference, there was sufficient legal and factual basis for the jury's verdict and the directed verdict should be reversed with instructions to enter judgment in Plaintiff's favor consistent with the verdict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing test searchable version of this brief were served by the e-filing portal upon Stuart Singer, Sashi Bach, Boies Schiller Flexner LLP, Florida Power & Light Co., 401 East Las Olas Boulevard, Suite 1200, Fort Lauderdale, Fl 33301, ssinger@bsfllp.com, sbach@bsfllp.com, ftleserve@bsllp.com; Mark Packo, GED Lawyers, LLP, 7171 North Federal Highway, Boca Raton, FL 33487, litlaw@gedlawyers.com; on March 6, 2024.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14-point Arial, contains 3,964 words, and otherwise complies with the requirements of Rule 9.210.

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