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A-102897-7

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

NO. 4D2023-2845

MILTON CORTEZ,

Appellant,

v.

IRBY CONSTRUCTION COMPANY, a foreign corporation and, FLORIDA POWER & LIGHT COMPANY, a Florida corporation,

Appellees.
_________________________/

On Appeal from the Circuit Court of Palm Beach County, No. 50-2021-CA-010723
The Honorable Nutt and The Honorable Kerner, Presiding Judges

ANSWER BRIEF OF APPELLEE, IRBY CONSTRUCTION COMPANY

Alyssa M. Reiter
WICKER SMITH O'HARA
McCOY & FORD, P.A.
Counsel for Appellee, Irby Construction Company
515 E. Las Olas Boulevard, Suite 1400
Fort Lauderdale, FL 33301
Phone: (954) 847-4800
Fax: (954) 760-9353
E-mail: AReiter@wickersmith.com

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a final judgment entered after the circuit court granted both defendants' motions for summary judgment.

Plaintiff/Appellant, Milton Cortez, alleged that on February 16, 2018, while working for C&D Tree Farm and using a bobcat machine to remove trees from a property, Cortez received an electrical shock. (R39). He contended that Florida Power & Light Company ("FPL") had contracted with Irby Construction Company in Fall 2017 to remove and replace existing transmission structures in an adjacent area on that property. (R35). Plaintiff alleged that the palm fronds on a tree Plaintiff was moving "may have touched the high voltage transmission line and/or gotten close enough so that an electrical shock passed through the tree into the bobcat and the Plaintiff's body." (R37). He alleged that Irby Construction was also "aware of the electrical current in the earth which may have caused or contributed to the electrocution." (R37). He further alleged that Irby Construction had knowledge of the operations performed in the vicinity and had a

duty to warn Plaintiff of the dangers associated with the tree removal process. (R37).

Summary judgment proceedings

The defendants sought summary judgment on the basis that there was no duty owed to Plaintiff. The defendants' two pending summary judgment motions were briefed and considered together. FPL filed its motion for summary judgment on January 23, 2023. (R140). FPL's primary argument was that it owed no duty to Plaintiff. (R140) ("…Final Judgment should be granted to FPL as it owed no duty to Plaintiff at the time of the subject accident."). The next day, Irby Construction filed a Notice of Joinder containing no substantive argument. It merely stated that Irby Construction "adopts and joins the arguments made" in FPL's motion for summary judgment, "incorporates by reference the evidence relied upon in the motion, and requests the same relief requested in the motion, as applicable to Defendant…." (R194).

Two weeks later, Irby Construction filed another summary judgment document, which incorporated "additional fact and

argument" "[a]s further support" for the joinder in FPL's motion. (R204). FPL filed a Notice of Joinder in Irby Construction's motion. (R288).

Plaintiff filed one response to all pending summary judgment motions. (R315-325). The response blended both defendants' motions and arguments and responded to both jointly. The response concluded "both power company defendants were well aware of the nature of the work being performed…." (R324). The response also asserted "the Defendants owed a duty to warn the Plaintiff…." (R325).

FPL timely noticed its motion for summary judgment for hearing and, at the hearing, the court asked Plaintiff's counsel whether there was "an agreement to hear both of [the defendants' summary judgment motions] today." (R633). Plaintiff's counsel responded "I think if we proceed on the FPL motion, that will be dispositive of all issues and will render the rest of it moot…." (R634).

The summary judgment hearing proceeded with argument by FPL's counsel until the court ran out of time. The court then recessed the hearing for several hours and resumed the hearing in the

afternoon. (R654). The court asked whether the parties had reached an agreement in the interim as to whether Irby Construction's motion for summary judgment could proceed and invited Irby Construction's counsel to present its argument. (R668-69). Plaintiff's counsel did not lodge any objection. Instead, Plaintiff's counsel responded on the merits to Irby Construction's motion. (R672-674, 677-78). At the end of that argument, the court asked: "Anything else to add from anyone?" (R678). Plaintiff did not object to the hearing proceeding on Irby Construction's motion or raise any issue about due process. (R678-79).

After the court granted the summary judgment motions, Plaintiff sought rehearing of the order. (R582). A second judge required the defendants to prepare responses to the motion for rehearing. (R598). The parties further briefed the motions. (R600, 607, 609). The second judge completed a full review of the court file and denied reconsideration. (R614). The court entered final summary judgment after that second review. (R616).

Summary judgment evidence

The evidence submitted in support of or opposition to the summary judgment motions showed the following. The property where the incident occurred was not owned by FPL or Irby Construction. (R142, 170). Cortez worked for C&D and only C&D trained Cortez on how to perform his job. (R175-6, 217-8).

At the time of the accident, Cortez was lifting a tree from a horizontal position off the ground to a vertical position to place it on a truck. (R188-89). The power line was about 35 feet above and had been there for the entire two months Cortez was working at that location. (R.220-222). Cortez "knew that the cables were carrying electricity" because you could hear the noise. (R224). Cortez believes that a palm frond of the tree hit the cable and caused his shock. (R182-3). He had never touched an electrical line before this "[b]ecause logically, you can get killed." (R180, 223). Plaintiff knew that there were activated, electrical transmission lines in the accident location. (R205).

Cortez contended that, before this incident, you could sometimes feel "a little bit of electric" shock while walking on the property. (R223). The Plaintiff asserted that a meeting took place between C&D and FPL to discuss those shocks. (R317-9). C&D's owner (Charles Angle) testified that C&D met with an FPL representative at some point but he had no knowledge whether anyone from Irby Construction was there and he had no written correspondence with Irby Construction. (R237, 245).

Irby Construction contended that the Plaintiff had not produced any competent admissible evidence that Irby Construction had knowledge of shocking sensations in the land or that it ever attended a purported meeting between C&D and FPL to discuss such sensations. (R204).

Many months before this incident, FPL had hired Irby Construction to change out the existing poles of the subject FPL transmission lines for larger concrete poles. (R205). Irby Construction completed that work about one month before the incident and left the property. (R206, 231). Plaintiff conceded that

Irby Construction had left the property at least two weeks before the incident occurred. (R676-7). No one from Irby Construction was present the date of the accident. (R206, 231). Plaintiff himself never spoke to anyone from Irby Construction. (R206, 226).

In granting summary judgment, the court found that there was no evidence that "FPL was on notice that the plaintiff would raise and transport the trees vertically in a way that could or would strike the open and obvious power lines." (R539). The court further found "[t]here is no evidence either defendant saw any trees being transported in a vertical manner near or under the lines." (R539). It found that FPL had no duty to plaintiff and "[t]he claim Irby had a duty is even more attenuated." (R540).

In his motion for rehearing, Plaintiff contended that Irby Construction's supervisor, Brad Cameron, testified that he would have warned the Plaintiff and C&D had he witnessed the tree harvesting operation. (R584, citing Cameron deposition at p.21-22). Cortez contended that because Irby was "aware of the tree harvesting

operation" it had a duty to warn. (R585). The cited testimony, in context, provided:

> Q. All right. And so you never saw, if I understand your testimony correctly, you don't recall ever having seen people engaged in harvesting trees from that location?
> A. I mean I don't. I mean I just don't.
>
> * * *
>
> Q. ...And then did you go out there in reference to an accident that occurred?
> A. I did.
>
> * * *
>
> Q. If you had been on the site and saw people using a bobcat to lift trees under the power lines, what if anything would you have done?
>
> * * *
>
> A. I mean I may, would have said something to them I mean but it's not uncommon to see people, you know, accessing FPL property to their own property and it's just not uncommon seeing people on FPL property.
> Q. Well, if you thought that they were in any danger, would you warn them?
> A. Yeah. If I thought. If I would have seen them, probably.
> Q. What I mean to say commonsensically if you were there just before this happened and you saw a guy loading a 20- or 30-foot tree under a power line, would you have done anything?
> A. Yeah. I would have said something I think.

(R961-4). Cameron was not at the site just before this happened. He could not even recall if he knew that there were tree harvesting procedures happening at the site at any point. (R957-8). He was not

aware of any meeting between FPL and C&D regarding alleged shocks in the ground. (R965).

SUMMARY OF THE ARGUMENT

There is no basis to reverse the summary judgment in Irby Construction's favor.

Appellant's argument on appeal is that Irby Construction had a duty to warn Cortez not to touch the overhead power lines under a theory of voluntary undertaking based upon Irby's contract with FPL. However, this argument is waived because Plaintiff never asserted that theory below.

Further, even if it had been asserted, the theory fails on the undisputed facts. Irby Construction had completed its Work by the time of the incident and there was no evidence that Irby Construction knew that the C&D workers' operations were risking touching the overhead power lines. Moreover, because Appellant's voluntary undertaking theory is based upon nonfeasance of not warning, he had to prove reliance. No such evidence was submitted.

Irby Construction's supposed knowledge of C&D's operations is also not a basis to find a duty as to Irby. To begin, Appellant has waived this theory because he has not provided a discussion or

analysis of this issue in the Argument section of his brief. The Argument contains only a passing reference to the concept, which is insufficient to preserve the issue.

Moreover, even if it were not waived, the cited facts do not provide a reasonable basis to impose a duty on Irby Construction. The Record does not demonstrate that Irby Construction knew the scope and specific location of C&D's work. The Record does not demonstrate that Irby Construction knew that C&D employees' operations were potentially impacting the overhead power lines.

In sum, the trial court properly entered summary judgment for Irby Construction. As a matter of law, Irby Construction did not have a duty to warn Cortez not to lift his tree so as to touch the overhead power line. The judgment in favor of Irby Construction should be affirmed.

ARGUMENT

Standard of Review

Appellee agrees that the issue of duty is a question of law subject to *de novo* review. (Corrected Initial Brief ["IB"], p.21, citing *R.J. Reynolds Tobacco Co. v. Grossman*, 96 So. 3d 917, 920 (Fla. 4th DCA 2012). A ruling on a motion for summary judgment is also reviewed *de novo*. *Florida Bar v. Greene*, 926 So. 2d 1195, 1200 (Fla. 2006).

I. The Court Properly Entered Summary Judgment for Irby Construction Company[1]

A. The Plaintiff waived any procedural objection to Irby Construction's motion for summary judgment and there was no harmful error.

The two pending summary judgment motions were briefed and considered together. FPL filed its motion for summary judgment on January 23, 2023. (R140). The next day, Irby Construction filed a Notice of Joinder containing no substantive argument. It merely

[1] This corresponds to Argument IV (A) and (B) in the Initial Brief. The first three arguments in the Initial Brief are directed only against co-appellee, FPL.

stated that Irby Construction "adopts and joins the arguments made" in FPL's motion for summary judgment, "incorporates by reference the evidence relied upon in the motion, and requests the same relief requested in the motion, as applicable to Defendant…." (R194). FPL's primary argument was that it owed no duty to warn to Plaintiff. (R140).

Thereafter (on February 7, 2023), Irby Construction filed another summary judgment document, which incorporated "additional fact and argument" "[a]s further support" for the joinder in FPL's motion. (R204). FPL filed a Notice of Joinder in Irby Construction's motion. (R288).

Plaintiff filed one response to all pending summary judgment motions. (R315-325). The response blended both defendants' motions and arguments and responded to both jointly. The response concluded that "both power company defendants were well aware of the nature of the work being performed…." (R324). The response also asserted that "the Defendants owed a duty to warn the Plaintiff…." (R325).

It is undisputed that FPL timely noticed its motion for summary judgment for hearing. Appellant cites to page 633 of the record as authority that he objected to the hearing proceeding on Irby Construction's motion. (IB, p.45).

While it is correct that on page R633, Irby Construction's counsel acknowledged that Plaintiff had previously objected to the hearing proceeding, Plaintiff's counsel backed off from that position immediately. The court asked Plaintiff's counsel whether there was "an agreement to hear both of them today." (R633). Plaintiff's counsel responded "I think if we proceed on the FPL motion, that will be dispositive of all issues and will render the rest of it moot…." (R634). While Appellant argues on appeal that summary judgment for one defendant did not necessarily mean summary judgment for the other defendant (IB, p. 48-49), he clearly took an opposite stance below.

The summary judgment hearing proceeded first with argument by FPL's counsel until the court ran out of time. The court then recessed the hearing for several hours and resumed the hearing in the afternoon. (R654). The court asked whether the parties had

reached an agreement in the interim as to whether Irby Construction's motion for summary judgment could proceed and invited Irby's counsel to present its argument. (R668-69). Plaintiff's counsel did not lodge any objection. Instead, Plaintiff's counsel responded on the merits to Irby Construction's motion. (R672-674, 677-78). At the end of that argument, the court asked: "Anything else to add from anyone?" (R678). Plaintiff did not object to the hearing proceeding on Irby Construction's motion or raise any issue about due process, which he raises now. (R678-79). Instead, Plaintiff/Appellant tacitly agreed to the hearing proceeding on both defendants' pending (and joined) motions for summary judgment.

To the extent that there was any procedural issue regarding noticing Irby Construction's motion for hearing, it has been waived. *See McElroy v. Oaks on the Bay, LLC*, 288 So. 3d 1259, 1260 (Fla. 2d DCA 2020) ("A party may waive a legal right, 'whether secured by contract, conferred by statute, or guaranteed by the Constitution.'...by taking action that is inconsistent with that right.") (citations omitted; cited at IB, p.47).

Appellant argues that Florida Rule of Civil Procedure 1.510(b) requires that a motion for summary judgment must be served at least 40 days before the hearing date. (IB, p.45-46). Here, Irby Construction's motion satisfied that requirement. It filed its joinder in January 2023 and its additional argument/motion on February 7, 2023. (R194, 203). The March 20, 2023 hearing (R630) was more than 40 days later.

None of Appellant's cited cases dictate a different outcome because they are cases where a party was not provided a hearing at all. Here, Appellant had a full and fair opportunity to argue against the motions for summary judgment. Moreover, he sought rehearing of the order granting the motions. (R582). A second judge required the defendants to prepare responses to the motion for rehearing. (R598). The parties further briefed the motions. (R600, 607, 609). The second judge completed a full review of the court file and denied reconsideration. (R614). The next judge entered final summary judgment only after its independent review. (R616).

Appellant's case law also supports Appellee's position that, because Irby Construction's motion joined FPL's motion, and because FPL's motion was properly noticed, there was no error in conducting the hearing on Irby Construction's motion as well. In *8425 Biscayne LLC v. Pinnacle Towers LLC*, 340 So. 3d 515 (Fla. 3d DCA 2022) (IB, p.46, n.6), the court considered the appellant's argument that its opponent's (Pinnacle's) cross-motion for summary judgment was erroneously granted because it had not been noticed for hearing. The appellate court disagreed "for two reasons," including that the cross-motion did not raise additional issues:

> First, 8425 Biscayne's motion for summary judgment *was* noticed for hearing. See Fla. R. Civ. P. 1.510(b). Second, Pinnacle's cross-motion filed in response to 8425 Biscayne's motion did not raise additional issues requiring resolution.

340 So. 3d at 517.

Here, FPL's motion was noticed for hearing. Irby Construction had joined in that motion and did not raise different issues requiring resolution. There was no harmful error in the summary judgment hearing proceeding on Irby Construction's motion.

B. Substantively, the court properly entered summary judgment for Irby Construction because there was no issue of material fact that Irby did not owe a duty to warn to Plaintiff; Appellant's new, appellate argument is waived and he has waived the argument presented below by failing to develop that argument on appeal.

In the first paragraph of argument IV(B), Appellant asserts that "Irby's duty derives from its contract with FPL...and Irby's firsthand knowledge of the C&D tree removal." (IB, p.50). This paragraph thus claims that there were two bases to find a duty on Irby's part ((i) a voluntary undertaking based on the contract between Irby Construction and FPL and (ii) knowledge of C&D's activities). However, both arguments are waived.

The voluntary undertaking argument is waived because Appellant/Plaintiff did not raise this argument below in response to Irby Construction's motion for summary judgment (R315-325) or even in his motion for rehearing (R582-585). He cannot assert the argument for the first time on appeal. *Kozich v. Hartford Ins. Co. of Midwest*, 609 So. 2d 147, 148 (Fla. 4th DCA 1992) ("Appellant did not make this specific argument below and, therefore, cannot successfully offer it for the first time on appeal.").

This Court should not consider the "undertaker doctrine" argument, as it has not been preserved.

As to the second argument (a duty based upon Irby Construction's knowledge of C&D's operations), other than a passing reference to Irby's knowledge in the final paragraph of the brief, the brief does not discuss or analyze this argument. Appellant has thus forfeited this argument as a supposed basis for Irby Construction's duty by failing to develop the argument about it in the brief. "Claims for which an appellant has not presented any argument, or for which he provides only conclusory argument, are insufficiently presented for review and are waived." *Hammond v. State*, 34 So. 3d 58, 59 (Fla. 4th DCA 2010). A passing reference to an argument "without further elucidation does not suffice to preserve issues…." *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). *See also Coolen v. State*, 696 So. 2d 738, 742, n.2 (Fla. 1997) ("…[Appellant's] failure to fully brief and argue these points constitutes a waiver of these claims.").

Thus, the judgment should be affirmed without further consideration. Appellant's voluntary undertaking argument is waived

because it was never asserted below. And, on appeal, Cortez has not presented argument regarding the imposition of a duty on Irby Construction based on its supposed knowledge. Without a duty, the claim against Irby Construction must fail as a matter of law. *Biglen v. Florida Power & Light Co.*, 910 So. 2d 405 (Fla. 4th DCA 2005).

Nevertheless, in the event that this Court decides to consider either of Appellant's waived, substantive arguments, Appellee provides the responsive argument below.

A voluntary undertaking is limited to the extent of its undertaking. *Sanderson v. Eckerd Corp.*, 780 So. 2d 930, 932 (Fla. 5th DCA 2001). Here, even if the contract with FPL created an undertaking of a duty, the extent of that duty was to provide for the "health and safety" at the work site in connection with performing Irby Construction's work.

Section 21 of the contract governed health and safety. Appellant relies on sections 21.2 and 21.11 to support his theory that Irby Construction voluntarily undertook to warn C&D's workers about the

risk of electrocution. Such a duty cannot be discerned from the provisions in Section 21, which provided in pertinent part:

> 21.1 Responsibility: Supplier shall be solely responsible for the safety and health of its personnel and Subcontractors engaged in the execution of the Work, as well as for the protection of the environment and of the Work and its personnel or Subcontractors. Supplier shall be responsible for the prevention of accidents and incidents and the administration of Supplier's safety, health and environmental programs....
>
> 21.2 Precautions: Supplier shall take all precautions for the safety and health of all affected persons and the environment and shall provide all protection necessary to prevent damage and mitigate injury, illness or loss to:
>
> 21.2.1 All persons and entities engaged in or performing the Work and all other persons and entities who may be affected thereby;
>
> 21.2.2 All Work and all materials and equipment to be incorporated therein, whether in storage on or off the Jobsite, under the care, custody, or control of Supplier or Subcontractor; and to
>
> 21.2.3 All existing Purchaser equipment or property and/or equipment or property of customers.
>
> * * *
>
> 21.11 Obligation: Work place safety is an integral part of Supplier's obligations and duties owed Purchaser under the Contract. A Purchaser representative may notify Supplier (which can be a verbal discussion with Supplier's management or Supplier Jobsite supervisor or Superintendent) the need for enhanced safety practices

> based upon Purchaser representative's observations or the findings or recommendations of any governmental agency having jurisdiction over matters of safety. Supplier is solely responsible for, and liable for, the health and safety of its personnel, equipment, property and Subcontractors, notwithstanding Purchaser's rights as set for (sic) in this Section 21.11. Supplier's responsibility for safety extends to Purchaser employees and members of the public who might reasonably be expected to come in contact with the Work. Once Supplier is notified of any need for improvement in safety and/or environmental protection practices…Supplier must make an immediate investigation….

(R.480-81). The term "Work" is defined to include "any and all labor, supervision…and all other necessary activities for the execution and timely completion of Supplier's obligations under the Contract…." (R.477).

As can be seen, the provisions regarding safety concern Irby Construction's performance of the "Work." It was undisputed that Irby's "Work" had been completed weeks before this incident occurred. There was no evidence submitted that Irby violated the terms of the contract.

Further, Appellant's (waived) voluntary undertaking theory fails because there was no evidence of reliance on the undertaking. Florida

courts follow the Restatement (2d) of Torts, sections 323 and 324A on the issue of voluntary undertaking and have looked to how other courts apply those sections in deciding related issues. *Sanderson*, 780 So. 2d at 932. Restatement (2d) sections 323 and 324A provide the general rule that if one voluntarily undertakes to render services that he should recognize as necessary for another's protection, he is subject to liability if (i) his failure to exercise such care increases the risk of such harm, or (ii) the harm is suffered because of the other's reliance upon the undertaking.

Other courts have recognized that, where a duty is based upon a voluntary undertaking, and the plaintiff claims nonfeasance of a failure to warn, the plaintiff must prove reliance on the voluntary undertaking. *Thornton v. M7 Aerospace LP*, 903 F. Supp. 2d 654, 668 (N.D. Ill. 2012). *See also Sanderson*, 780 So. 2d at 934 (noting reliance element); *Jakubowski v. Alden-Bennett Const. Co.*, 327 Ill. App. 3d 627, 640 (1st Dist. 2002) ("Courts have made a distinction between misfeasance and nonfeasance with respect to the applicability of section 324A of the Restatement" providing that

"breach…can be found only where there is misfeasance rather than nonfeasance, unless plaintiff can show that he reasonably relied on the defendant for protection"). No such evidence of reliance by Plaintiff was submitted here. Cortez admitted that C&D provided him all his training.

Appellant cites *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1186 (Fla. 2003), for the proposition that one who undertakes to provide a service to others "assumes a duty to act carefully and to not put others at an undue risk of harm." (IB, p.51). Appellant claims that the "specific" duty Irby assumed was to "ensure the safety for any member of the public 'who might reasonably be expected to come in contact with the Work.'" (IB, p.52, citing R481, ¶21.11). As discussed above, Irby Construction's Work had been completed before this incident occurred and there was no evidence that Cortez ever came into contact with that Work as it occurred. The presence of the overhead electrical lines (not owned by Irby Construction) was a permanent condition on the land that Irby Construction did not have a duty to perpetually monitor. Further, because the evidence

did not establish that Irby Construction knew that C&D's operations brought its workers near the overhead power lines, Plaintiff could not show that Irby reasonably expected Cortez to come in contact with the Work (even if the Work had been ongoing, which it was not).

Moreover, even if Cortez had raised voluntary undertaking and could have used subsection (a) of the Restatement above (which, he could not), Irby Construction provided evidence that none of its conduct, in replacing the transmission poles, created a broader zone of risk. (R208). It further argued that there was no allegation of any defect or problem with Irby Construction's completed work. (R208). And, Irby Construction did not own the property or the electrical wires or poles involved. (R209). Finally, it contended that the presence of the overhead wires was open and obvious. (R209-210) (*see also* R239 [C&D's witness Angle admitting that the wires were "[o]pen and obvious."]). None of those facts were refuted either. On appeal, Plaintiff/Appellant does not refute – or even address – those contentions. Thus, the voluntary undertaking theory is not only waived but also inapplicable.

As to imposing a duty on Irby Construction based upon the general facts of the case (*Biglen*, 910 So. 2d at 408), there was no genuine issue of material fact that the record did not support such a theory. In the trial court, Irby Construction contended that it never provided any instruction to Plaintiff and had no special relationship with C&D or any of its employees. (R208). That evidence was unrefuted.

In the Argument section, Appellant's only remark as to duty based upon the general facts is that "Irby's duty derives from…Irby's firsthand knowledge of the C&D tree removal." (IB, p.50). Appellant does not cite any facts or part of the Record to support that contention. In the Statement of Facts, Appellant asserted that "…Irby personnel agreed: if they had known of either the tree-removal work around the power lines, or, the inexplicable shocks…either a safety warning or a 'stop-work' order would have been issued." (IB, p.10-11, citing R961-2).

As set forth above, that testimony of Cameron does not support a claim that Irby Construction had "firsthand knowledge" of the tree

removal operation. Cameron testified, to the contrary, that he had no recollection of ever seeing people engaged in harvesting trees from that location. (R957-8). He was thereafter asked a purely hypothetical question and responded that, theoretically, if he saw someone doing something potentially dangerous he probably would have warned them. (R961-4). Cameron's theoretical response to hypothetical questions that were not based on actual facts or evidence did not provide a basis to defeat summary judgment. *See, e.g., Barn Light Electric Co., LLC v. BarnLight Originals, Inc.*, No. 8:14-cv-1955, 2017 WL 11632561, *5 (M.D. Fla. Aug. 3, 2017) (testimony that was "speculative and hypothetical" was not admissible on summary judgment); *Sheldon Greene & Associates, Inc. v. Williams Island Associates*, 571 So. 2d 549, 550 (Fla. 3d DCA 1990) (affidavit "constituted legally inadmissible evidence because it was based on hypothetical facts…and, consequently, was insufficient to preclude the summary judgment….").

There are only two other aspects of Appellant's brief that arguably touch upon Irby Construction's knowledge. Neither is part of the Argument section of Cortez's brief.

First, Appellant claims in his Statement of Facts that when the work started, Irby Construction asked C&D's owner what C&D was doing on the premises. (IB, p.3, citing SR 773-4). But, on pages 773-4 of the Record, C&D owner Angle testified that he was "not sure if it was an Irby guy or Florida Power guy" that he was introduced to on the first day.

Appellant's Statement of Facts also claims that the crews "educated" one another about their work. (IB, p.4, citing SR1073). But page 1073 of the Record shows that the deponent (Josh Jones of C&D) was only assuming that he talked to Irby Construction employees and that they only discussed, superficially, what their work entailed:

> Q. …During the course of your work there, did you have contact with the workers who were doing the electrical work?
> A. Yeah, I mean we just BS'd with each other, but that's about it.

Q. What type of interaction would you have with those folks?

A. Sometimes we would ask them to move their trucks, they'd ask us to move ours. And then sometimes we would just sit there and just like shoot the bull for a little bit. And that's about it. Nothing – nothing – nothing else.

Q. Was there any conversation about what you were doing, the work you were doing with the trees?

A. Yeah, I mean, they were naturally curious on what we were doing. So then, you know, we explained to them what we did and then they would explain what they were doing and, you know some of their cool machines that they had and stuff like that.

Q. All right. And do you know who they were employed by?

A. At the time I did not, but I'm assuming Irby now.

(R1072-3).

Even assuming that, in fact, Jones was speaking to Irby Construction employees, this testimony does not establish that Irby Construction knew where the C&D employees were performing their activities or that C&D employees could potentially be touching the overhead power lines.

The trial court properly found that there was no relationship between Irby Construction and C&D that would give rise to a duty to warn. This issue has been waived on appeal but, even if it were

preserved, it is not a basis to reverse the judgment. The Record fully supports the trial court's conclusion that the claim that Irby Construction had a duty was "attenuated" and that there was no such duty as a matter of law. (R540).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, Irby Construction Company, respectfully requests that this Court affirm the judgment and for such other relief deemed proper.

Respectfully submitted,

WICKER SMITH O'HARA
McCOY & FORD, P.A.
Attorney for Appellee, Irby Construction Company
515 E. Las Olas Boulevard, Suite 1400
Fort Lauderdale, FL 33301
Phone: (954) 847-4800
Fax: (954) 760-9353
E-mail: AReiter@wickersmith.com

By: *_/s/ Alyssa M. Reiter_*
Alyssa M. Reiter
Florida Bar No. 715034

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy hereof has been filed and electronically served via Florida ePortal on this 26th day of July, 2024, to all counsel on the attached service list.

/s/ Alyssa M. Reiter

Alyssa M. Reiter, Esquire
Florida Bar No. 715034
WICKER SMITH O'HARA
McCOY & FORD, P.A.
Attorneys for Irby Construction Company
515 E. Las Olas Boulevard, Suite 1400
Fort Lauderdale, FL 33301
Phone: (954) 847-4800
Fax: (954) 760-9353
FTLcrtpleadings@wickersmith.com

SERVICE LIST

Bradford L. Jefferson, Esquire
Bradford L. Jefferson, P.A.
130 S. Indian River Dr., Suite 402
Fort Pierce, FL 34950
(772) 468-8887
servebradjefferson@yahoo.com
dawn@bradfordjefferson.com
brad@bradfordjefferson.com
lawofficeblj@gmail.com

Eric R. Hoecker, Esquire
Office of General Counsel - FPL
700 Universe Blvd.
Juno Beach, FL 33408
(561) 304-5369
Eric.Hoecker@FPL.com
Alisha.hixon@fpl.com
Lorena.sardinha@fpl.com