JOHN CHARLES HEEKIN
ATTORNEY AT LAW
21202 OLEAN BLVD., SUITE C-2
P.O. BOX 2434
PORT CHARLOTTE, FLORIDA 33949-2434
PHONE (941) 627-0333

FEB 19 AM 8:31

February 17, 1999

ORIGINAL

Ms. Blanca S. Bayó, Director
State of Florida Public Service Commission
Division of Records and Reporting
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-8050

RE: John Charles Heekin v. Florida Power & Light Company
Case No. 981923-EI

Dear Ms. Bayó:

Enclosed for filing in the above case is a Response To Motion To Dismiss And For More Definite Statement.

Thank you for your time and prompt attention.

Sincerely,

John Charles Heekin, Esq.

JCH/st
Enclosure

ACK ____
AFA ____
APP ____
CAF ____
CMU ____
CTR ____
EAG 1
LEG 1
LIN ____
OPC ____
RCH ____
SEC 1
WAS ____
OTH ____

ORIGINAL

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of
JOHN CHARLES HEEKIN,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY CASE NO. 981923 EI

Respondent,

_____/

RESPONSE TO MOTION TO DISMISS AND FOR MORE DEFINITE STATEMENT

JOHN CHARLES HEEKIN, responds to the Motion To Dismiss and For More Definite Statement filed by the attorney for Florida Power and Light Company and says:

1. Attached to this Response is the Motion To Dismiss filed by capable counsel for Florida Power and Light Company (hereafter FPL) with the trial court.

2. As may be seen, the argument is made to the rial court that the trial court lacks subject matter jurisdiction because this honorable body has exclusive jurisdiction.

3. FPL now contends that this Honorable Commission lacks subject matter jurisdiction because exclusive jurisdiction is with the trial court.

4. Respectfully, FPL cannot have it both ways. Violations of its tariff through the commission of wrongs against customers are within the jurisdiction of this Commission to redress. If not, the Commission would have no jurisdiction to confer authority for trespass on FPL, and to hold it harmless from the same "with the force of law" (to quote FPL).

WHEREFORE, John Charles Heekin respectfully prays that the Commission will deny the Motion To Dismiss, authorize discovery, and set this matter for a full hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished on Wade Litchfield, Attorney for Florida Power & Light Company, 700 Universe Blvd., Juno Beach, Florida 33408-0420 and William G. Walker, III, Vice President Florida Power & Light Company, 215 South Monroe Street, Suite 810, Tallahassee, Florida 32301-1859 by U.S. Mail this 17 day of Feb, 1999.

JOHN CHARLES HEEKIN
P.O. Box 2434
Port Charlotte, FL 33949-2434
(941) 627-0333
Florida Bar No. 274267

JOHN CHARLES HEEKIN, Plaintiff, vs. FLORIDA POWER & LIGHT COMPANY, Defendant.	)	IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR CHARLOTTE COUNTY, FLORIDA CASE NO. 98-1304 CA

AMENDED MOTION TO DISMISS AMENDED COMPLAINT

Defendant, Florida Power & Light Company, by and through their undersigned attorneys, files this Amended Motion to Dismiss Plaintiff's Amended Complaint and say:

I. SUBJECT MATTER JURISDICTION

1. The Circuit Court does not have jurisdiction over the subject matter of Plaintiff's Amended Complaint in that the Plaintiff's damages must exceed $15,000.00.

2. Plaintiff stated in Count I of his Amended Complaint that "the damage amount is unknown to Plaintiff and may well exceed $100.00, but does not exceed $15,000.00..."

Alardt v. Nelson Ent.

3. Plaintiff prays for an equitable remedy in Count II. However, the County Court has concurrent jurisdiction with the Circuit Court to issue injunctions. Equitable remedies are no longer within the exclusive jurisdiction of the Circuit Court.

II. TRESPASS

4. The Statement of Claim and Amended Complaint as filed contain no short and plain statement of the ultimate facts showing that the pleader is entitled to relief as it relates to

rec'd 11/23/98

an action on trespass.

5. Plaintiff alleges that FPL broke and entered the curtilage of his premises and damaged a hasp to a gate on his fence after having made an appointment to enter the premises for a lawful purpose (replacing an electric meter - see Paragraph 7 of Amended Complaint). Plaintiff's complaint is that FPL went ahead with the work before the appointment date.

6. Even assuming for argument's sake that FPL or its employee's action would be considered a trespass on Plaintiff's property, Plaintiff has failed to state a cause of action in that the General Rules and Regulations for Electric Service (hereinafter "FPL's Tariff") specifically preclude such a claim. Rule 2.8 of FPL's Tariff (see copy attached as Exhibit "A") states:

> 2.8 Access to Premises. The duly authorized agents of the Company shall have safe access to the premises of the Customer at all reasonable hours for the purpose of installing, maintaining and inspecting or removing the Company's property, reading meters and other purposes incident to performance under or termination of the Company's agreement with the Customer, and in such performance shall not be liable for trespass (emphasis added).

not trespass

FPL's Tariff has the force and effect of Law. See Landrum v. Florida Power & Light Company, 505 So.2d 552 (Fla. 3d DCA 1987) (copy attached as Exhibit "B"). It thus excuses FPL for liability in the instant case and is fatal to the maintenance of a cause of action for trespass.

"In the absence of special statutory regulations setting up

some special system for dealing with the subject, the rule usually followed by the courts is to hold justifiable a regulation which is made by a public utility company in good faith, and enforced by it without discrimination, unless it is plainly unreasonable or outrageous in its general operation. Whether the court might itself have done differently, or even if it sees hardship in particular cases, is not enough to induce the courts to set a regulation aside or hold it [has] no justification." (Citations omitted). Florida Power & Light Company v. State ex. rel. Malcom, et al., 144 So. 657, 658 (Fla. 1932), (cited in Landrum).

This Court is without authority to review the propriety of FPL's Tariff, as only the Supreme Court can review Florida Public Service Commission (hereinafter "PSC") actions that relate to rates or service. Fla. Const. (article V, S. 3(b) (2); Section 350.128(1), Fla. Stat. (1997). The approval by the PSC of FPL's Tariff is an action which relates to service and only the Supreme Court can review its propriety. However, should this Court feel that it has the authority to rule on the propriety of FPL's Tariff, the limitation of liability is valid, as parties to contracts can limit their liability as to certain actions. For example, parties can limit their liability for their own ordinary negligence so long as the language in the hold harmless clause is clear and unequivocal, see University Plaza shopping Center vs. Stewart, 272 So.2d 507 (Fla. 1973).

Both the consumer and the power company are bound by the

Tariff and must live by its terms. Malcolm, supra; Cohen v. Florida Power & Light Co., 46 Fl.Supp. 29 (Fla. Dade Cty. Ct. 1977). Further, the Tariff is not "imposed" upon the consumer by FPL, as it must first be approved by the PSC, which has been mandated by statute to regulate public utilities. The tariff provision limiting FPL's liability in the instant case has been filed with the Public Service Commission, and was in effect at the time this cause of action arose. The Supreme Court of Florida has upheld contracts between Florida power companies and their customers which limit liability. See Florida Power Corporation v. City of Tallahassee, 18 So.2d 671 (Fla. 1944). It is not unusual for there to be limitation of liability clauses in tariffs of regulated Industries, and those clauses are routinely upheld by the courts. See Eight Air Depot v. Pan American, 254 So.2d 564 (Fla. 3d DCA 1971); Life Sciences, Inc. vs. Emory Air Freight Corp., 341 So.2d 272 (Fla. 4th DCA 1972); Behrend v. Bell Telephone Co., 363 A.2d 1152 (PA Super. 1976).

In Landrum v. Florida Power & Light Company, 505 So.2d 552 (Fla. 3d DCA 1987), a customer sought to recover against FPL for negligent termination of service, and the Third District Court ruled that "the Trial Court correctly concluded, the complaint fails to state a cause of action for negligence because FPL's tariff (Rule 2.5) operates as a limitation for ordinary negligence" (emphasis added).

Based upon the foregoing, the Complaint fails to allege a cause of action for trespass against FPL or its employees.

WHEREFORE, FPL requests this Court to Dismiss the Amended Complaint. Moreover, FPL requests that this Court enter an order pursuant to Section 57.105, Fla. Stat. (1997) requiring Plaintiff to pay FPL a reasonable attorney's fee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing has been furnished via facsimile and by US Mail to: John Charles Heekin, Esq., Plaintiff and Plaintiff's Attorney, 21202 Olean Blvd., Ste. C-2, Port Charlotte, FL 33952, this 17th day of November, 1998.

Florida Power & Light Company

By: _____

Aimee D. Stein, Esquire
~~FBN: 265160~~
Joaquin E. Leon, Esquire
FBN: 230197
Attorneys for Defendant
9250 West Flagler Street
Miami, FL 33174
(305) 552-3866

F:\JEL\Heekin.CAS\HeekinMotiontoDismissAmendedComplaint

2.2 Availability of Service. The Company will supply electric service to any applicant for service throughout the territory it serves, subject to the following conditions: should an extension of the Company's facilities be required, the Company will pay for the cost where justified, in the Company's opinion, by revenues to be secured; however, the Company may require monthly or annual guarantees, cash contributions in aid of construction, and/or advances for construction, when in the Company's opinion, the immediate or potential revenues do not justify the cost of extension. If facilities are requested that are not usual and customary for the type of installation to be served, the Company may require a contribution in aid of construction based upon the incremental cost of the requested facility. All contributions in aid of construction will be calculated in accordance with applicable rules and regulations of the Florida Public Service Commission. If the installation of facilities is justified based on the Customer's estimates for electric power but there is reasonable doubt as to level of use or length of use of such facilities, the Customer, when mutually agreeable with the Company, may contract for a minimum Demand or monthly payment sufficient to justify the Company's investment. Upon request, written information will be supplied by the Company concerning the availability and character of service for any desired location. The Company will not be responsible for mistakes of any kind resulting from information given orally.

2.3 Point of Delivery. This is the point where the Company's wires or apparatus are connected with those of the Customer.

2.4 Character of Service. Alternating current is supplied at a frequency of approximately sixty cycles. Standard nominal voltages are 120 or 120/240 volts for single phase service and 240 volts for 3 phase delta service. Where "Wye" service is provided, the standard nominal voltages are 120 or 120/208 volts. In some locations other voltages are available. The Company will be glad to furnish information on request.

2.5 Continuity of Service. The Company will use reasonable diligence at all times to provide continuous service at the agreed nominal voltage, and shall not be liable to the Customer for complete or partial failure or interruption of service, or for fluctuations in voltage, resulting from causes beyond its control or through the ordinary negligence of its employees, servants or agents. The Company shall not be liable for any act or omission caused directly or indirectly by strikes, labor troubles, accident, litigation, shutdowns for repairs or adjustments, interference by Federal, State or Municipal governments, acts of God or other causes beyond its control.

2.6 Temporary Service. Temporary service refers to service required for short term exhibitions, displays, bazaars, fairs, construction work, camps, houseboats, dredging jobs, and the like. It will be supplied only when the Company had readily available capacity of lines, transformers, generating and other equipment for the service requested. Before supplying temporary service the Company may require the Customer to bear the cost of installing and removing the necessary service facilities, less credit for salvage.

2.7 Indemnity to Company. The Customer shall indemnify, hold harmless and defend the Company from and against any and all liability, proceedings, suits, cost or expense for loss, damage or injury to persons or property, in any manner directly or indirectly connected with, or growing out of the transmission and use of electricity on the Customer's side of the point of delivery.

2.8 Access to Premises. The duly authorized agents of the Company shall have safe access to the premises of the Customer at all reasonable hours for the purpose of installing, maintaining and inspecting or removing the Company's property, reading meters and other purposes incident to performance under or termination of the Company's agreement with the Customer, and in such performance shall not be liable for trespass.

2.9 Right of Way. The Customer shall grant or cause to be granted to the Company and without cost to the Company all rights, easements, permits and privileges which, in the opinion of the Company, are necessary for the rendering of service to the Customer.

3 LIMITATION OF USE

3.1 Resale of Service Prohibited. Electric service received from the Company shall be for the Customer's own use and shall not be resold. Where individual metering is not required under Subsection (5)(a) of Section 25-6.049 (Measuring Customer Service) of the Florida Administrative Code and mastering metering is used in lieu thereof, reasonable apportionment methods, including sub-metering, may be used by the Customer solely for the purpose of allocating the cost of the electricity billed by the utility. Any fees or charges collected by a Customer for electricity billed to the Customer's account by the utility, whether based on the use of sub-metering or any other allocation method, shall be determined in a manner which reimburses the Customer for no more than the Customer's actual cost of electricity.

For the purpose of this Rule:

(1) Electric service is "sub-metered" when separate electric meters are used to allocate among tenants, lessees or other entities the monthly bill rendered by FPL to the Customer for electric service, when these tenants, lessees or other entities are charged no more than a proportionate share of such bill, based on their monthly consumption as measured by such meters.

(2) Electric service is "resold" when separate electric meters are used to charge tenants, lessees or other entities more than a proportionate share of the Customer's monthly bill.

Exhibit "A"

tigue, fever, s[illegible]hroats, upper respiratory ailments, and flu-like symptoms. Because these symptoms also accompany many other diseases, the log's report of crew members' complaints bears no relevance to the presence of toxoplasmosis on the TSS Festivals. Moreover, the log sheds no light on the primary issue before the court: whether Rodriguez acquired toxoplasmosis while on board ship.

Even if the log were relevant, the prejudice caused by its admission outweighed its probative value. *See* § 90.403, Fla.Stat. (1983); Fed.R.Evid. 403. The log listed approximately 1,619 visits by crew members with 827 different ailments, including 68 references to venereal disease. The log's numerous entries gave the jury the impression that a miasma of disease encompassed the ship.

[2] Evidence of other incidents or accidents, even when admitted for impeachment purposes, tends to inject collateral issues and to divert the jury's attention from the matter directly in controversy. *See I.B.L. Corp. v. Florida Power & Light Co.*, 400 So.2d 1288 (Fla. 3d DCA 1981), *review denied*, 412 So.2d 466 (1982). A party may introduce evidence of other incidents to contradict a witness's testimony if the proffered evidence relates to a similar incident occurring under substantially similar circumstances. *Lawrence v. Florida East Coast Ry.*, 346 So.2d 1012 (Fla.1977); *see Saunders v. Florida Keys Elec. Co-op Ass'n*, 471 So.2d 88 (Fla. 3d DCA 1985), *review denied*, 482 So.2d 348 (Fla.1986); *Liberty Mut. Ins. Co. v. Kimmel*, 465 So.2d 606 (Fla. 3d DCA 1985); *Lazar Mfg. Co. v. Bachanov*, 436 So.2d 236 (Fla. 3d DCA 1983). Here, the log fails the test: it contains no specific diagnosis of toxoplasmosis. Thus, the trial court's admission of irrelevant and unduly prejudicial evidence constituted an abuse of discretion.

[3] The second error mandating reversal arises from the omission of a material fact in a hypothetical question posed to one of Rodriguez's expert witnesses. The question omits the critical fact that Rodriguez had vacationed in Costa Rica for approximately six weeks during his employment and [illegible]as had not consumed all his meals on board ship. This omission is especially prejudicial because another of Rodriguez's experts testified that Rodriguez may have acquired the disease while he was on vacation. The trial court erred in overruling counsel's objection to the question.

Steiger v. Massachusetts Casualty Ins. Co., 273 So.2d 4 (Fla. 3d DCA 1973), controls this issue. In *Steiger*, we held that the trial court committed reversible error in overruling a specific objection to a hypothetical question which failed to contain a fact necessary to the formation of the expert's opinion. As we did in *Steiger*, we again find that the trial court committed reversible error in overruling counsel's objection to the defective hypothetical question. *See Huff v. State*, 495 So.2d 145 (Fla.1986); *Chiles v. Beaudoin*, 384 So.2d 175 (Fla. 2d DCA 1980); *Young v. Pyle*, 145 So.2d 508 (Fla. 1st DCA 1962).

Our disposition makes it unnecessary for us to address the remaining issues.

Reversed and remanded for a new trial.

Herbert LANDRUM and Loretta Landrum, his wife, Appellants,

v.

FLORIDA POWER & LIGHT COMPANY, Appellee.

No. 85-2582.

District Court of Appeal of Florida, Third District.

April 7, 1987.

Rehearing Denied May 12, 1987.

Consumer sought to recover against electric utility for alleged negligent termination of service. The Circuit Court, Dade

County, Phillip W. Knight, J., entered order dismissing complaint for failure to state a cause of action, and consumers appealed. The District Court of Appeal, Jorgenson, J., held that limitation of liability for ordinary negligence contained in tariff filed by electric utility with Public Service Commission barred consumers' claim for negligent termination of service arising out of loss sustained by consumers when candle being used for illumination during interruption in power caused a fire.

Affirmed.

1. Electricity ⇐11.1(1)

A limitation of liability by an electric utility in a tariff is an essential part of rate and one as to which consumer is bound regardless of his knowledge or assent thereto.

2. Electricity ⇐11.1(1)

A tariff validly approved by the Public Service Commission, including a limitation upon an electric utility's liability for ordinary negligence, resulting in the interruption of the regular supply of electric service to a consumer, is valid.

3. Electricity ⇐11.1(2)

Limitation of liability for ordinary negligence contained in tariff filed by electric utility with Public Service Commission barred consumers' claim for negligent termination of service based on loss consumers sustained when candle being used for illumination during interruption in power caused a fire.

4. Electricity ⇐11.1(1)

"Gross negligence" not covered by a tariff filed by an electric utility with Public Service Commission is a course of conduct such that likelihood of injury to another person or property is known by actor to be imminent or clear and present.

5. Electricity ⇐11.1(2)

Mistaken interruption in electrical power was not sufficient to state a cause of action against electric utility for gross negligence, which was outside tariff limitations of liability for ordinary negligence.

Ronald L. Buschbom, Robert Shaughnessy, Jeanne Heyward, Miami, for appellants.

Aimee D. Stein, Miami, for appellee.

Before SCHWARTZ, C.J., and DANIEL S. PEARSON and JORGENSON, JJ.

JORGENSON, Judge.

The appellants [Landrums] filed suit for personal and property damages alleged to have been caused by an interruption in electrical power to their residence. Their second amended complaint alleged that appellee [FP & L] had contracted to supply electricity to their home, and that, due to FP & L's negligent termination of service, a candle which was being used for illumination caused a fire which resulted in the aforesaid damages.

In confining ourselves to the four corners of the complaint, *e.g.*, *Corbett v. Eastern Airlines, Inc.*, 166 So.2d 196, 203 (Fla. 1st DCA 1964)—assuming the truth of the allegations therein, *e.g.*, *Baum v. Freeman*, 103 So.2d 654, 655 (Fla. 3d DCA 1958)—we find that, as the trial court correctly concluded, the complaint fails to state a cause of action for negligence because FP & L's tariff [1] operates as a limitation of liability for ordinary negligence. *Food Pageant, Inc. v. Consolidated Edison Co.*, 54 N.Y.2d 167, 445 N.Y.S.2d 60, 429 N.E.2d 738 (1981); *LoVico v. Consolidated Edison Co.*, 99 Misc.2d 897, 420 N.Y.S.2d 825 (Sup.Ct.1979); *Lee v. Consolidated Edison Co.*, 98 Misc.2d 304, 413 N.Y.S.2d 826 (Sup.Ct.1978); *Devers v. Long Island Lighting Co.*, 79 Misc.2d 165, 359 N.Y.S.2d 940 (Sup.Ct.1974); *Newman v.*

1. Rule 2.5 of FP & L's Tariff states:
Continuity of Service. The company will use reasonable diligence at all times to provide continuous service at the agreed nominal voltage, and shall not be liable to the customer for complete or partial failure or interruption of service, or for fluctuations in voltage, resulting from causes beyond its control or through the ordinary negligence of its employees, servants or agents....

The order of the trial court is, accordingly,

Affirmed.

Alberto Diaz MASVIDAL, Appellant,

v.

Alfonso Andrade OCHOA, Appellee.

No. 86-1244.

District Court of Appeal of Florida, Third District.

April 7, 1987.

Rehearing Denied May 12, 1987.

Action was brought sounding in breach of contract, conversion and civil theft. The Circuit Court, Dade County, Richard S. Hickey, J., entered final judgment against defendant. The defendant appealed. The District Court of Appeal held that: (1) fact that plaintiff testified he considered a prior agreement, which did not conflict with subscription agreement, constituted relationship between parties did not amount to repudiation of subscription agreement which evidence showed defendant breached; (2) evidence supported finding that defendant committed embezzlement, civil theft, and conversion; and (3) there was no obligation on part of trial court to charge jury on defendant's counterclaim for breach of contract.

Affirmed.

1. Contracts ⇐313(2)

Fact that plaintiff testified he considered prior agreement, which did not conflict with subscription agreement on which plaintiff sued, to constitute essential relationship between parties did not amount to repudiation of subscription agreement, which evidence showed defendant breached.

2. Trover and Conversion ⇐40(4)

Evidence supported finding that defendant, by his actions, committed embezzlement, civil theft, and conversion; evidence showed classic embezzlement by defendant of escrow funds set up under subscription agreement between parties, that is, defendant lawfully obtained possession of plaintiff's funds to set up escrow and thereafter converted the funds for his own use.

3. Contracts ⇐353(1)

There was no obligation to charge jury on defendant's counterclaim for breach of contract, absent evidence that plaintiff breached any agreement between the parties.

4. Evidence ⇐441(6)

Proof of oral agreement between parties that defendant was to receive $75,000 salary as bank president was barred by parol evidence rule as it was inconsistent with prior written agreement between parties which required bank's board of directors to approve any management contract with defendant.

McDermott, Will & Emery and Lydia A. Fernandez, Miami, for appellant.

Hertzberg & Malinski and Deborah Marks, Miami, for appellee.

Before BARKDULL, HUBBART and BASKIN, JJ.

PER CURIAM.

This is an appeal by the defendant from a final judgment entered below on an adverse jury verdict in an action sounding in breach of contract, conversion and civil theft. The defendant Alberto Diaz Masvidal raises three points on appeal. We find no merit in these points and affirm, based on the following briefly stated legal analysis.

[1] First, we see no error in the trial court's denial of defense motions for a directed verdict and new trial because the