IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,533

EDWARD ARENADO, as Personal Representative of the Estate of Susanna Arenado,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.
_____/

BRIEF OF AMICUS CURIAE, FLORIDA DEFENSE LAWYERS ASSOCIATION, IN SUPPORT OF THE POSITION OF RESPONDENT

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INTRODUCTION

This Brief is submitted on behalf of the Florida Defense Lawyers Association ("FDLA"), a voluntary organization, whose membership is composed of attorneys in private practice and engaged in civil litigation primarily for the defense. It is filed in support of the Respondent, FLORIDA POWER and LIGHT, who was the defendant in the trial court. The Petitioner, EDWARD ARENADO, as Personal Representative of the Estate of Susanna Arenado, seeks discretionary review of a trial court order dismissing a Fourth Amended Complaint with prejudice.

In this Brief, the parties will be referred to as they appeared in the trial court or by name.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopts the Statement of the Case and Facts as presented in the Brief of Respondent, FLORIDA POWER and LIGHT.

SUMMARY OF THE ARGUMENT

Florida courts have never held an electric company liable where its failure to supply electricity for the operation of a traffic light allegedly causes an accident. The Florida Statutes govern the manner in which a driver should proceed when a traffic light is inoperable. As a result, courts have held that any vehicle accident resulting from a malfunctioning light does not provide a basis for liability.

Additionally, the contract between Palm Beach County and FP&L does not confer the status of third-party beneficiary on Plaintiff. The contract between the County and FP&L was not created to confer a direct and substantial benefit on a non-customer like Plaintiff, but was only meant to provide electricity as an aid to traffic. Since Plaintiff is only an incidental beneficiary of an operable traffic light, she cannot recover as a third-party beneficiary.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT WITH PREJUDICE SINCE FLORIDA POWER AND LIGHT OWED NO DUTY TO PLAINTIFF.

An electric company agrees to supply power to the county for the operation of a traffic light on a city street. The street is to be used by thousands of unknown drivers a day, who have no agreement with the power company. These drivers have, however, agreed with the State of Florida to drive in a safe manner and follow those Florida Statutes which control driving conditions. Within the confines of certain Florida Statutes, these drivers make decisions about how fast they should drive, when they should change lanes, when they should proceed through intersections, and when they should yield.

The County has placed this traffic light on the street to benefit these drivers and to aid the flow of traffic. However, neither the County nor its supplier of electricity, is an insurer that this light will prevent accidents. Thus, when this traffic light malfunctions and an accident ensues due to negligent driving, can it reasonably be said that the electric company breached its duty to this driver by failing to supply electricity? The Plaintiff in this action says "yes." The Fourth District Court of Appeal agreed with the resounding majority of states and said "no." The only reported Florida case encompassing this specific scenario,

Abravaya v. Florida Power & Light Co., 39 Fla. Supp. 153 (Fla. 11th Cir. Ct. 1973), said "no."

Amicus Curiae respectfully submits that this Court should follow the longstanding precedent set by the majority of states and Abravaya and decline to impose liability on an electric company for injuries to a non-customer which occur as a result of a service interruption.

A. Florida Courts have Continually Denied Recovery for Failure to Provide Operable Traffic Signals.

The Florida Legislature has unequivocally placed the duty on a driver to stop and proceed in a safe manner when a light is inoperable. Specifically, section 316.1235, Florida Statutes, entitled "Vehicle Approaching Intersection in Which Traffic Lights are Inoperative" states:

> The driver of a vehicle approaching an intersection in which the traffic lights are inoperative shall stop in the manner indicated in s. 316.123(2) [stopping as if there were a stop or yield sign] for approaching a stop intersection.

Furthermore, Florida courts have continually held cities and counties not liable for inoperable traffic signals which result in accidents. Metropolitan Dade County v. Colina, 456 So.2d 1233 (Fla. 3d DCA 1984); Ferri v. City of Gainesville, 362 So.2d 345 (Fla. 1st DCA 1978); Pearce v. State of Florida, Dep't of Transp., 494 So.2d 264 (Fla. 1st DCA 1986). These decisions bar Plaintiff's Complaint herein.

In Ferri, the personal representative of two individuals killed in an automobile/truck collision brought a wrongful death action against the city for its failure to repair an inoperable traffic light. The trial court dismissed plaintiff's complaint for failure to state a cause of action. In upholding the trial court's dismissal of this action, the First District Court of Appeal indicated that a person who becomes involved in a traffic accident due to an inoperable traffic light cannot maintain an action against the city for failure to maintain that traffic light. The court stated:

> A person does not have the right to require the city, county or the state to maintain any particular type of traffic light at a given time or place.

Id. at 346.

In Colina, the plaintiff alleged that the county was negligent in failing to repair a malfunctioning stop light causing the plaintiff to cross an intersection and strike a second vehicle. The Third District Court of Appeal found that the action of the plaintiff, in crossing the intersection in the hopes of beating oncoming vehicles, proximately caused the accident and resulting death. In reaching this conclusion, the court relied on plaintiff's violation of section 316.1235 which required the plaintiff to stop when noting an inoperable traffic light. The court held that the plaintiff's violation of this statute constituted a superseding and intervening cause which relieved the county of liability for its negligence, if

any, in failing to repair the stop light. Id. at 1235. The court stated:

> Any negligence on Dade County's part simply provided the occasion for the actions of Masferrer and Colina, which together were the proximate cause of Mrs. Colina's death. Both Masferrer and Colina could see that the traffic light was not functioning and, by complying with statutory requirements, could have avoided the collision. To hold the county liable on these facts would make it an insurer of motorists acting in disregard of their own safety and that of others. Such a responsibility would be an unwarranted social burden.

Id. at 1235 (emphasis added) (citation omitted).

In Pearce, plaintiffs filed an action for damages when the car in which she was a passenger collided with a drawbridge operated by DOT. At the time of the accident, the gate of the bridge was inoperative. DOT elected to keep the bridge open for public use, and bypass the off-going gate to the east side of the highway. The plaintiff attempted to go around the gate in his lane and went into the lane designed for traffic proceeding in the opposite direction. After crossing the double center line going to the opposite lane, the plaintiff lost control of his car and struck the bridge.

The First District Court of Appeal upheld the trial court's granting of a summary judgment in favor of DOT. In approving the decisions in Ferri and Colina, the court stated that DOT did not have a duty to maintain any particular type of traffic light at a given time or place and that any negli-

gence of DOT was not the proximate cause of the plaintiff's injuries. The court further stated:

> In fact, to subject the DOT to liability under the facts here **would appear to stretch "duty" with respect to traffic signal and warning devices well beyond the standard applied to governmental authorities in the Ferri and Colina cases above cited.** We conclude that the DOT had no duty to guard against the possibility of injury occasioned by the negligence of Winchell [the driver].

Id. at 267 (emphasis added).

Thus, Colina, Ferri, and Pearce all found there to be no liability on a city or county for failure to operate traffic lights. This case presents an even more remote situation in that Plaintiff seeks to impose liability on the supplier of electricity. If a county which is directly responsible for maintaining the light cannot be liable, certainly the supplier to the county cannot be liable. As such, the Fourth District Court of Appeal was correct in dismissing Plaintiff's action.

B. Florida Power and Light Owes No Duty to Plaintiff in Contract or in Tort.

It is axiomatic that the first measure of negligence is whether there is a duty. The Fourth District correctly determined that there is no duty owed by an electric company to a non-customer for damages which occur as a result of an interruption in service. There is no contractual duty and there is no tort duty.

The County of Palm Beach contracted with FP&L to supply electricity to operate its traffic lights. Plaintiff has alleged that she is a third-party beneficiary of this contract between FP&L and the County. However, Plaintiff was not a party to that contract and cannot be classified as a third-party beneficiary of that contract.

A third party may sue as a beneficiary on a contract only if the provisions of the contract clearly show an intention to primarily and directly benefit the third party. Legare v. Music & Worth Constr., 486 So.2d 1359 (Fla. 1st DCA 1986); Security Mut. Cas. Co. v. Pacura, 402 So.2d 1266 (Fla. 3d DCA 1981); Lawrence v. Fox, 20 N.Y. 268 (1859). Furthermore, the benefit must not be merely incidental, but immediate and to such a degree as to indicate the assumption of a duty to make reparation if the benefit is lost. Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277 (Fla. 1985); Associated Flour Haulers & Warehousemen v. Hoffman, 282 N.Y. 173, 26 N.E.2d 7 (1940). Absent such intent, a third party is merely an incidental beneficiary with no right to enforce the contract. Publix Super Markets, Inc. v. Cheesbro Roofing, Inc., 502 So.2d 484 (Fla. 5th DCA 1987); Joseph Bocheck Constr. Corp. v. W.E. Music, 420 So.2d 410 (Fla. 1st DCA 1982).

Furthermore, even when contracting parties specifically intend to confer benefits on a third party, the contract "must evince a discernible intent to allow recovery for the specific

damages to the third party that result from a breach, . . . before an action is stated." Strauss v. Belle Realty Co., 469 N.Y.S.2d 948 (1983).

Indeed, the Florida Supreme Court in Woodbury v. Tampa Waterworks Co., 49 So. 556 (Fla. 1909), recognized that a contract must show a clear intent and purpose to be a direct substantial benefit to third parties and not merely that third parties might be benefited by it before a third party can recover for breach of that contract. Id. at 560.

Plaintiff has not met the qualifications to recover as a third-party beneficiary to the contract between FP&L and the County. There are no allegations in the Complaint that the purpose of the contract between FP&L and the County was to confer a direct and substantial benefit on Plaintiff, who is not even alleged to be an FP&L customer. The Complaint merely alleges that FP&L had a duty to "do all that it could reasonably do to protect those who use electricity and to provide and maintain reliable electrical service . . . so as to provide the electricity essential to the proper operation of all traffic control devices in Palm Beach County in general."

These allegations, even taken as true, do not elevate Plaintiff to the status of a third-party beneficiary. Plaintiff is merely an incidental beneficiary receiving some benefit from the contract, i.e., as a result of the contract, Plaintiff's driving conditions are made easier. However, there is

no assumption of a duty on the part of FP&L to make reparations to Plaintiff if the benefit is lost, or to allow recovery for Plaintiff's specific damages resulting from an accident. Since "a promisor will not be deemed to have in mind the assumption of a risk so overwhelming for any trivial reward," H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928), there can be no doubt that FP&L has no duty by contract to Plaintiff.

Alternatively, Plaintiff contends that there is a duty imposed in tort. However, the failure to perform a contractual obligation never rises to the level of a tort unless it is also a violation of a legal duty. Shubitz v. Consolidated Edison Co., 59 Misc. 2d 732, 301 N.Y.S.2d 926 (1969). Florida has never imposed a common law duty on an electric company to provide a functioning traffic light by a contract with the county. To impose such a duty now, would be contrary to public policy and of the responsibility to the courts, whose duty is "to limit the legal consequences of wrongs to a controllable degree." Tobin v. Grossman, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419, 424 (1969).

Duty is often determined by asking whether the plaintiff's interests are entitled to legal protection against defendant's conduct. In determining the extent of legal protection, the analysis frequently centers on a question of fairness. This inquiry involves a weighing of the relationship of the parties,

the nature of the risk, and the public interest in the proposed solution. Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984). In dealing with a changing society, duty must adjust to the "changing social relations and exigencies and man's relation to his fellows." Wytupeck v. Camden, 25 N.J. 450, 462, 136 A.2d 887, 894 (1957). As noted by the court in Moch, courts must limit liability in that "an intention to assume an obligation of indefinite extension to every member of the public is seen to be the more improbable when we recall the crushing burden that the obligation would impose." Id. at 897-898.

The above principles would dictate that FP&L is not liable for Plaintiff's accident and resulting death. FP&L is a supplier of electricity to those who seek to use it. In this case, Palm Beach County has contracted to use FP&L's services in order to operate a traffic light. The County's purpose in constructing a traffic light is to aid the flow of traffic. Plaintiff, being a non-party to the contract and non-customer of FP&L, is merely a recipient of the benefit conferred by the County, resulting from its contract with FP&L. It is well settled that the denial of a benefit is not the commission of a wrong, and thus an action is not maintainable as one for common law tort. H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. at 898. Since Plaintiff was merely denied the benefit of not having an operable traffic light while she was driving, she cannot recover in tort for breach of a common law duty.

If this Court were to extend liability for the denial of benefits such as a malfunctioning traffic light, it would be "nearly impossible to guard against unlimited or unduly burdensome liability and avoid arbitrary distinctions in defining the areas of liability." Beck v. FMC Corp., 53 A.D.2d 118, 385 N.Y.S.2d 956 (1976). Since policy considerations and balancing of conflicting interests are vital factors in the molding and application of common law principles of negligence, see Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959), these considerations would dictate that Plaintiff cannot recover in this action.

The foregoing analysis of the duty to be imposed on an electric company does not suggest that an electric company can never be liable for damages. In fact, when an electric company uses its electricity in a dangerous manner, courts have continually held the company liable. See Escambia County Elec. Light & Power Co. v. Sutherland, 61 Fla. 167, 55 So. 83 (1911); Braden v. Florida Power & Light Co., 413 So.2d 1291 (Fla. 5th DCA 1982). Contrary to Plaintiff's contentions however, these Florida cases which have held electric companies liable for certain affirmative acts of negligence do not provide a basis for liability in the present case.

Plaintiff fails to draw a distinction between an electric company creating a dangerous condition and the failure of the electric company to provide a benefit. A live wire which causes

injury is not analogous to an inoperable traffic light. The inoperable traffic light is caused by the nonperformance of a contract between FP&L and the County. An inoperable traffic light is not in and of itself a dangerous hazard. On the other hand, live wire could never be characterized as the denial of a benefit. Rather, it is the creation of a hazard. Thus, while there may be a duty imposed on electric companies to contain electric power in a safe and prudent manner, this duty does not extend to providing electricity for the operation of a traffic light. Such an extension would necessarily make an electric company liable in every instance in which electricity is provided.

Plaintiff further attempts to impose a duty on FP&L based on the eighty-year-old opinion in Mugge v. Tampa Waterworks Co., 52 Fla. 371, 42 So. 81 (Fla. 1906). In Mugge, the Florida Supreme Court held a water company liable for failing to provide water for the extinguishment of a fire on the Plaintiff's property. The City of Tampa had contracted with the defendant water company specifically to furnish water to extinguish fires, and specifically contracted to have special taxes levied on the property of the citizens to pay for this service. In addition, the contract between the City of Tampa and defendant stated that the water works company would assume all liabilities to persons and property.

Although Plaintiff in his Brief quotes a passage from Mugge which holds that a water company will still be liable even if there was no contract between the City and the water company, this quote is not the opinion of the Florida Supreme Court, but a cited passage from another case. In fact, this court in Mugge emphatically stated that "the contract of the water company is the measure of its duty to the property owner, and therefore of its liability." Id. at 86. This Court determined that the terms of the contract between the water company and the City of Tampa, made the city liable in tort to the general public and thus, the plaintiff was entitled to recover. The Court specifically noted that the contract with the city and the water company provided special taxes to be paid for the extinguishing of fires and the assumption of all liabilities. Through this specific language, the water company assumed a duty to the general public. Based on the specific contractual language, it was apparent that there was liability on the part of the water company.

The outcome of this action cannot be based on the case of Mugge. Holding a water company liable for failure to provide water for one of its residents which resulted in the destruction of that resident's personal property is vastly different than holding an electric company liable for failure to supply electricity for the operation of a traffic light which allegedly caused a non-customer of that electric company to get in a

traffic accident. In Mugge, the city's water was a necessity for the extinguishment of the fire, which is precisely the reason why the "extinguishment of fire" provision was included in the contract between the water company and the city. In this case, the operation of the traffic light from FP&L's electricity is not a necessity for preventing a traffic accident, since that traffic light is only an aid to traffic. If a traffic light is required to prevent a traffic accident as water is to extinguish a fire, the Florida Legislature would not have mandated the manner in which a driver should proceed when a light is inoperable. See infra § 316.1325, Fla. Stat.

Furthermore, it has not been alleged, nor has it been shown, that the County's contract with FP&L specified that special taxes would be levied on non-customers in order to pay for the electricity. Additionally, FP&L has not assumed all liabilities to persons arising from this contract. Since FP&L has no duty to Plaintiff by contract or for common law tort, there is no basis for recovery by Plaintiff.

CONCLUSION

Florida has never recognized a cause of action against an electric company for failing to supply electricity for the operation of a traffic light which causes a vehicle accident. Whether basing decisions on an absence of duty, or finding that the inoperable traffic light is not the proximate cause of the accident, courts have continually found no liability on the part of those responsible for the maintenance of traffic lights. Since the Fourth District Court of Appeal correctly decided that Plaintiff has failed to state a cause of action, this Court should affirm that ruling in all respects.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of October, 1988, to RICHARD A. KUPFER, ESQ., Cone, Wagner, Nugent, Post Office Box 3466, West Palm Beach, Florida 33402; MARK POSTELNEK, ESQ., Suite 10-B, 407 Lincoln Road, Miami, Florida 33130; JAMES R. COLE, Post Office Box 3767, West Palm Beach, Florida 33401; JOHN HASWELL, Post Office Box 23879, Gainesville, Florida 32602; WILLIAM R. HOLZAPFEL, One Gateway Centre, Newark, New Jersey 07102-5311; SYLVIA WALBOLT, Post Office Box 3239, Tampa, Florida 33601; and MARJORIE GADARIAN GRAHAM, ESQ., Northbridge Centre, Suite 1704, 515 N. Flagler Drive, West Palm Beach, Florida 33401.

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