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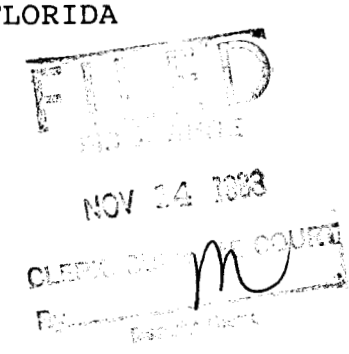
IN THE SUPREME COURT OF FLORIDA



EDWARD ARENADO, as Personal Representative of the Estate of SUSANNA ARENADO,	:	
Petitioner,	:	
vs.	:	CASE NO.: 72,533
FLORIDA POWER & LIGHT COMPANY, a Florida corporation,	:	
Respondent.	:	

BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE IN SUPPORT OF RESPONDENT FLORIDA POWER & LIGHT COMPANY

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PREFACE

This is a petition for discretionary review of a decision of the District Court of Appeal, Fourth District.

The petitioner, Edward Arenado, as personal representative of the Estate of Susanna Arenado, was the plaintiff before the trial court. The respondent, Florida Power & Light Company, was the defendant before the trial court. In this brief, the parties will be referred to by name or as plaintiff and defendant.

Amicus curiae Edison Electric Institute ("EEI") submits this brief in support of the position of Florida Power & Light Company. EEI is the association of electric companies. Its members serve 97% of all customers served by the investor-owned segment of the industry. They generate approximately 76% of all electricity in the country and serve 73% of all ultimate customers in the nation. The issue in this case, whether an electric company owes a duty to a non-customer, which would allow the non-customer to maintain an action for damages allegedly suffered as a result of failure to provide electricity to a traffic signal, is one of general concern and interest to the electric industry as a whole.

STATEMENT OF THE CASE AND FACTS

EEI adopts the statement of the case and facts set forth in Florida Power & Light Company's brief on the merits, filed with the Court on October 31, 1988, with the following addition.

EEI moved before this court for leave to appear as amicus curiae and for an extension of time in which to file its brief on October 25, 1988. The motion of EEI was granted by this Court by Order of November 3, 1988.

QUESTION PRESENTED

Whether Florida Power & Light Company owes a duty to a non-customer, which would allow the non-customer to maintain an action for damages allegedly suffered as a result of failure to provide electricity to a traffic signal under its contract with a customer.

SUMMARY OF ARGUMENT

No court in the nation has held that an electric company owes a tort duty to a non-customer,[1/] which would be breached by failure to supply electricity to a customer. The question of whether a duty is owed to a non-customer for failure to supply electricity is a case of first impression for this Court. No valid public policy purposes would be served by the establishment of such a tort duty[2/] by this Court.

The rationale for finding that a water company owes a duty to a non-customer, which is breached by failure to provide water for fire-fighting due to inoperative hydrants or insufficient water pressure, is not applicable to the question of an electric company's duty to a non-customer for failure to supply electricity used to power a traffic signal. When there is insufficient water for fire-fighting purposes, the persons whose duty it is to fight the fire are prevented from fulfilling their obligation. When electricity which powers a

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1/ As used in this brief, "non-customer" means a person who is not a customer of the utility for purposes of the particular service rendered. For example, Florida Power & Light provides electricity to Palm Beach County which is used to power traffic signals, among other uses. Therefore, Susanna Arenado was a "non-customer" of Florida Power & Light Company for purposes of providing electricity to a traffic signal.

2/ The term "tort duty" is used in this brief to mean a duty arising independent of contract and giving rise to potential liability in tort.

traffic signal fails, the persons whose duty it is to regulate traffic are not prevented from fulfilling that obligation. Temporary stop signs can be placed at intersections, flares put out or police officers can assume control of the intersection. Moreover, the drivers and pedestrians, whose obligation it is to exercise care and caution, can fulfill that obligation.

Holding that water companies have undertaken a public duty when they agree to provide water for fire-fighting purposes is perhaps justified by the damage which can result to the community at large if the fire-fighting system fails. A major fire can destroy homes, businesses and consequently mean the loss of jobs. The entire community will bear, to some extent, the consequences of the failure of the fire-fighting system through the broad economic impact of lost revenues and reconstruction costs. Intersection accidents, whatever their tragic outcome, do not have the same ready potential to economically impact the community as a whole.

Establishment of a legal duty is based upon considerations of the relationships of the parties, the nature of the risk and the public interest. In a traffic accident case, the electric company may have absolutely no relationship with the injured party. The risk associated with failure of the fire-fighting system is exponentially greater than the risk associated with the failure of electricity to a traffic control signal. Nor is it in the public interest to turn electric companies into

insurers of persons injured in traffic accidents. At a minimum, the cost of defending such accidents will become a cost of doing business and eventually be factored into the rates which the electric company must charge its customers.

In considering whether to establish a tort duty from an electric company to a non-customer, the Court must consider the duty of due care, caution and judgment incumbent upon all drivers and pedestrians. In Florida, that duty has been put into law by the Legislature in the State Uniform Traffic Control Chapter of the Florida statutes. Among other requirements, the Legislature has obligated a driver approaching an intersection in which the traffic lights are inoperative to stop as if approaching an intersection controlled by a stop sign.

The instant action cannot be sustained on a third party beneficiary contract theory. Plaintiff has not pleaded any of the elements of the contract between Florida Power & Light and Palm Beach County. It is therefore impossible for the Court to determine whether persons such as plaintiff's decedent are intended third party beneficiaries of that contract. Moreover, assuming arguendo that plaintiff's decedent could be considered a third party beneficiary, a contract action in this case would be barred by specific language in Florida Power & Light's tariff. Plaintiff here alleges nothing more than simple negligence, and Florida Power & Light's tariff operates as a bar to an action based upon simple negligence.

ARGUMENT

POINT I

THE COURT SHOULD NOT CREATE A TORT DUTY ON THE PART OF AN ELECTRIC COMPANY TO A NON-CUSTOMER, WHICH WOULD BE BREACHED BY THE ELECTRIC COMPANY'S FAILURE TO PROVIDE ELECTRICITY TO POWER A TRAFFIC SIGNAL UNDER ITS CONTRACT WITH THE CUSTOMER

It is a basic tenet of tort law that in order to establish liability based upon negligence, the person charged with negligence must owe a duty to the person injured. See Prosser and Keaton on Torts (5th Ed. 1984) at §30; Florida First National Bank of Jacksonville v. City of Jacksonville, 310 So. 2d 19, 21 (Fla. 1st DCA 1975), cert. dismissed, 339 So. 2d 632 (Fla. 1976); Seitz v. Surfside, Inc., 517 So. 2d 49, 50 (Fla. 3d DCA 1987), rev. denied, 525 So. 2d 880 (Fla. 1988); Weinberg v. Dinger, 524 A.2d 366, 373-74 (N.J. 1987).

No Florida court -- indeed, no court in any state -- has held that an electric company owes a tort duty to a non-customer, which would be breached by the electric company's failure to provide electricity to a customer. While this issue has been addressed by lower Florida courts, both in this case and in Abravaya v. Florida Power & Light Company, 39 Fla. Supp. 153 (Dade Cty. Cir. Ct. 1973), it is a case of first impression for this Court. As has been said innumerable times, the establishment of a duty under tort law is a policy decision, which entails the allocation of the risk of loss among various parties. See, e.g., Abravaya, 39 Fla. Supp. at 158. Courts in

other states, in considering whether an electric company should be liable in tort to a non-customer for failure to provide electricity to a customer, have been unanimous in responding that there should be no liability.[3/] There are good and valid reasons why this Court should decline to establish a tort duty on the part of electric companies to non-customers.

A. The Rationale For Imposing Liability on a Water Company is Not Applicable to Electric Companies.

Plaintiff urges this Court to find that an electric company owes a duty to a non-customer for failure to provide electricity based upon the determinations of certain courts that, in some circumstances, a water company may owe a duty to a non-customer, thereby facing liability for failure to provide sufficient water for fire-fighting. See Petitioner's Brief at 5-9. Plaintiff puts particular emphasis on the recent decision of the New Jersey Supreme Court in Weinberg v. Dinger, 524 A.2d 366 (N.J. 1987), in which the court abrogated the long-standing immunity against such suits against water companies in cases of

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3/ See, e.g., Strauss v. Belle Realty Co., 482 N.E. 2d 34 (N.Y. 1985); Quinn v. Georgia, 180 S.E. 246 (Ga. 1935); Shafouk Nor El Din Hamza v. Bourgeois, 497 So. 2d 1013 (La. 1986); East Coast Freight Lines, Inc. v. Consolidated Gas, Elec. Light & Power Co., 50 A.2d 246 (Md. 1946); Cochran v. Public Service Electric Co., 117 A. 620 (N.J. 1922); compare, Koch et al. v. Consolidated Edison Co., 468 N.E. 2d 1 (N.Y. 1984), cert. denied, 105 S. Ct. 1177 (plaintiffs were intended third-party beneficiaries of contract between parties).

no insurance or under-insurance. Plaintiff's argument does not withstand analysis. Because water for fire-fighting is relied on in an emergency situation and because the consequences of failure to provide water for fire-fighting and failure to provide electricity for traffic signals are dramatically different, the rationale for finding a duty on the part of a water company does not apply to an electric company, under the facts presented in this case.

The "water company cases" typically involve a water company which, pursuant to contract with a municipality, provides water to fire hydrants.[4/] A fire breaks out, the fire department responds, and allegedly either the fire hydrants do not operate properly or there is insufficient water pressure to extinguish the fire. The property owner, who is not a customer of the water company for purposes of providing water for fire-fighting, brings suit against the water company for negligent failure to provide water for fire-fighting. The question faced by the courts is whether such an action can be maintained on either a contract or a tort theory. The majority of courts which have considered the issue have found that the

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4/ In many instances the water company also installs, owns and maintains the hydrants. Such was the case in Weinberg. 524 A.2d at 367. This is in contrast to the facts here, where Florida Power & Light Company does not own, operate or maintain the traffic signal.

water company owes no duty to a non-customer which would render it liable, either in contract or tort, for failure to provide sufficient water for fire-fighting purposes. See discussion of decisions in Weinberg, 524 A.2d at 371-73.

The rationale of those decisions finding a common law tort duty on the part of the water company, however, is not transferable to the question of whether an electric company owes a similar duty to a non-customer motorist which would be breached by the electric company's failure to provide electricity to a customer for traffic signals.[5/] It is easy to see the difference in both short and long term consequences resulting from failure to provide water for fire-fighting and failure to provide electricity which is used to operate a traffic signal.

In the short term, when fire fighters arrive at a home or a business to extinguish a fire, and there are inoperative hydrants or insufficient water, they are either completely prevented or severely hindered in their efforts to stop the fire. A fire which might otherwise have been extinguished without causing major damage then has the potential to result

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5/ Whether a person can proceed on a contract theory as a third party beneficiary must be decided on the basis of the actual contract. Because contract terms vary, it would not be possible to fashion an all-encompassing rule. Moreover, the terms of the contract may limit liability. See discussion at Point II.

in substantial loss of property and perhaps life. Failure to provide electricity, which results in traffic signals not functioning, does not have the same immediate and almost unavoidable consequences. Lack of water prevents the persons whose duty it is to fight fires from doing so; a non-functioning traffic light does not prevent either the entity whose duty it is to regulate the control of traffic from doing so or drivers and pedestrians from exercising caution to avoid accidents. There are methods other than traffic lights by which traffic at intersections can be controlled. Temporary stop signs can be erected, flares placed at the intersection, or police officers can assume control of the intersection. There are no such alternatives available when a fire company attempts to extinguish a fire but is faced with inoperative hydrants or insufficient water pressure. Moreover, when traffic signals do not operate, drivers have the ability -- and in Florida are required by law (see §316.125, Fla. Stat. (1987)) -- to take extra precautions to insure their own safety. The property owner can do nothing to stop a fire in the absence of water.

In the long term, the impact of failure to supply sufficient water for fire-fighting can also have more severe effects on the community as a whole than can the impact of failure to provide electricity used to operate a traffic signal. If a fire burns out of control and destroys large

portions of any given community, it is not only the burned-out property owners who suffer the consequences. The community faces the loss -- at least for some period of time -- of businesses, jobs and the revenues generated by those businesses and jobs. This is a loss which will be borne by all members of the community, if only through the broad economic impact resulting from lost revenues and reconstruction costs.[6/]

Whatever the unfortunate or even tragic results might be of intersection traffic accidents, they generally do not have the potential to have the same long-term community impact that a major fire does. Businesses, jobs and revenues are not lost. Because the public consequences of traffic accidents are so different than those of fires, a finding that a water company has undertaken a public duty when it contracts to provide water for fire-fighting does not justify holding that an electric company has undertaken a public duty when it contracts to provide electricity which is used to operate traffic signals, among other municipal purposes.

Also underlying the willingness of certain courts to allow actions to proceed against water companies in fire cases may be the unspoken assumption that the person whose property has been destroyed was not an active contributor in bringing about the

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6/ As noted in the dissent in Weinberg, damage from a 1985 fire in Passaic, N.J. exceeded $500 million. 524 A.2d at 382-83 (Garibaldi, J., dissenting).

damage. Such an assumption would be rare in an intersection accident case, where the question of the negligence of the parties involved in the accident will almost always arise.

The courts allowing actions against water companies seem implicitly to use the "but for" test, that is, "but for" the negligence of the water company, the resulting damage would be limited. See, Weinberg, 524 A.2d at 375 ("That a structure could be destroyed by fire because of a negligently-maintained water-delivery system is self-evident.")

It is the same "but for" test that may have prompted the court's decision in Vendola v. Southern Bell Telephone & Telegraph Company, 474 So. 2d 275 (Fla. 4th DCA 1985). In Vendola the plaintiff brought suit against Southern Bell for negligent operation of the "911" emergency service. In Vendola and the water company cases, the utility has assumed a public duty with direct and immediate benefits to the public in life-threatening situations, in one instance a provision of water for fire-fighting and in the other provision of an emergency number by which help can be sought. 474 So. 2d at 279. "But for" the utility's negligence in carrying out that public duty, the damage which is sought to be prevented might have been minimized. Even if the plaintiff's own negligence or action could be said to have set the chain of events in

motion,[7/] but for the negligence of the utility in carrying out the public duty which it had assumed, the resulting damage might have been minimized.

In Vendola the court cited expert testimony presented at trial to the effect that Vendola's life could have been saved had he received medical treatment within the hour immediately following the shooting. 474 So. 2d at 277. Southern Bell's potential liability was predicated upon its alleged negligence in tracing the source of the call placed to its 911 number by Vendola. While Southern Bell had not contractually agreed to trace such calls, it had undertaken tracing as a standard practice. 474 So. 2d at 277-278. The benefit of tracing a call made to a 911 number is obviously for the person who has placed the call and for some reason is unable to provide location information. The court stated that when Southern Bell undertook the service of tracing the 911 calls, it "exposed itself to that venerable principle of law that an action undertaken for the benefit of another, even gratuitously, must

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7/ In Vendola the plaintiff's decedent suffered a gun shot wound and sought help from the 911 number operated by Southern Bell. There was no factual basis in Vendola upon which the court could determine whether the gun shot wound was self-inflicted or inflicted by a third party. Moreover, the court indicated that the actual origin of the wound was not important in determining the duty owed by Southern Bell. 474 So. 2d at 279.

be performed in accordance with an obligation to exercise reasonable care." 474 So. 2d at 278.

Whenever there is an intersection accident where a traffic signal is not functioning, it can be argued that "but for" the non-operative signal the accident would not have occurred. However, it is not the same "but for" argument that applies to water for fire-fighting and 911 service. Fire hydrants are installed and maintained to be utilized in response to an emergency. So is a 911 number. When the emergency occurs and the rescue efforts, be they fire-fighting, police or medical services, are thwarted because of the faulty operation of the very systems designed to respond to that emergency, the people who have placed their reliance on that system are left with no help or inadequate help. A traffic signal is not part of a system designed to respond to an emergency. When it does not function, people are not left in an emergency situation with no assistance forthcoming. Without water for fire-fighting the damage cannot be prevented; without electricity to operate a traffic signal, damage (accidents) can be prevented.

Moreover, the "but for" test is properly used, not to determine whether a duty exists, but whether the defendant's conduct has been a proximate cause of plaintiff's injury. See, e.g., Stahl v. Metropolitan Dade Co., 438 So. 2d 14, 17-18 (Fla. 3d DCA 1983) (Florida courts have historically followed "but-for" test to establish proximate cause). The use of the

"but for" test in relation to duty in essence by-passes the essential question of the existence of the duty and transforms the inquiry into one of proximate cause. EEI submits that the question of the duty owed by an electric company is separate from the question of proximate cause and must be resolved prior to any proximate cause inquiry.[8/]

The facts in this case are in direct contrast to the facts in Vendola where Southern Bell undertook to operate the 911 number and in Weinberg where the water company undertook to install, furnish water to and maintain the fire hydrants. In this case, Florida Power & Light did not undertake to erect, maintain or operate traffic lights. When an electric company contracts to provide electricity to a local government, which electricity is used in part to power traffic signals, it does not undertake the performance of a public duty to regulate pedestrian and vehicle traffic. It has not put itself in the position where its actions can and are expected to minimize damage already set in motion, as in the water company cases and Vendola. It simply provides electric service to one means by which the local government has chosen to control the flow of traffic.

In addition to the distinctions between failure to provide water for fire-fighting and failure to provide electricity to a

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8/ EEI is not suggesting that the inoperative traffic light was the proximate cause of the accident here.

traffic signal, it is inaccurate to argue, as plaintiff does, that the minority position imposing liability on water companies is "growing". See Petitioner's Brief at 9. Since 1958, the majority rule has been adopted or affirmed in at least five states. See Lanier Investments v. Dept. of Water and Power of Los Angeles, 215 Cal. Rptr. 812 (Cal. Ct. App. 1985) (city not liable in tort or contract); Rose v. Sapulpa Rural Water Co., 631 P.2d 752 (Okla. 1981) (affirming 1911 majority rule decision); Libbey v. Hampton Water Works Co., Inc., 389 A.2d 434 (N.H. 1978) (adopting majority rule); Clark v. Meigs Equipment Co., 226 N.E.2d 791 (Oh. App. 1967) (affirming long-standing Ohio majority rule); Earl E. Roher Transfer & Storage Co. v. Hutchinson Water Co., 322 P.2d 810 (Kan. 1958) (affirming longstanding majority rule). In addition, American Jurisprudence lists fifteen other states that adopted or affirmed the majority rule prior to 1952. See 78 Am. Jur.2d §51 at p. 938 n.71 (1975).

In contrast, only two states have clearly adopted the minority rule in that same time period, New Jersey in Weinberg and Alabama. See Harris v. Board of Water and Sewer Com'rs of Mobile, 320 So.2d 624 (Al. 1975). In several other states, Courts have found water company liability on the specific facts of each case. See White v. Tennessee - American Water Co., 603 S.W.2d 140 (Tenn. 1980) (Court found express contract between the plaintiff and water company, distinguishing the case from

the long-standing majority rule followed in Tennessee); Veach v. City of Phoenix, 427 P.2d 335 (Az. 1967) (imposed liability only when the municipality itself is liable to plaintiffs for fire damage); Pineville Water Co. v. Bradshaw, 266 S.W.2d 305 (Ky. 1953) (citizen can recover from a water company for fire damages only upon a breach of contract theory and not upon a tort theory); Doyle v. South Pittsburgh Water Co., 199 A.2d 875 (Pa. 1964) (held that the water company could be liable under the specific facts alleged in the plaintiff's complaint: that the water company was actively negligent in failing to inspect, repair and maintain fire hydrants near plaintiffs' property).

This survey of the case law demonstrates that there is no "growing" modern trend assigning liability to water companies for fire damage to the property owners. In fact, since 1958, more State courts reviewing the majority and minority rules have chosen to adopt or keep the majority rule than have adopted the minority rule.[9/]

B. Public Policy Militates Against Creation of a Duty on the Part of an Electric Company to a Non-Customer for Failure to Provide Electricity to a Traffic Signal.

As stated above, a fundamental predicate of actionable negligence is the existence of a duty owed by the person

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9/ Of significance, California has always been a majority rule jurisdiction, even though it has been a leader in fashioning causes of action for aggrieved and injured parties.

charged with negligence to the person injured. The question becomes, when does such a duty exist. As the New Jersey Supreme Court said in Kelly v. Gwinnell, 476 A.2d 1219, 1222 (N.J. 1984):

> In most cases the justice of imposing such a duty is so clear that the cause of action in negligence is assumed to exist simply on the basis of the actor's creation of an unreasonable risk of foreseeable harm resulting in injury. In fact, however, more is needed, "more" being the value judgment, based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care. Palsgraf v. Long Island R.R. Company, 248 N.Y. 339, 162 N.E. 99 (1928).

The court went on to say that the question of whether a duty exists "involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Id.

To establish a duty on the part of an electric company to a non-customer for failure to provide electric service could result in potential liability for electric companies whenever accidents occur and a traffic light does not function, street or building lights are out, or there are allegations of insufficient street lighting. Such a result could make electric companies insurers of persons, whose own negligence or that of another has been the actual cause of the damage suffered. Based upon considerations of the relationships of the parties, the nature of the risk and the public interest, this Court should not establish such a duty from an electric company to a non-customer.

In a traffic accident case, there is no contractual relationship whereby the electric company agreed to provide the injured party with electricity to operate traffic signals. Nor has the electric company assumed any role of regulating traffic at intersections or of directly protecting or providing emergency assistance to individuals. There is simply no relationship between the electric company and the injured party which should give rise to a tort duty for failure to provide electricity.

The nature of the risk involved also militates against a finding of a duty. When water intended for fire-fighting purposes fails, for whatever reason, the risk of substantial damage is greatly magnified. When the supply of electricity to traffic lights fails, the risk of substantial damage is not so magnified. Affirmative steps can be taken, either by the person to whom the electricity is supplied or the persons enjoying the incidental benefits of the electricity, to minimize the potential for damage. Where traffic lights fail as a result of lack of electricity, the entity charged with controlling traffic can take other steps to fulfill its obligation and the persons using the streets can exercise due care for their own protection.

It is not in the public interest for this Court to create a duty for electric companies that would turn them into insurers of persons injured in traffic accidents. Each additional

liability which is faced by a public utility will, at some time or another, have an impact on the rates which that utility must charge its customers. Even if electric companies were regularly found not to have acted negligently in failing to supply electricity and thus ultimately absolved of liability, they would be forced to assume the costs of defending such actions. These costs, just as any other costs, become a cost of doing business to the utility. The utility's cost of doing business eventually becomes factored into the rates which it must charge to its customers.

Over the years, courts in other states have considered the policy implications of imposing a duty on the part of an electric company to a non-customer. The question arises in a variety of factual circumstances. A tenant falls down the stairs of a building which is unlighted due to a city-wide blackout. Strauss v. Belle Realty Company, 482 N.E.2d 34 (N.Y. 1985). A pedestrian is struck on the side of the road where the street lights were allegedly not operating or were inadequate. Shafouk Nor El Din Hamza v. Bourgeois, 493 So. 2d 112 (La. Ct. App. 1986), cert. denied, 497 So. 2d 1013 (La. 1986). A vehicle crashes into a girder, allegedly because the street lights in the area were burned out. Kraye v. Long Island Lighting Company, 348 N.Y.S. 2d 16 (App. Div. 1973). In these types of cases, where the damage allegedly resulted from the failure to provide electricity, the courts have without

exception not found that the electric company owes a common law tort duty to a non-customer.

The failure to provide electricity cases are entirely distinct from another factual setting, where a person is injured by coming in contact with an electric line. Escambia Co. Elec. Light & Power Co. v. Sutherland, 61 Fla. 167, 55 So. 83 (1911). It is only in this last class of cases, where the damage is caused by the electricity itself, not by the failure to supply electricity, that the courts have regularly found a duty existing to a non-customer.

In the electrocution cases cited by plaintiff in his brief, the power company faced liability because it allegedly breached its duty of care to protect those who come in contact with its electricity. As the cases cited by plaintiff have noted, contact with electricity can cause severe injury or even death. This led the courts long ago to impose a duty of care on electric companies to do all that can reasonably be done, consistent with the practical operation of the electrical system, to protect those who come in contact with their facilities. Rice v. Florida Power & Light Company, 363 So. 2d 834, 838 (Fla. 3d DCA 1978). However, that an electric company does owe a duty of care to protect those coming in contact with its facilities does not mean that it owes a duty of care to a non-customer to ensure a steady supply of electricity to a customer. In the former instance, public policy concerns have

led the courts to find that a duty exists and the electric company can be subject to liability. In the other instance, public policy concerns have led the courts to find that no duty exists. Therefore, liability may not follow.

In the cases where damage has allegedly resulted due to inoperative traffic lights or insufficient street lighting, the courts have regularly found that the electric company did not owe a duty of care to the injured party. In Shafouk Nor El Din Hamza, the Louisiana Court of Appeal found that the electric company did not owe a duty to a pedestrian to provide street lighting. Mr. Shafouk, while standing on the side of the roadway, was struck and killed. His widow sought to sue the electric company alleging that certain street lights were not operating or that the lighting was inadequate. 493 So. 2d at 115. The Court of Appeal affirmed the dismissal of the complaint against the electric company, stating that the duty to supply street lighting did not extend to anyone other than the parties to the contract. "The failure of LP&L to provide adequate street lighting was at most a deprivation of a benefit; it was not the violation of a duty." 493 So. 2d at 117.[10/]

10/ See, also, Nicholson v. City of New York, 67 N.Y.S. 2d 156 (App. Div. 1946), aff'd., 74 N.E. 2d 477 (N.Y. 1947); Shubitz v. Consolidated

(Footnote continued on next page)

The policy reasons for not creating a duty on the part of electric companies to non-customers for failure to provide electricity, set forth above and in the briefs of Florida Power & Light, Florida Defense Lawyers Association, and Florida Rural Electric Cooperatives Association underlie decisions in both this jurisdiction and in other states. This Court should not create a duty on the part of electric companies, the consequences of which could be virtually unlimited.

C. Inoperative Traffic Signals Do Not Cause Accidents. The Burden of Preventing Traffic Accidents Rests upon Drivers.

A non-functioning traffic signal does not cause a traffic accident. At worst, it provides the occasion for the actions of the driver(s) and/or pedestrian(s) which result in the damage. Metropolitan Dade County v. Colina, 456 So. 2d 1233, 1235 (Fla. 3d DCA 1984). Consideration of the imposition of a duty on an electric company must be balanced against the duty incumbent upon drivers and pedestrians to use due care, caution

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(Footnote continued from previous page)
Edison Company, 301 N.Y.S 2d 926 (Sup. Ct. 1969); Cochran v. Public Service Electric Company, 117 A. 620 (N.J. 1922); Tollison v. Georgia Power Company, 187 S.E. 181 (Ga. App. 1936); East Coast Freight Lines v. Consolidated Gas, Electric Light & Power Company of Baltimore, 50 A.2d 246 (Md. 1946); Beck v. C. Corp., 385 N.Y.S. 2d 956 (N.Y. App. 1976); and Strauss v. Belle Realty Company, 482 N.E. 2d 34 (N.Y. 1985), discussed in Brief of Florida Power & Light Company at 6-7, 16-19.

and judgment when traveling on streets and highways throughout the nation. The duty on drivers and pedestrians is expressed both by the common-sense warnings born of experience such as, "look both ways before crossing" and "always walk facing traffic," and by statute. In Florida, the statutory duty is expressed in Chapter 316 of Florida Statutes, State Uniform Traffic Control.

By statute, the Legislature has imposed a variety of duties on both drivers and pedestrians. For example, drivers are required to obey the instructions of any official traffic control device. §316.074 (1), Fla. Stat. (1987). Vehicular traffic facing a green light may "proceed cautiously straight through." §316.075, Fla. Stat. Drivers must yield the right-of-way to pedestrian workers and flagmen engaged in maintenance or construction work on a highway. §316.079, Fla. Stat. A driver shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic and the condition of the highway. §316.0895 (1), Fla. Stat. Drivers entering intersections which are not controlled by traffic control devices are subject to specific rules regarding yielding of the right-of-way. §316.121, Fla. Stat. A driver approaching an intersection in which the traffic lights are inoperative shall stop as if approaching an intersection controlled by a stop sign. §316.125, Fla. Stat.

These and similar provisions in the State Uniform Traffic Control Chapter of the Florida statutes indicate the policy decision of the Legislature that drivers themselves have the responsibility to exercise due caution, care and judgment when operating their vehicles upon the streets and highways of Florida. That message is conveyed to the drivers of Florida. For instance, on the first page of the 1987 Florida Driver's Handbook, published by the State Department of Highway Safety & Motor Vehicles: "Driving is a privilege, not a right. Protect yourself and others by knowing the laws and driving with care." The message to use care and judgment is reiterated time and time again throughout the Driver's Handbook.

> "Who has the right to go first? The law gives the right-of-way to no one...every driver, motorcyclist, moped rider, bicyclist and pedestrian must do everything possible to avoid an accident." Florida Driver's Handbook at 29.
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> "Remember that speed limits show the fastest speed you may drive under good conditions. You are responsible for adjusting your driving speed to the road conditions." Id. at 27 (emphasis in original).
>
> "You must yield the right of way to all other traffic and pedestrians at stop signs. Move forward only when the road is clear." Id. at 29.
>
> "You should not drive so slowly that you block other vehicles moving at normal, safe speeds." Id. at 28.
>
> "If traffic lights are out of order, stop as you would for a stop sign." Id. at 46 (emphasis in original).

When two motor vehicles are involved in an accident in an intersection where a traffic signal is not operating, it must

be assumed that one or both drivers did not follow the duty of due care and caution established for them by the Legislature. In determining whether to reallocate the risk by creating a duty which would allow such persons to seek damages from an electric company, the Court should consider the statutorily-created duty of due care and caution required of motorists.

POINT II

PLAINTIFF CANNOT SUSTAIN THIS ACTION IN CONTRACT

Plaintiff alleges that Florida Power & Light Company should be liable to it as a third party beneficiary under the contract between Florida Power & Light and Palm Beach County. As correctly pointed out by Florida Power & Light, any third party beneficiary of the contract between Florida Power & Light and Palm Beach County would be subject to the limitations of liability expressed in the applicable tariff.[11/] See Respondent's Brief at 23-24. Florida Power & Light's tariff as set forth in its brief, bars liability based upon ordinary negligence. See Respondent's brief at 23-24; Landrum v. Florida Power & Light Co., 505 So. 2d 552 (Fla. 3d DCA 1987), rev. denied, 513 So. 2d 1061 (Fla. 1987).

Plaintiff here cannot proceed on a contract theory because he has not pleaded the terms of the contract in the Fourth Amended Complaint. It is axiomatic that a party suing as a third-party beneficiary must plead the contract which was expressly for his benefit and under which it clearly appears he was beneficiary. Weimar v. Yacht Club Point Estates, Inc., 223

11/ A utility's tariff, which has been approved by the Public Service Commission, is considered part of the contract with the customer. It is recognized as having the force and effect of law. Landrum v. Florida Power & Light Co., 505 So. 2d 552, 553-54 (Fla. 3d DCA 1987), rev. denied, 513 So. 2d 1061 (Fla. 1987).

So. 2d 100 (Fla. 1st DCA 1969). In this case, there is nothing before the Court from which it can determine whether the parties to the contract, Florida Power & Light and Palm Beach County, intended to make persons such as plaintiff's decedent third-party beneficiaries. The conclusory and insufficient pleading of the complaint at issue here is in direct contrast to a case upon which plaintiff places great reliance, Mugge v. Tampa Waterworks Co., 52 Fla. 371, 42 So. 81 (1906) ("Mugge I"). Mr. Mugge pleaded in great detail the terms of the contract on which he relied, including the provision in which the water company agreed to assume all liabilities to persons and property arising from the construction or operation of the waterworks system. Mugge I, 42 So. 2d at 81-82.

The terms of the contract were very important, as Mr. Mugge learned four years later when the Supreme Court reviewed the damage award achieved by Mr. Mugge in his action against the water company. Tampa Waterworks Company v. Mugge, 60 Fla. 263, 50 So. 943 (1910) ("Mugge II"). The Court said that the water company was "liable only on the theory of failure to comply with [its] contract duty to supply water for fire protection at an agreed pressure of forty pounds to the square inch in its water mains...." Mugge II, 50 So. at 944. The burden of proving failure to comply with the contract terms was on the plaintiff and the Court found that the plaintiff did not meet his burden of proof. Id. Thus, the contract terms limited his

ability to recover. Therefore, even assuming arguendo that plaintiff's decedent in this case could be considered a third-party beneficiary, the contract between Florida Power & Light and Palm Beach County, through the tariff, limits the ability of plaintiff to recover from Florida Power & Light Company on a contract theory. The tariff bars an action based on ordinary negligence. As plaintiff has pleaded only ordinary negligence, he cannot sustain this action on a contract theory.

CONCLUSION

The imposition of a duty upon an electric company to third party, non-customers for failure to provide electric service, the breach of which would result in potential liability, is a major public policy question. Amicus curiae Edison Electric Institute respectfully submits that sound public policy and the existing weight of legal authority overwhelmingly dictate against the imposition of such a duty. Amicus curiae Edison Electric Institute respectfully urges this Court to affirm the ruling of the Fourth District Court of Appeal dismissing the Fourth Amended Complaint of plaintiff.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10th day of November, 1988 to JOHN H. HASWELL, ESQ., Chandler, Gray, Lang, Haswell & Enwall, P.A., 211 N.E. 1st Street, P.O. Box 23897, Gainesville, FL 32602; RICHARD L. KUPFER, ESQ., Cone, Wagner, Nugent, Post Office Box 3767, West Palm Beach, FL 33402; MARC POSTELNEK, ESQ., 407 Lincoln Road, Suite 10-B, Miami, FL 33130; JAMES R. COLE, ESQ., P.O. Box 37667, West Palm Beach, FL 33401; MARJORIE GADARIAN GRAHAM, ESQ., Suite 1704, Northbridge Center, 515 North Flagler Drive, West Palm Beach, FL 33401; WENDY LUMISH, ESQ., One Biscayne Tower #3410, 2 South Biscayne Boulevard, Miami, FL 33131; and SYLVIA WALBOLT, ESQ., P.O. Box 3239, Tampa, FL 33601.

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