

IN THE SUPREME COURT OF FLORIDA

EDWARD ARENADO, as Personal  
Representative of the Estate  
of SUSANNA ARENADO,

Petitioner,

vs.

FLORIDA POWER & LIGHT COMPANY,  
a Florida corporation,

Respondent.

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CASE NO: 72, 533 *ph*

ANSWER BRIEF OF RESPONDENT  
ON JURISDICTION

JAMES R. COLE, ESQ.  
Sellars, Supran, Cole,  
Marion & Espy  
Post Office Box 3767  
West Palm Beach, FL 33401  
(407) 659-5600

and

MARJORIE GADARIAN GRAHAM, ESQ.  
Marjorie Gadarian Graham, P.A.  
Suite 1704, Northbridge Centre  
515 North Flagler Drive  
West Palm Beach, FL 33401  
(407) 655-9146

Attorneys for Respondent

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## PREFACE

This is a petition for discretionary review of a decision of the District Court of Appeal, Fourth District, which purportedly conflicts with other Florida appellate decisions.

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.

The following symbols will be used in this brief:

(PA. \_\_\_\_\_) Petitioner's appendix

(RA. \_\_\_\_\_) Respondent's appendix

STATEMENT OF THE CASE & FACTS

This is an appeal from an order dismissing the plaintiff's fourth amended complaint. For purposes of this proceeding the facts are presumed to be as alleged in the fourth amended complaint.

Plaintiff alleged that at 1:00 am on March 12, 1983 Susanna Arenado was driving east on Summit Boulevard. Rene Demers was driving south on Congress Avenue. The traffic device at the intersection of Summit and Congress was inoperable. The vehicles collided. Susanna Arenado died as a result of injuries sustained in the collision.

Plaintiff sued Florida Power & Light, alleging that Florida Power & Light contracted to furnish electricity to the county for use in activating and controlling traffic signals. Plaintiff alleged that Susanna Arenado was a third party beneficiary of the contract. Plaintiff alleged that the traffic control device was inoperable due to the negligence of Florida Power & Light. (RA. 1-7) The trial court dismissed plaintiff's fourth amended complaint with prejudice. (RA. 9-10)

The plaintiff appealed to the District Court of Appeal, Fourth District. The Fourth District Court of Appeal affirmed. (PA. 1-4) The plaintiff asked the Fourth District Court of Appeal to certify the case to this court as a question of great public importance. (RA. 11-17) The Fourth District Court of Appeal declined to do so and denied plaintiff's motion for rehearing and motion for rehearing en banc. (PA. 5)

QUESTION PRESENTED

I

WHETHER THIS COURT HAS JURISDICTION TO REVIEW THIS CAUSE ON THE MERITS BECAUSE OF A DIRECT CONFLICT BETWEEN THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL AND THE DECISIONS IN MUGGE V. TAMPA WATERWORKS CO. AND WOODBURY V. TAMPA WATERWORKS CO.

SUMMARY OF ARGUMENT

This court does not have jurisdiction to hear this cause on the merits. There is no direct and express conflict due to a misapplication of prior decisions of this court.

### ARGUMENT

THIS COURT DOES NOT HAVE JURISDICTION  
BECAUSE THERE IS NO DIRECT AND EXPRESS  
CONFLICT

This court does not have jurisdiction to hear this case on the merits. There is no direct and express conflict with the decisions in Mugge v. Tampa Waterworks Co., 52 Fla. 371, 42 So. 81 (Fla. 1906) and Woodbury v. Tampa Waterworks Co., 57 Fla. 243, 49 So. 556 (Fla. 1909). "Conflict" exists when two decisions are wholly irreconcilable or when the decisions collide so as to create an inconsistency or conflict among the precedents. Williams v. Duggan, 153 So. 2d 726 (Fla. 1963); Kincaid v. World Insurance Co., 157 So. 2d 517 (Fla. 1963).

In Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960) this court explained that conflict jurisdiction may be invoked where the District Court of Appeal announces a rule of law which conflicts with a rule previously announced or where the District Court of Appeal applies a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior decision. Plaintiff cites Wale v. Barnes, 278 So. 2d 601 (Fla. 1973) and erroneously argues that this court has jurisdiction because the Fourth District Court of Appeal misapplied the decisions in Mugge and Woodbury. It did not; thus this court does not have jurisdiction.

X  
Both Mugge and Woodbury are factually distinguishable. In Mugge, Tampa Waterworks entered into a contract with the city of Tampa. Under the contract it was granted the franchise and right to lay pipes, erect fountains and other structures and the exclusive privilege to construct and operate the city's waterworks for 30 years. An individual whose property was destroyed by fire because of insufficient water pressure sued the waterworks.

It was alleged in Mugge that the contract between Tampa Waterworks Company and the City of Tampa contained the right on the part of Waterworks Company to have sufficient taxes levied and collected annually on all taxable property in the City to pay for hydrant rentals for public fire service. The complaint alleged that a special tax could be levied and collected for such purposes, and that the proceeds were to be kept as a separate fund to be exclusively devoted to hydrant rentals. This special tax for hydrant rentals had been levied annually, collected and paid to the defendant company. It was also specifically alleged that the principal and primary consideration for grant of the franchises and rights to the defendant, as stipulated by ordinance, was to provide and secure to the citizens, residents, and property owners of the city, better protection against fires. *Opinion*

Close reading of the Mugge decision shows that this court relied upon the specific allegations, including the levy of a



special tax whose proceeds and funds were to be kept separate and devoted exclusively to the payment of hydrant rentals, in reaching its decision.

The allegations in Mugge differed vastly from the allegations contained in Arenado's fourth amended complaint. The distinctions are readily apparent. For instance, there are no allegations in this case that Susanna Arenado was a taxpayer and paid a tax specially levied for the purpose of the county contracting with Florida Power & Light Company.

The Woodbury decision must be read in light of the Mugge case. The Woodbury decision followed Mugge. The defendant was the same in both cases. It is important to compare the allegations in each case. [ Woodbury involved a claim against Tampa Waterworks Company for damages due to the burning of a house. The damage allegedly resulted from the negligence of the defendant in not furnishing water for fire protection under a franchise with the City of Tampa. The complaint was dismissed for failure to state a cause of action. This court upheld the dismissal, stating:

To maintain the action the plaintiff should allege facts to show that the defendant negligently failed to perform a duty it owed to the plaintiff because of the public service undertaken by the defendant, and that such failure was a proximate cause of the injury complained of. Where the duty does not necessarily result from the relation of the parties as alleged, the circumstances from which the duty arises should be alleged.....A declaration in an action at law should allege distinctly every fact that is essential to the plaintiff's right of action."

49 So. at 559.

This court found that the allegations of the complaint failed to state a cause of action and that plaintiff was nothing more than an incidental beneficiary under the alleged contract. In Woodbury this court was <sup>did</sup> very careful not to extend the doctrine enunciated in Mugge past the applicable facts.

Florida Power & Light did not owe a duty to a third party non-customer. Since no duty was owed, the trial court was correct in dismissing plaintiff's fourth amended complaint. The plaintiff failed to allege the special circumstances set forth in Mugge. To impose a duty on Florida Power & Light under the facts of this case would be to impose liability for numerous remote situations and to create liability to non-customers for service interruptions. This court should decline to do so.

CONCLUSION

This court should deny the petition to invoke discretionary jurisdiction.

Respectfully Submitted,

**JAMES R. COLE, ESQ.**  
Sellars, Supran, Cole,  
Marion & Espy  
Post Office Box 3767  
West Palm Beach, FL 33401  
(407) 659-5600

and

**MARJORIE GADARIAN GRAHAM, ESQ.**  
Marjorie Gadarian Graham, P.A.  
Northbridge Center, Suite 1704  
515 N. Flagler Drive  
West Palm Beach, FL 33401  
(407) 655-9146

By: Marjorie Gadarian Graham  
Marjorie Gadarian Graham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of June, 1988, to: Richard L. Kupfer, Cone, Wagner, Nugent, Post Office Box 3466, West Palm Beach, FL 33402; Marc Postelnek, 407 Lincoln Road, Suite 10-B, Miami, FL 33130, and James R. Cole, Jones & Foster, P.A., Post Office Drawer E, West Palm Beach, FL 33402.

By: Marjorie Gadarian Graham  
Marjorie Gadarian Graham