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.

RESPONDENT'S BRIEF ON THE MERITS

On Discretionary Jurisdiction to Review the Decision of the Fourth District Court of Appeal

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TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii-iii
PREFACE	iv
STATEMENT OF THE CASE & FACTS	1-2
QUESTION PRESENTED	3
I	
WHETHER THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT WITH PREJUDICE WHERE:	
A. FPL OWED NO DUTY TO DECEDENT TO SUPPLY ELECTRICAL SERVICE.	
B. FPL COULD NOT ANTICIPATE THAT THE DRIVERS WOULD VIOLATE STATE LAW.	
C. THE TARIFF BARS FPL'S LIABILITY FOR ORDINARY NEGLIGENCE.	
SUMMARY OF ARGUMENT	3
ARGUMENT	
SUBTITLE "A"	4-19
SUBTITLE "B"	19-23
SUBTITLE "C"	23-24
CONCLUSION	25-26
CERTIFICATE OF SERVICE	27
APPENDIX	1-29

TABLE OF CITATIONS

	PAGE
Abravaya v. Florida Power & Light Company, 39 Fla. Supp. 153 (Cir. Ct., Dade County 1973)	4, 5, 6, 7
Beck v. C. Corp., 385 N.Y.S. 2d 956 (N.Y.App. 1976)	18
Cochrane v. Public Service Electric Company, 117 A. 620 (N.J.App. 1922)	16
Corbett v. Eastern Airlines, Inc., 166 So. 2d 196 (Fla. 1st DCA 1964)	14
Department of Transportation v. Anglin, 502 So. 2d 896 (Fla. 1987)	13, 21
East Coast Freight Lines v. Consolidated Gas, Electric Light and Power Company of Baltimore, 187 Md. 385, 50 A.2d 246 (Md. 1946)	17, 18
Florida Power and Light Co. v. Lively, 465 So. 2d 1270 (Fla. 3rd DCA 1985), mand. den., 476 So. 2d 674 (Fla. 1985)	4, 22
Florida Power & Light Co. v. Macias, 507 So. 2d 1113 (Fla. 3rd DCA 1987), rev. dism., 513 So. 2d 1060 (Fla. 1987)	21, 22
H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928)	4, 5, 7, 8, 9, 19
Landrum v. Florida Power & Light Co., 505 So. 2d 552 (Fla. 3rd DCA 1987), rev. den., 513 So. 2d 1061 (Fla. 1987)	23
Metropolitan Dade County v. Colina, 456 So. 2d 1233 (Fla. 3rd DCA 1984), pet. for rev. den., 464 So. 2d 554 (Fla. 1985)	21

	PAGE
Mugge v. Tampa Waterworks Co., 52 Fla. 371, 42 So. 81 (1906)	9, 10, 11, 12
National Airlines, Inc. v. Edwards, 336 So. 2d 545 (Fla. 1976)	20
Nicholson v. City of New York, 271 App.Div. 899, 67 NYS.2d 156 (1946), aff'd 297 N.Y. 548, 74 N.E. 2d 477 (1974)	5, 6
Shubitz v. Consolidated Edison Co., 59 Misc. 2d 732, 301 NYS.2d 926 (Sup.Ct. 1969)	5, 7
Strauss v. Belle Realty Company, 469 N.Y.S.2d 948 (N.Y.App. 1983), aff'd, 492 NYS2d 55, 482 NE 2d 34	13, 19
Tollison v. Georgia Power Company, 53 Ga.App. 795, 187 S.E. 181, (Ga.App. 1936)	17
Vendola v. Southern Bell Telephone & Telegraph Co., 474 So. 2d 275 (Fla. 4th DCA 1985), rev. den., 486 So. 2d 597 (Fla. 1986)	15
Weinberg v. Dinger, 106 N.J. 469, 524 A.2d 366, 372 (1987)	12, 13
Woodbury v. Tampa Waterworks, 57 Fla. 243, 49 So. 556 (1909)	9, 10, 11, 12

OTHER AUTHORITIES

The Law of Torts, §43, at 251 (4th Ed. 1971)	6

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 as FPL and plaintiff.

The following symbols will be used in this brief:

(R._____) Record on Appeal

(RA._____) Respondent's Appendix attached to this brief

STATEMENT OF THE CASE & FACTS

The plaintiff's statement of the case and facts is argumentative; hence it is unacceptable. The facts have been objectively restated.

The facts are presumed to be what is alleged in plaintiff's fourth amended complaint. Plaintiff has violated this axiom and stated many "facts" which are not alleged in that fourth amended complaint. Plaintiff alleged in the fourth amended complaint that at 1:00 a.m. on March 12, 1983, Susanna Arenado was driving east on Summit Boulevard at about the same time Rene Demers was driving south on Congress Avenue. The traffic device at the intersection of Summit and Congress was inoperable, allegedly due to the negligence of FPL. The cars collided, allegedly as a result of FPL's negligence.[1] Susanna Arenado died as a result of injuries sustained in the collision.

The complaint alleged that Palm Beach County contracted with FPL to furnish electricity to Palm Beach County for use in activating and controlling traffic signals. The complaint concluded that Susanna Arenado was a third party beneficiary of the contract between Palm Beach County and FPL. The plaintiff alleged that FPL failed to exercise reasonable care to remove or trim trees that might constitute a hazard to power lines in

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1. Plaintiff also sued the Florida Department of Transportation and Palm Beach County. They were dismissed as parties by stipulation. (R. 147-148; 484)

the vicinity where the actual power interruption occurred. (R. 544-550; A. 1-7)

The fourth amended complaint did not allege that the power line "went down because it was rendered unreasonably weak and unsafe due to the number of splices in the wire." Petitioner's brief on the merits at page 1. The fourth amended complaint did not allege there were 32 splices in the line. (R. 544-550) These were allegations in prior complaints which were deleted from the fourth amended complaint.

The trial court dismissed the plaintiff's fourth amended complaint with prejudice. (R. 557-558; A. 8-9) The plaintiff filed a timely notice of appeal. (R. 559) The Fourth District Court of Appeal affirmed. The plaintiff asked the Fourth District Court of Appeal to certify the case to this court as a question of great public importance. The Fourth District Court of Appeal declined to do sc and denied plaintiff's motion for rehearing and motion for rehearing en banc.

Plaintiff then filed a notice to invoke the discretionary jurisdiction of this court. On September 28, 1988 this court accepted jurisdiction, set a briefing schedule and dispensed with oral argument. This brief on the merits is filed in accordance with this court's order.

QUESTION PRESENTED

I

WHETHER THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT WITH PREJUDICE WHERE:

A. FPL OWED NO DUTY TO DECEDENT TO SUPPLY ELECTRICAL SERVICE.

B. FPL COULD NOT ANTICIPATE THAT THE DRIVERS WOULD VIOLATE STATE LAW.

C. THE TARIFF BARS FPL'S LIABILITY FOR ORDINARY NEGLIGENCE.

SUMMARY OF ARGUMENT

FPL owed no contractual or common law duty to a third party non-customer. Because it owed no duty to Susanna Arenado, the trial court correctly dismissed plaintiff's fourth amended complaint. The accident resulted solely from the negligence of Demers and/or Arenado in failing to stop at the inoperable signal.

To impose a duty on FPL in this case would impose a burden of liability for numerous remote situations. If this court finds a duty exists in this case, then FPL would be liable to non-customers for any damages which occur as a result of a service interruption. For public policy reasons, and in view of the limitation of liability imposed by the tariff, this court should decline to extend FPL's duty.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT WITH PREJUDICE

A. FPL OWED NO DUTY TO DECEDENT TO SUPPLY ELECTRICAL SERVICE.

The foundation of any negligence claim is duty. Before there can be liability for a negligent act, the defendant must owe a duty to the plaintiff. Duty is the existence of a relationship between individuals which imposes upon one the legal obligation to conform to a standard of reasonable conduct so as to protect the other from foreseeable and unreasonable risks of harm. Whether a duty exists is a question of law for the court. Florida Power and Light Co. v. Lively, 465 So. 2d 1270 (Fla. 3rd DCA 1985), mand. den., 476 So. 2d 674 (Fla. 1985). If no duty is owed, then there can be no liability for negligence. In this case the trial court and the Fourth District Court of Appeal correctly concluded that the fourth amended complaint failed to state a cause of action because FPL owed no contractual or common law duty to Susanna Arenado.

The Fourth District Court of Appeal relied on Abravaya v. Florida Power & Light Company, 39 Fla. Supp. 153 (Cir. Ct., Dade County 1973) and H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928) in reaching its decision. Abravaya is the only written, reported Florida decision which is factually and legally directly on point. There an automobile driver suffered injuries in a vehicular intersectional collision. The driver and his father sued

FPL, alleging that the accident occurred because the traffic signals were inoperative due to the negligence of FPL. The trial court dismissed plaintiffs' amended complaint for failure to state a cause of action. The trial court found that FPL did not owe a duty to the plaintiff driver who, admittedly, was not a customer of FPL for purposes relevant to the case.

In dismissing the complaint Judge Nesbitt relied on foreign decisions which discuss the duty owed by a power company to a non-customer, notably, Nicholson v. City of New York, 271 App.Div. 899, 67 NYS.2d 156 (1946), aff'd 297 N.Y. 548, 74 N.E. 2d 477 (1974) and Shubitz v. Consolidated Edison Co., 59 Misc. 2d 732, 301 NYS.2d 926 (Sup.Ct. 1969). Judge Nesbitt also cited Justice Cardozo's classic opinion in H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928). The court concluded that the facts in Abravaya were fundamentally indistinguishable from the facts in those cases. The court observed that FPL had no duty to regulate the flow of traffic for the city of Miami. As in this case, there were no allegations that FPL assumed that duty to regulate traffic. Since FPL owed no duty to plaintiff, as a matter of law there could be no breach of duty.

Judge Nesbitt commented that to cause the power company to bear the risks for traffic accidents due to signal failures would impose liability for situations quite remote from the duties assumed in an ordinary contract situation. The court explained:

> In addition to the reasons cited in the above decisions, there is another rationale for this court's conclusion -- tort law is largely concerned with the allocation of risks, and the determination of who should bear risks has far-reaching consequences. The plaintiffs in this case want a power company to bear risks for traffic accidents, in the event of signal failures. Their theory would impose a burden of liability for situations quite remote from the duties assumed in an ordinary contract situation. This would result in the burden for traffic accidents being shifted to the power company and, ultimately, to the rate payer through increased power rates. The court can see no reason to use this device for allocating risks for traffic accidents when the involvement of the power company is passive and so far removed from the direct causation.
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> In making these determinations, the court is sensitive to the many repercussions which might result from such an extension of duties. Some courts have dismissed this in terms of foreseeability, others have referred to causation. But, the conclusion is best expressed in terms of duty. See W. Prosser, The Law of Torts, §43, at 251 (4th Ed. 1971). 39 Fla.Supp. at 157-158

In Nicholson v. City of New York, 271 App.Div. 899, 67 N.Y.S.2d 156 (1946), aff'd 297 N.Y. 548, 74 N.E.2d 477 (1947), a case cited in Abravaya, the plaintiff was injured when an automobile collided with a steel column supporting elevated train tracks. Plaintiff sued the power company, which had contracted with the city to provide electricity for street lights. Plaintiff alleged that the defendant had been negligent in allowing the street lights in the vicinity of the collision to remain unlighted and that, but for the failure of the lights and subsequent darkness, the accident would not have occurred. The appellate court held that the plaintiff had no

right of action for a violation of duty imposed upon the power company by a contract with the city of New York. The court explained that the power company had not obligated itself to perform the city's duty to maintain its streets in a reasonably safe condition. The court concluded that the power company was not liable.

Shubitz v. Consolidated Edison Company, 59 Misc.2d 732, 301 N.Y.S.2d 926 (1969) was also cited in Abravaya. There the court held that an electric utility company owed no duty to an apartment dweller who was injured during a blackout. The court explained that negligent conduct becomes actionable only when it violates some specific duty and that failure to perform a contractual obligation is never a tort, unless it is also a violation of a legal duty. The court concluded that since there was no legal duty owed by the utility to the non-customer plaintiff, there could be no breach of duty.

A similar issue, although not identical, was presented in H.R. Moch Co. v. Rensselaer Water Company, 247 N.Y. 160, 159 N.E. 896 (1928). In that case, water pressure in fire hydrants failed. The plaintiff lost his warehouse in a fire because of the lack of water pressure. There was a contract between the city and the water company to provide water to the fire hydrant system. The plaintiff alleged that the breach of that contract resulted in his loss. The plaintiff's theories of recovery were breach of contract, common law tort and breach of statutory duty. The court held that with regard to the contractual agreement, there could be no recovery unless it

were shown that the utility intended to answer to individual members of the public, as well the municipality with which it had contracted. The court explained that in a broad sense every city contract is for the benefit of the public; however more must be shown to give a right action to a member of the public who is not a party to the agreement. The court also rejected a claim based upon common law tort, explaining that duty could arise only if the conduct had gone forward to such a stage that inaction would commonly result in positively or actively working an injury.

In concluding that FPL owed no duty to plaintiff, the Fourth District Court of Appeal relied on Moch, quoting as follows:

> In a broad sense it is true that every city contract not improvident or wasteful, is for the benefit of the public. More than this, however, must be shown to give a right of action to a member of the public not formally a party. The benefit, as it is sometimes said, must be one that is not merely incidental and secondary . . . It must be primary and immediate in such a sense and to such a degree as to bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost.
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> * * *
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> (b)y a vast preponderance of authority, a contract between a city and a water company to furnish water at the city hydrants has in view a benefit to the public that is incidental rather than immediate, an assumption of duty to the city and not to its inhabitants. 159 N.E. at 897

The plaintiff argues that although Moch is the majority rule, that Florida does not and should not follow the majority

rule. Plaintiff says that in Mugge v. Tampa Waterworks Co., 52 Fla. 371, 42 So. 81 (1906) and Woodbury v. Tampa Waterworks, 57 Fla. 243, 49 So. 556 (1909) this court adopted the minority position. FPL does not believe that this court adopted the minority decision in those cases and believes that those decisions are factually distinguishable from this case.

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 Tampa Waterworks.

Plaintiff alleged 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 of Tampa 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 devoted exclusively 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.

Close reading of the Mugge decision shows that this court, in reaching its decision, relied upon the specific allegations of the complaint, including allegations that there was a levy of a special tax whose proceeds were to be kept separate. Those taxes were devoted exclusively to the payment of hydrant rentals.

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 that she paid a tax specially levied for the purpose of providing and securing traffic regulation by FPL. There are no allegations that FPL undertook performance of a public service.

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. The allegations in each case must be compared. 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 very careful not to extend the doctrine enunciated in Mugge beyond the Mugge facts.

FPL did not owe a duty to Susanna Arenado, a third party non-customer. Plaintiff's fourth amended complaint did not allege any facts which would justify a special relationship between the decedent, Susanna Arenado, and FPL. It did not allege that FPL undertook performance of a public service. The fourth amended complaint contained no factual allegations similar to those in Mugge. If the Mugge decision stands for the proposition claimed by plaintiff, why did the same court in Woodbury, which followed by three years and was a similar claim against the very same defendant for property destroyed by fire, determine that there was no cause of action? The answer is obvious -- the Mugge decision is limited to the circumstances of that case.

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 FPL 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.

Plaintiff seeks to establish a duty by claiming that Susanna Arenado was a third party beneficiary to a contract between Palm Beach County and FPL. Arguably every contract entered into by a municipality is for the benefit and use of its citizens. That is not grounds to permit an action by an individual non-customer as a third party beneficiary.

The plaintiff cites Weinberg v. Dinger, 106 N.J. 469, 524 A.2d 366, 372 (1987) as authority for the proposition that Florida follows the minority position. FPL does not believe that is correct. The Weinberg court obviously misread Woodbury. Both Mugge and Woodbury must be restricted to the special circumstances and factual allegations of those cases.

In Weinberg a 12 unit apartment building caught fire. Because of inadequate water pressure at nearby fire hydrants, fire fighters were unable to extinguish the flames. The building owner and residents of the building sued the private water company that installed and maintained the fire hydrants and water mains in the municipality. The trial court granted the defendant's motion for summary judgment. The New Jersey Supreme Court reversed and held that the private water company was not immune from liability for its negligence in failing to provide sufficient water pressure, except with respect to subrogation claims asserted by fire insurance companies. In doing so the court receded from the longstanding New Jersey

rule which had immunized private water companies from liability. The court abrogated the immunity of a water company only to the extent of claims that are uninsured or underinsured.

Weinberg is factually distinguishable from this case. In Weinberg the water company had installed and maintained the fire hydrants and water mains in the municipality. In this case FPL did not install or maintain the traffic control device. Palm Beach County undertook that responsibility. Power failures can sometimes occur. The county could have provided an emergency power source. It apparently did not. FPL should not be held accountable for that.

This court should not make the sweeping policy changes which plaintiff suggests. There are many practical and policy reasons why this court should decline to extend liability. As the court recognized in Strauss v. Belle Realty, 492 NYS.2d 555 (1985), it is the responsibility of the courts, in fixing the orbit of duty, to limit the legal consequences of wrongs to a controllable degree and to protect against crushing exposure to liability. This court reflected a similar sentiment in Department of Transportation v. Anglin, 502 So. 2d 896 (Fla. 1987). In fixing the bounds of duty, logic, science and policy play an important role. Sometimes application of these principles may necessarily result in exclusion of recovery for some. In this case there is no basis for extending tort liability. The death of Susanna Arenado was caused by the driver of the other vehicle. Plaintiff asks this court to

impose a duty on FPL to regulate traffic and to prevent automobile drivers from causing injury to others. There is simply no practical, logical or policy reason to impose that duty on FPL.

Plaintiff argues that the decision of the Fourth District Court of Appeal immunizes power companies from liability to the public regardless of the degree of negligence involved. That simply is not correct. Power companies are liable where they owe a duty. Where, as here, there is no duty, there can be no liability.

It should be noted that plaintiff argues many "facts" which are not contained within the allegations of the fourth amended complaint. For instance, plaintiff argues that he paid taxes to the county to enjoy the benefit of FPL's services. That is not alleged in the fourth amended complaint. Plaintiff also states that FPL was guilty of reckless disregard for human safety. Plaintiff says this transmission wire fell down numerous times in the past and had been spliced, rather than replaced. Those allegations are not contained in the fourth amended complaint. We are concerned with the propriety of the order dismissing the fourth amended complaint, not unpled allegations. In considering a motion to dismiss a complaint for failure to state a cause of action, the trial or appellate court is confined to the allegations within the four corners of the complaint. Corbett v. Eastern Airlines, Inc. 166 So. 2d 196, 203 (Fla. 1st DCA 1964).

The plaintiff relies on a number of factually distinguishable cases as authority for the proposition that a power company can be liable to a third person, not in privity of contract, who is burned or electrocuted due to a power company's negligence. Petitioner's Brief on the Merits at pages 11-12. Those cases are factually distinguishable. In those cases, unlike this one, there was no intervening negligence of a third party which directly caused the injury. Furthermore, in those cases the claimed negligence was not failure of the electric utility to provide electrical service to its customer. In those cases, unlike this one, the power company owed a duty to the plaintiff. Those cases have no bearing on the issue in this case.

Likewise, Vendola v. Southern Bell Telephone & Telegraph Co., 474 So. 2d 275 (Fla. 4th DCA 1985), rev. den., 486 So. 2d 597 (Fla. 1986) is factually distinguishable from this case. In Vendola plaintiffs brought a wrongful death action against the telephone company, alleging that it was negligent in tracing a 911 emergency call made by their son after he suffered a gunshot wound. Plaintiffs' son had dialed the sheriffs office at 12:23 pm and uttered "Ambulance. Quick." Unable to say more, he lay moaning into the receiver until his death an hour and a half later. The sheriff's office immediately called Southern Bell and requested it to trace the call. Southern Bell undertook to trace the call, but did not accomplish the task for almost 2 hours. By then the decedent's

girlfriend had found him and notified the sheriff. Vendola was dead.

Plaintiffs sued Southern Bell for negligent discharge of a public duty. The appellate court held that Southern Bell could be liable for negligence once it undertook performance of a public service.

In this case FPL did not undertake performance of a public service. The only obligation FPL assumed was a contractual obligation to supply electricity to Palm Beach County for use in many different ways. FPL did not agree to undertake a governmental function, regulation of traffic. This accident arose because of the negligence of the other driver. Since FPL was not charged with the responsibility to regulate traffic and since this accident resulted from the negligence of the other driver, FPL is not liable.

The courts of foreign jurisdictions have considered the liability on a power company to a non-customer and found that a power company owes no duty to a non-customer under circumstances similar to those in this case. This court should adopt the decisions of those courts. For instance, in Cochrane v. Public Service Electric Company, 117 A. 620 (N.J. App. 1922), plaintiff was injured while driving a truck from Trenton to New York at about 4:30 am in the morning. At the point where the accident occurred, there was a safety isle with upright standards for electric lights. The defendant, Public Service Electric Company, had a contract with the city to illuminate that light from dusk until dawn. The safety isle

constituted such an obstruction, that if it were not properly lighted, it might become a nuisance. The plaintiff sued the power company for failure to perform the contract to provide lighting.

The appellate court held that the plaintiff could not recover against the power company. It observed that where the complaint alleges failure to perform a contract, the right of action is the right of the promisee under the contract, unless it clearly appears that the parties intended that a third party could have a right of action on the contract. Whether there is a right of action in tort depends upon whether there is a duty to the plaintiff which the defendant has violated. There the court found that the electric company, by its own consent, became liable for breach of its contract with the city, but the power company did not incur liability for a tort committed by the city against one to whom the power company owed no immediate duty.

Similarly, in Tollison v. Georgia Power Company, 53 Ga. App. 795, 187 S.E. 181, (Ga. App. 1936), the plaintiff was injured in an automobile collision. The plaintiff sued the power company, alleging it was negligent in failing to maintain an electric light at a dangerous place in the city. The appellate court held that the power company, which contracted with the city to furnish street lighting, was not liable for the death of a motorist. The court found no privity of contract between the plaintiff and the power company.

In East Coast Freight Lines v. Consolidated Gas, Electric Light and Power Company of Baltimore, 187 Md. 385, 50 A.2d 246

(Md. 1946) at about 1:00 am on a dark and rainy night, a tractor trailer struck a lamp post and then veered over into the opposite lane of traffic and collided with a tractor. An electric light at the scene of the accident was not illuminated. Plaintiff sued the gas company. The issue on appeal was whether the gas company, which had contracted with the city, could be liable to plaintiffs for failure to carry out the lighting agreement. The gas company was charged with nonperformance of its contract with the city. The court explained that the gas company's liability for nonperformance, under the greater weight of authority, was solely to the city. The gas company owed no duty to the general public for which it could be held liable in tort.

The New York courts have refused to allow recovery by non-customer third parties against the power company for damages allegedly resulting from a power failure. In Beck v. C. Corp., 385 N.Y.S.2d 956 (N.Y.App. 1976) the employees of an automobile plant sued the power company, alleging it was liable to them for wage losses which were attributable to disruption of electrical power service to the automobile plant. The appellate court held that the employees failed to state a cause of action against the power company for either breach of warranty or negligence. The power company owed not duty to the employees for negligent failure to furnish electricity. Creation of a duty would unduly extend the liability of the power company to an indefinite number of potential beneficiaries and would mean the involuntary assumption of a new series of relations.

Likewise, in Strauss v. Belle Realty Company, 469 N.Y.S.2d 948 (N.Y.App. 1983), aff'd 492 NYS2d 55, 482 NE 2d 34, a building tenant sought damages for personal injuries allegedly sustained when he fell down stairs in the common area of the building during a blackout. He sued Consolidated Edison Company of New York. The trial court held that plaintiff failed to establish a right to recover as a third party beneficiary of the contract between the landlord and the electric company. The court held that the electric utility did not owe any duty to the tenant.

In Strauss v. Belle Realty Co., 492 NYS 2d 555 (1985), the appellate court upheld the trial court decision. Based on public policy reasons the court held the power company owed no duty to a non-customer. Citing Moch v. Rensselaer, supra, the court declined to extend the duty of care to non-customers.

B. FPL COULD NOT ANTICIPATE THAT THE DRIVERS WOULD VIOLATE STATE LAW

Liability should be imposed on those who wrongfully injure others. In this case either Rene Demers or Susanna Arenado was responsible for Susanna Arenado's death. Liability should be imposed on Demers or Arenado, not on FPL. The responsible party, not FPL, should bear the cost of his tortious conduct.

Demers and/or Susanna Arenado violated state law. Section 316.1235, Florida Statutes (1983), provides that the driver of a vehicle approaching an intersection in which the traffic lights are inoperable shall stop in the manner indicated in

section 316.123(2). Section 316.123(2) Florida Statute (1983) describes the manner of stopping and requires that a driver yield the right-of-way to any vehicle which is approaching so closely as to constitute an immediate hazard during the time when the driver is moving across or within the intersection. In enacting these statutes the legislature obviously realized that there can be power failures which result in inoperable traffic control devices and placed a duty to stop on automobile drivers. Obviously Demers and/or Arenado were required to stop and failed to do so. FPL was not required to anticipate this active and intervening action by Demers and/or Arenado.

Whether FPL should have anticipated Demers' violation of the statute is a question of proximate cause. Proximate cause must be decided by the court where there is an active and efficient intervening cause. That principle was espoused by this court in National Airlines, Inc. v. Edwards, 336 So. 2d 545 (Fla. 1976). In that case an airline passenger on a hijacked plane sued the airline for the illness and injuries she allegedly sustained when forced to consume Cuban food and drink. The trial court dismissed the complaint for failure to state a cause of action. The appellate court reversed. This court quashed the appellate decision and remanded with instructions to reinstate the order of dismissal. This court found that the alleged injuries resulted from the active, efficient, intervening cause of consumption of Cuban food and that the injuries were too remote to be recoverable damages.

In Department of Transpcrtation v. Anglin, 502 So. 2d 896 (Fla. 1987) this court reiterated that the question of intervening cause is one for the court where there is an active and efficient intervening cause. In Anglin this court held that, while the Department of Transportation may have been negligent in allowing water to pcol on a roadway, the action of a motorist in colliding with the plaintiffs' stalled vehicle constituted an intervening cause which broke the chain of causation between the Department of Transportation's alleged negligence and plaintiffs' injuries. In Anglin, as in this case, the Department of Transportation's alleged negligent conduct did not set in motion a chain of events resulting in injury to plaintiffs; it simply provided the occasion for the tortfeasor's negligence. Under those circumstances there is no liability.

In Metropolitan Dade County v. Colina, 456 So. 2d 1233 (Fla. 3rd DCA 1984), pet. for rev. den., 464 So. 2d 554 (Fla. 1985) a case involving very similar facts, the court held that plaintiffs could not recover from the county where a traffic light was inoperable. The court found that violation of section 316.1235 and 316.123(2) was the proximate cause of the injury. There, as in this case, the county's actions simply provided the occasion for the actions of the automobile drivers.

In Florida Power & Light Co. v. Macias, 507 So. 2d 1113 (Fla. 3rd DCA 1987), rev. dism., 513 So. 2d 1060 (Fla. 1987)

the court explained that "It is incumbent upon the courts to place limits on forseeability, lest all remote possibilities be interpreted as forseeable in the legal sense." 507 So. 2d at 1115. In Macias the minor plaintiff was injured when an automobile driven by her father left the edge of the roadway and fell into a "drop-off." Her father lost control of the car. The car deflected off a utility pole, collided with a tree and then came to a stop 320 feet east of the drop off. Plaintiffs sued the Department of Transportation, FPL and the City of Hialeah. The case proceeded to trial against the Department of Transportation and FPL. The jury returned a verdict of $4,500,000, finding the Department of Transportation 60% negligent and FPL 40% negligent.

The appellate court reversed the judgment against FPL, finding that FPL was not liable as a matter of law. The court found that the accident was of an extraordinary nature and was not legally forseeable to FPL; accordingly FPL had no duty to guard against the accident.

Similarly, in Florida Power & Light Co. v. Lively, 465 So. 2d 1270 (Fla. 3rd DCA 1985), mand. den., 476 So. 2d 674 (Fla. 1985) the court found FPL did not owe a duty to plaintiff to place markers on its static lines so as to make them more visible to pilots encountering problems with flight. The court explained that "One-need not ... anticipate and guard against a happening which would not have arisen but for exceptional or unusual circumstances...." 465 at 1275. The court explained

that there must be a probability that something will occur, not a possibility. id.

In this case, as a matter of law, it cannot be said that there was a probability that plaintiff Demers and/or Arenado would disobey the state statute. At best, there was a possibility. Under the circumstances FPL had no duty, breached no duty and was not the legal cause of injury to Susanna Arenado.

C. THE TARIFF BARS FPL'S LIABILITY FOR ORDINARY NEGLIGENCE.

Assuming, arguendo, that Susanna Arenado is a third party beneficiary to the contract between FPL and Palm Beach County, this court should affirm the order of dismissal based on the decision in Landrum v. Florida Power & Light Co., 505 So. 2d 552 (Fla. 3rd DCA 1987), rev. den., 513 So. 2d 1061 (Fla. 1987). In Landrum, the plaintiffs filed suit for damages allegedly caused by an interruption in electrical power to their residence. Due to FPL's negligent termination of service, plaintiffs were using a candle for light. A fire resulted.

The appellate court found that the complaint failed to state a cause of action for negligence because FPL's tariff operates as a limitation of liability for ordinary negligence. The court cited the provisions of FPL's tariff which has been approved by the Public Service Commission. Rule 2.5 of FPL'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...505 So. 2d at 553 footnote one.

The court explained that a limitation of liability contained in a tariff is an essential part of the rate. The customer is bound by the tariff, regardless of his knowledge or assent thereto. Tariffs are recognized as having the force and effect of law. id. at 554. The justification for a tariff is to regulate the rate practices for the services furnished. Broadened liability exposure must inevitably raise the cost and rates for electric service. The court held that the tariff was a bar to liability for ordinary negligence. The court refused to hold that a mistaken interruption in electrical power is sufficient to state a cause of action for gross negligence.

The same rationale applies in this case. Under the tariff, FPL is not liable to the customer, Palm Beach County, for complete or partial failure or interruption of service. Assuming Susanna Arenado were a third party beneficiary of the contract, her rights would be the same as those of a party to the contract. Since FPL's liability to Palm Beach County is limited under the tariff, its liability, if any, to plaintiff is also limited. The FPL tariff operates as a bar in cases of ordinary negligence. Ordinary negligence is all that is alleged by plaintiff's fourth amended complaint. The order dismissing the complaint must be affirmed on that basis.

CONCLUSION

The plaintiff has failed to demonstrate that there was any legal duty owed by FPL to Susanna Arenado. The contract to provide power was between FPL and Palm Beach County. Assuming that FPL breached its duty under the contract, the only cause of action under contract or any other theory is between Palm Beach County and FPL.

The plaintiff asks this court to shift the burden for traffic accidents from tortfeasors to the power companies. Ultimately the consumer would bear this cost. Whether this duty should be imposed on FPL is a question of fairness. In deciding the question of duty this court should weigh the relationship of the parties, the nature of the risk and the public interest in the propcsed solution. Weighing those factors leads to the conclusion that it would be unfair to impose a duty against FPL under these circumstances.

To hold that FPL owes a duty to third parties would unduly extend its liability to an indefinite number of potential beneficiaries. FPL's assumption of a contractual relationship with Palm Beach County would thus mean the involuntary assumption of a series of new, unintended relationships. The applicable cases do not extend FPL's contractual duty to a non-customer. For public policy reasons and practical reasons

this court should decline to extend liability. The appealed order should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 31st day of October, 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; James R. Cole, Post Office Box 3767, West Palm Beach, FL 33401; John Haswell, Post Office Box 23879, Gainesville, FL 32602; Wendy Lumish, One Biscayne Tower #3410, 2 South Biscayne Blvd., Miami, FL 33131; William R. Holzapfel, One Gateway Centre, Newark, New Jersey 07102-5311; and Sylvia Walbolt, Post Office Box 3239, Tampa, FL 33601.

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