IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

CASE NO. 72,533

PETITIONER'S REPLY 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
Issue Presented:	1
WHETHER THE OPINION OF THE FOURTH DCA BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S EARLY OPINIONS IN MUGGE v TAMPA WATERWORKS CO., INFRA; AND WOODBURY v TAMPA WATERWORKS CO., INFRA?	
Reply Argument	1-14
Conclusion	14
Certificate of Service	15

TABLE OF CITATIONS

Cases	Page
Acton v Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982)	6
Berndt v Planning Devl'p. Corp., 361 So.2d 724 (Fla. 4th DCA 1978)	4
Commercial Carrier Corp. v Indian River County, 371 So.2d 1010 (Fla. 1979)	11
Dober v Worrell, 401 So.2d 1322 (Fla. 1981)	5
Escambia County v Stichweh, 13 F.L.W. 2155 (Fla. 1st DCA, Sept. 15, 1988)	11
Gibson v Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980)	8
Hendeles v Sanford Auto Auction, 364 So.2d 467 (Fla. 1978)	6
Landrum v FP&L, 505 So.2d 552 (Fla. 3d DCA 1987)	9
Life Ins. Co. of Georgia v Lopez, 443 So.2d 947 (Fla. 1983)	6
Metro Dade County v Colina, 456 So.2d 1233 (Fla. 3d DCA 1984)	7
Mugge v Tampa Waterworks Co., 52 Fla. 371, 42 So. 81 (1906)	3
Orlando Executive Park, Inc. v Robbins, 433 So.2d 491 (Fla. 1983)	6
Osorio v Metro Dade County, 459 So.2d 332 (Fla. 3d DCA 1984)	11
Palm Beach County Bd. of County Comm'n. v Salas, 511 So.2d 544 (Fla. 1987)	7
Robinson v State of Fla., D.O.T., 465 So.2d 1301 (Fla. 1st DCA 1985)	11
Schwartz v American Home Assurance Co., 360 So.2d 383 (Fla. 1978)	7

TABLE OF CITATIONS

Cases	Page
Smith v Dep't. of Ins., 507 So.2d 1080 (Fla. 1987)	9
State of Fla., D.O.T. v Neilson, 419 So.2d 1071 (Fla. 1982)	11
Vermont Mut. Ins. Co. v Cummings, 372 So.2d 990 (Fla. 2d DCA 1979)	4
Wiggins v Tart, 407 So.2d 1094 (Fla. 1st DCA 1982)	4
Woodbury v Tampa Waterworks Co., 57 Fla. 243, 49 So. 556 (1909)	4

Other Authorities

Fla.R.App.P. 9.110 (h)	2
§316.1235, Fla. Stat.	6

ISSUE PRESENTED

WHETHER THE OPINION OF THE FOURTH DCA BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S EARLY OPINION IN MUGGE v TAMPA WATERWORKS CO., INFRA; AND WOODBURY v TAMPA WATERWORKS CO., INFRA?

REPLY ARGUMENT

After having filed a 14 page Initial Brief on the Merits, we now have the task of replying to a combined total of 97 pages of argument from Respondent and all the utility company amicus curiae groups that Respondent has called in for assistance; and we must do so within the 15 page limit provided for by the Rules of Appellate Procedure for reply briefs. Accordingly we cannot reply to everything we would like to, but we will try to address the most important points, and primarily those raised in FP&L's (Respondent's) Brief.

We stated in our initial brief that the pleadings in this case alleged that the same transmission line had fallen down numerous times in the past which caused the same traffic signal to become inoperative (see R. 129, 210, 436, 441), and that it was just spliced and put back up again so many times (instead of being replaced with a new line) that there was an average of one splice every 12 1/2 feet in the part of the line that again fell down (See R. 206, 436, 369, 441, 474, 557). FP&L argues these allegations cannot be considered because, although they may have been pleaded in earlier complaints, they were not contained in the Fourth Amended Complaint and

we should only be concerned with the propriety of the order dismissing the Fourth Amended Complaint.

This argument is unavailing and FP&L cannot so easily sidestep the inflammatory facts in this case. As we pointed out in our Initial Brief, each of the complaints leading up to the Fourth Amended Complaint were dismissed by the lower court without prejudice to replead. Sometimes portions of the earlier complaints were stricken (improperly so) and could not be repleaded. (Eg. R. 365, 411). For example, the lower court improperly struck all the allegations that FP&L violated specifically identified statutes and administrative regulations, on grounds that they do not create a private cause of action for their violation. (R. 365-366, 374, 377, 393-394, 398, 411). With each new complaint the plaintiff attempted to amend the allegations to satisfy the lower court.

We have not stated any allegations of fact which are not contained either in the Fourth Amended Complaint or in the allegations of earlier versions of the complaint, and we are not restricted only to the Fourth Amended Complaint. When this case was before the Fourth DCA we also challenged the orders dismissing the original Complaint, the First Amended Complaint, the Second Amended Complaint, and the Third Amended Complaint; as well as the orders striking some of our allegations in the earlier complaints. This conforms with Fla.R.App. P. 9.110 (h) which provides that an appellate court "may review any ruling or matter occurring prior to filing of the notice" of appeal.

Moreover, the trial judge stated that, for purposes of FP&L's motions to dismiss the complaints, he was assuming the truth of the allegations that the transmission line simply fell down because it was in such a poor state of disrepair. (R. 384). The order dismissing the case with prejudice even recites the facts pertaining to the number of splices in the transmission line. (R. 557). Accordingly, we rely on the allegations pleaded in each of the complaints. They all stated a cause of action against FP&L.

FP&L seeks to distinguish Mugge v Tampa Waterworks Co., 52 Fla. 371, 42 So. 81 (1906) on the grounds that the city in that case could levy a special tax for the utility service, to be kept separate from general tax revenue. We fail to understand (and FP&L fails to explain) how that is significant to the issue of whether a duty of care is owed by a utility company to the public. In the present case it has never been disputed that the deceased lived in her parents' household in Palm Beach County (and her estate is being probated in Palm Beach County; R. 24) and obviously all residents of Palm Beach County pay taxes to receive certain county services, including electric service hook-ups to traffic lights. Whether county residents pay for this through the general taxing power and revenue of the county, or whether the county can levy a special assessment, seems quite irrelevant to the question of whether the utility company owes a duty of care to the county residents who are paying for the service and for whose benefit the county has contracted to receive the service. As this

court stated in Mugge, at 85: "Even if the water company was under no contract obligations . . . to supply citizens with water, yet having undertaken to do so, it comes under an implied obligation to use reasonable care."

This court also stated in Woodbury v Tampa Waterworks Co., 57 Fla. 243, 49 So. 556 (1909):

> These principles are particularly applicable where individuals have . . . contributed directly or indirectly to the compensation for the public service. [e.s.] Id. at 562.
>
> * * *
>
> If the public service is . . . for compensation paid by individuals through the taxing power of the city, such undertaking by implication of law imposes upon the water company duties to individuals for whose benefit the service is rendered. . . Id. at 564-565.

The distinction FP&L attempts to draw between Mugge and this case is artificial and belied by this court's own language. Contrary to FP&L's argument, it was not necessary in this case to allege that the deceased paid taxes specially levied by the county for the purpose of electrical hook-ups to traffic lights, in order to state a cause of action against FP&L.[1]

FP&L asks in its brief (at p. 11): "If the Mugge

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1. Also, to the extent a complaint may be deficient by failing to allege something which easily could be alleged (for example, that FP&L "undertook the performance of a public service"), that does not justify a dismissal with prejudice. See Wiggins v Tart, 407 So.2d 1094 (Fla. 1st DCA 1982); Vermont Mut. Ins. Co. v Cummings, 372 So.2d 990 (Fla. 2d DCA 1979); Berndt v Planning Devl'p. Corp., 361 So.2d 724 (Fla. 4th DCA 1978).

decision stands for the proposition claimed by plaintiff, why did the same court in Woodbury . . . determine that there was no cause of action?" That question is essentially rhetorical since we believe we have already answered it at page 7 of our Initial Brief.

In an attempt to divert this court's attention away from the one and only issue addressed by either lower court (i.e., whether a "duty of care" was owed by FP&L to the deceased), both FP&L and its amicus supporters raise such red herring issues as alleged "tariffs" limiting liability, and causation and comparative negligence issues. The Fourth DCA's opinion in this case was based entirely on the finding that under the facts of this case, a utility company owes no duty of care to members of the general public who may be injured due to its negligent conduct in allowing an interruption of service to occur, unless the utility company has expressly assumed such a duty by contract. Nothing about proximate cause or tariffs has been addressed by any court in this case because it was not preserved by FP&L in the trial court. These affirmative defenses cannot be raised for the first time on appeal. Dober v Worrell, 401 So.2d 1322 (Fla. 1981). The only issue before this court is to resolve the conflict created by the Fourth DCA on the issue of the duty owed by a utility company to members of the general public to avoid a negligent interruption of electrical service to a traffic control device.

The fact that FP&L would try to bootstrap itself by raising such new issues before this court is, we believe, in-

dicative of some desperation. The fact that FP&L finds it necessary to call in a cavalry of utility company amicus groups is also, we believe, a sign of desperation. And, the fact that the amicus curiae groups are also going outside the sole issue of "duty" and raising these unpreserved collateral issues is an abuse of the privilege of appearing as a friend of the court. See Acton v Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982) (Held: Amici curiae have no standing to raise issues not available to be raised by the parties).

Even though it is unpreserved, we will address the proximate cause issue briefly. FP&L argues that both the deceased and the other driver who collided with her must have violated state law (§316.1235, Fla. Stat.) by failing to stop at an intersection having an inoperable traffic light, and FP&L could not have reasonably foreseen that a motorist would violate that law; therefore it constitutes an unforeseeable intervening cause which breaks the chain of causation. There are several responses to that argument.

First, this statute was never mentioned by FP&L when this case was before the Fourth DCA. Second, it has nothing to do with the Fourth DCA's opinion. Third, this court has held numerous times under various different factual contexts that it is a jury question whether a defendant could have reasonably foreseen his negligent conduct could lead to damages caused by a third party's criminal act. Eg. Orlando Executive Park, Inc. v Robbins, 433 So.2d 491 (Fla. 1983); Life Ins. Co. of Georgia v Lopez, 443 So.2d 947 (Fla. 1983); Hendeles v

Sanford Auto Auction, 364 So.2d 467 (Fla. 1978); Schwartz v American Home Assurance Co., 360 So.2d 383 (Fla. 1978). (We cite these cases even though nobody in the present case is accused of any criminal act, but at most, a civil infraction.) Fourth, the argument that the deceased may have caused the accident by not following section 316.1235 and stopping at the intersection is, in reality, a comparative negligence defense which does not justify dismissing the case with prejudice. See Palm Beach County Bd. of County Comm'n v Salas, 511 So.2d 544 (Fla. 1987) where this court held such a statutory violation to be merely a comparative negligence issue and not a superseding cause. Fifth, this accident happened at 1:00 in the morning and there is no reason to believe that either the deceased or the other driver had any idea they were approaching an intersection that had an inoperable traffic signal. The area was enveloped in darkness because of the negligently maintained transmission line.

This case is distinguishable from Metro Dade County v Colina, 456 So.2d 1233 (Fla. 3d DCA 1984) where the motorist stopped at the intersection and admittedly knew the traffic light was inoperable, but then proceeded across the intersection hoping to beat the oncoming traffic. Also in that case it was a storm that caused a power outage throughout the county, rather than a negligently maintained transmission line that simply fell down as in this case. FP&L's reliance on Colina is misplaced.

Moreover, FP&L's reliance on cases which involve

accidents found to be "so highly bizarre as to be beyond the scope of any fair assessment of the danger" is similarly misplaced. The very reason traffic lights are maintained at busy intersections is to avoid exactly this type of easily foreseeable accident. See Palm Beach County Bd. of County Comm'n v Salas, supra. Certainly a jury could reasonably find in this case that FP&L's negligence set in motion the chain of events leading to this teenager's death and the harm that occurred was within the scope of the danger created by FP&L's negligent conduct. See Gibson v Avis Rent-A-Car System, Inc., 386 So. 2d 520 (Fla. 1980).

This is especially true in this case where it has been alleged that the same transmission line had fallen down numerous times in the past which had caused the same traffic signal to become inoperative. (R. 129, 210, 436, 441). How many times must it happen before such an accident becomes foreseeable? As we said in our Initial Brief, surely the probability of an intersection collision resulting (at 1:00 a.m.) from an inoperable traffic signal is just as foreseeable as the burning of a house resulting from an inoperative fire hydrant. Cf. Mugge , supra; Woodbury, supra. This court has held the foreseeability of these type of intersection collisions to be a jury question. See Palm Beach County Bd. of County Comm'n v Salas, 511 So.2d 544 (Fla. 1987).

Even though it is unpreserved and therefore waived as an affirmative defense, we will also address the "tariff" argument briefly. FP&L suggests there is a tariff on file

with the Public Service Commission limiting its liability, which supposedly would cover this accident in Palm Beach County in March of 1983. However, there is no evidence in the record in this case (nor even an allegation in any pleading in this case) of any such applicable tariff that would relate to this accident. This is a new twist which was first raised by FP&L in this case after the Third DCA published its opinion in Landrum v FP&L, 505 So.2d 552 (Fla. 3d DCA 1987).

Although the Landrum case is recent, it is not as recent as Smith v Dep't. of Insurance, 507 So.2d 1080 (Fla. 1987) where this court held unconstitutional an arbitrary limitation of liability enacted by the legislature under the guise of "tort reform." In Smith this court noted that the access to courts provision in the Florida Constitution must be read in pari materia with the very next constitutional guaranty of a right to trial by jury; to mean that a party is guaranteed access to the courts for the purpose of having a jury decide the amount of damages without any arbitrary limitation of liability imposed by the legislature, unless there is a reasonable alternative remedy provided, or an "overpowering public necessity" is shown along with the unavailability of any less drastic alternatives. It was on this basis that the legislature's $450,000 cap on non-economic damages was declared unconstitutional. In the words of this court: "There are political systems where constitutional rights are subordinated to the power of the executive or legislative branches, but ours is not such a system." Id. at 1089.

Presumably it would be no more constitutional for an administrative agency like the PSC to deny access to courts by arbitrarily limiting (or totally insulating) FP&L's liability to all consumers regardless of the actual damages sustained. Whether Landrum can survive the Smith case is a question this court may have to address some day. But there is no occasion for this court in this case to enter that foray because there is no applicable tariff known to exist in this case and the whole issue has not been preserved in the lower court.

Aside from the constitutional question, even FP&L admits that the tariff would not insulate its liability for gross negligence. In Landrum, supra, the Third DCA noted that the applicable tariff in that case did not protect conduct such that the likelihood of injury to another person is either imminent or clear and present. As we pointed out in our Initial Brief (at p. 12), FP&L's negligence in this case could easily be found by a jury to exhibit a reckless disregard for human safety. Such grossly negligent conduct by a utility company will only be encouraged by a rule of law that shields the utility company from any accountability. Immunity breeds irresponsibility, whereas accountability promotes preventive vigilance.

Cities, counties and state agencies have frequently been held accountable by Florida courts for negligently maintaining existing traffic control devices.[2] Eg. Palm Beach

2. To the extent amicus, the Florida Defense Lawyer's Association, argues otherwise (at p. 5 of its brief) it is definitely a misstatement of the law.

County Bd. of County Comm'n. v Salas, 511 So.2d 544 (Fla. 1987); State of Fla. D.O.T. v Neilson, 419 So.2d 1071, 1078 (Fla. 1982); Commercial Carrier Corp. v Indian River County, 371 So.2d 1010 (Fla. 1979); Escambia County v Stichweh, 13 F.L.W. 2155 (Fla. 1st DCA, Sept. 15, 1988); Robinson v State of Fla. D.O.T., 465 So.2d 1301 (Fla. 1st DCA 1985); Osorio v Metro Dade County, 459 So.2d 332 (Fla. 3d DCA 1984). FP&L in this case seeks greater protection than that enjoyed by a governmental entity, whose potential exposure is just as great.

No crisis has evolved for water companies as a result of the Mugge opinion or the Woodbury opinion from this court. None would evolve either for utility companies if this court now reaffirms the Mugge and Woodbury cases. Some of the electric company amici curiae suggest that electric companies deserve greater protection than water utility companies or telephone companies. Their reason is two-fold.

First they argue that the public needs more protection from negligent water companies because a fire can be a monetary catastrophe that destroys homes, businesses and results in loss of jobs which the entire community will bear; whereas intersection accidents do not have the same widespread economic potential. (Brief of amicus Edison Electric Institute, p. 4). It seems to us that this argument attaches more significance to the loss of property than to the loss of life. Second, they argue that a water company maintains its own hydrants whereas an electric company does not maintain traffic signals. That is not the point of this case. An electric

company does maintain control over its own transmission lines, which in this case were in a negligent state of disrepair.

Some of the amici curiae suggest that their potential liability exposure for this type of accident would eventually have to be factored into the utility rates they charge the public. That is a political issue for the Public Service Commission and they would have to prove justification to the PSC before a rate increase would be approved. It would not be based on an unsupported statement in an appellate brief. Interestingly we do not have the PSC appearing in this appeal as amicus curiae echoing this allegation. Besides, governmental entities are responsible for similar accidents and don't they also spread the cost of that risk amongst a large group of people? The concept of spreading risk amongst many to avert a catastrophic loss to a few has permeated our society for years in the form of private insurance and public benefits.

However, as we said in our Initial Brief, we are not suggesting that FP&L should be held liable as an insurer regardless of the cause of the interruption of electrical service to a traffic signal. We agree that would be too broad of a risk to reasonably bear, and it would serve no public purpose to make a utility company pay for something that was not its fault. But that is not what this case is about.

FP&L, and its supporting amici, list a parade of horribles that bear no resemblance to the facts of this case. They discuss crimes occuring when building lights go out; people falling down steps during a city-wide blackout; pedestrians

being struck on the side of the road; people slipping in grocery stores during a power outage; restaurants serving unwholesome food because of insufficient refrigeration; businesses suing utility companies for lost profits; etc. Obviously each case must be examined ad hoc for proximate cause, foreseeability and special damages. It serves no purpose to hypothesize about the most attenuated examples of cases that can be imagined. That does not warrant the dismissal of a meritorious case like this one.

FP&L will not, as a result of this case, be liable to everyone for any damages that can occur from a service interruption. FP&L tries to make it seem that way but it is simply not true. There must still be negligence, and proximate cause (foreseeability), and special damages different in kind from that suffered by the general public.

FP&L urges in its brief (at p. 13) that this court "not make the sweeping policy changes which plaintiff suggests." We are not asking for any policy changes. We are asking this court to reaffirm the status quo (the Mugge and Woodbury cases, supra.) It is FP&L, and its amicus friends, who are urging sweeping policy changes and special treatment for electric utility companies. What then will be the treatment for cable television companies, gas companies, telephone and satellite communication companies, and future utilities we could not even comprehend at this time? Will they have a uniform duty of care to the public or will they also lobby for varying levels of special treatment?

FP&L concludes its brief by saying we are asking this court to shift the burden for traffic accidents from tortfeasors to power companies. Not so. We are saying that when FP&L is a tortfeasor it should be held accountable. The Mugge and Woodbury cases created good law eighty years ago, and with the technological improvements and engineering achievements which should be incorporated into modern utilities that law makes even more sense today.

CONCLUSION

The Fourth DCA has created express and direct conflict by holding that a utility company that contracts with a county to provide continuous services owes no common-law duty to members of the general public relying on such services to avoid a negligent interruption. The Fourth DCA's opinion should be quashed and this court should reaffirm the continuing vitality of its own prior opinion in Muggee, supra, and Woodbury, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, this 23rd day of November, 1988, to: MARJORIE GADARIAN GRAHAM, ESQ., Northbridge Center, Suite 1704, 515 North Flagler Drive, West Palm Beach, FL 33401; MARK POSTELNEK, ESQ., Suite 10-B, 407 Lincoln Road, Miami Beach, FL 33139; ALAN SUNDBERG, ESQ., and SYLVIA WALBOLT, ESQ., P. O. Box 3239, Tampa, FL 33601; JAMES TAYLOR, JR., ESQ., 200 Laura Street, Jacksonville, FL 32202; WENDY LUMISH, ESQ., and LYNN EPSTEIN, ESQ., One Biscayne Tower, Suite 3410, 2 South Biscayne Blvd., Miami, FL 33131; and JOHN HASWELL and WILLIAM CHANDLER, ESQ., P. O. Box 23879, Gainesville, FL 32602.

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