SUPREME COURT OF FLORIDA

Case No. :SC01-1505
Lower Tribunal No.: 3D99-2795
Case No. :SC01-1955
Lower Tribunal No.: 1D00-1850
Case No. :SC01-1956
Lower Tribunal No.: 1D00-1854

IVAN MARTINEZ, ETC., ET AL. vs. FLORIDA POWER & LIGHT CO.

CLAY ELECTRIC COOPERATIVE, INC. vs. DELORES JOHNSON, ET AL

CLAY ELECTRIC COOPERATIVE, INC. vs. LANCE, INC., ETC., ET AL.,

_____

Petitioner(s)Respondent(s)

ON APPEAL FROM THE
DISTRICT COURT OF APPEALS,
FIRST DISTRICT

PETITIONER CLAY ELECTRIC'S AMENDED BRIEF ON THE MERITS

William T. Stone, Esquire
Florida Bar No. 263397
Cole, Stone, Stoudemire, Morgan
& Dore, P.A.
201 North Hogan St., Suite 200
Jacksonville, FL 32202
Attorney for Petitioner, Clay

Electric Cooperative, Inc.

TABLE OF CONTENTS

. 41

TABLE OF AUTHORITIES

Cases: Page

Statutes:

Florida Statute, Section

STATEMENT OF THE CASE

This case arises out of a motor vehicle-pedestrian accident that occurred on September 4, 1997[1]. In Count I of their Second Amended Complaint, Plaintiffs alleged that Dante Johnson was a pedestrian walking along Collins Road early in the morning, prior to sunrise, when Lance's employee, Ganas, negligently drove his employer's truck colliding with Johnson and causing his death. (R. pp. 127-28). In Count II of the Second Amended Complaint, Johnson alleged that Clay Electric breached its duties to provide and maintain lighting on Collins Road where the decedent was hit by Lance's vehicle. (R. pp. 130-31).

Johnson alleged Clay Electric failed to maintain the lighting in the area, since the light near the accident was not working. (R. pp. 130-31). Johnson alleged Clay Electric's failure to maintain this light caused or contributed to the death of Dante Johnson, in that Ganas' ability to see the pedestrian was allegedly reduced due to the darkness. (R. pp. 130-31). Clay Electric answered the second Amended Complaint denying these allegations. (R. pp. 144-45).

---

[1] In this brief, the parties will be referred to by name. Thus Petitioner (defendant at the trial court level) will be referred to as Clay Electric; Respondent Johnson (plaintiff at the trial court level) will be referred to as Johnson; and Respondents Larry Ganas and Lance, Inc. (defendants at the trial court level) will be referred to as Ganas and Lance, respectively. The letter "R" will indicate a citation to the record on appeal. References to depositions will be with the letter "D," followed by the deponent's name.

Clay Electric moved for summary judgment arguing that it owed no legal duty either to the decedent pedestrian or to the motor vehicle driver to maintain the light and hence, as a matter of law, could not be liable to Johnson. (R. p. 256). The trial court agreed and granted summary judgment in favor of Clay Electric. In its Order, the trial court found "Clay Electric did not owe the decedent a legally recognized duty of care." (R. p. 385).

The First District Court of Appeals reversed this summary judgment entered by the trial court. Johnson v. Lance, Inc., 790 So. 2d 1144 (Fla. 1st DCA, 2001). The Court determined the lights in question were "streetlights," an improvement intended for the safety of motorists and pedestrians. The Court ruled that since a government entity would owe a duty to maintain these lights, Clay Electric would have the same duty pursuant to its agreement with the government. Clay Electric filed a timely Notice to invoke the discretionary jurisdiction of this Court relying on conflict between the First District Court of Appeals' decision below and the cases of Martinez v. Florida Power & Light Co., 785 So. 2d 1251 (Fla. 3rd DCA 2001) and Arenado v. Florida Power & Light Co., 523 So. 2d 628 (Fla. 4h DCA 1988). This Court accepted jurisdiction pursuant to its Order entered on May 14, 2002.

STATEMENT OF THE FACTS

On September 4, 1997, prior to sunrise, Dante Johnson was walking east on Collins Road toward his school bus stop. He walked directly over the white fog line on the road in the same direction as traffic. (D:Ganas p. 78). Defendant Ganas was driving his employer Lance's truck, with its headlights illuminated, also traveling east like the decedent, approaching him from behind. (D:Ganas pp. 37, 77). As Ganas' vehicle approached Dante Johnson it struck him in the roadway resulting in Johnson's death.

Just nine months before this, on December 3, 1996, Dante Johnson had been in a remarkably similar accident as a pedestrian walking on the same road. (D:Beaver p. 8). On that date, Johnson was walking over the white line on the right side of the road in the same direction as traffic when Teresa Beaver hit him with the side view mirror of her car, causing only minor injuries. (D:Beaver pp. 9-12). As a result of this accident, both the decedent's grandmother and his father instructed him to walk on the grass beside the road, and to walk on the left side of the road, against traffic, so that he could see and avoid oncoming traffic. (D:Delores Johnson pp.39, 46). The shoulder along Collins Road where the incident occurred consisted of a well-maintained, firm, grassy area suitable for walking. (D:Gilbert p. 18).

Approximately thirty years ago, the City of Jacksonville[2] asked Clay Electric to place security lights on some of the existing utility poles which ran along a privacy fence that runs parallel to Collins Road. (D:Chaff at p. 7). The City selected the specific utility poles on which the security lights would be placed. (Id. at p. 39). The City designated what type of light, what length of stem, and what wattage light would be used. (Id. at p. 7). The type of light used was a "security light," not a street light. (D:Chaff at pp. 6, 7, and D:Kennedy at p. 92).

Several photographs of the accident scene were identified by witnesses and marked as Exhibits to their depositions. Three of these photographs are attached as an Appendix to this Brief. The photograph marked as Defendant's Exhibit 1, (D:Ganas at p. 77), to the deposition of Larry Ganas looks in an easterly direction (Appendix, Photo 1). The back of Ganas' truck, parked on the side of the road and heading east, is shown in the center of this picture. A nearby homeowner, Mr.

---

[2] Actually, the witnesses were not sure whether the initial request for lighting was by the City of Jacksonville, or the Jacksonville Electric Authority (JEA). The same uncertainty surrounded the parties to the "contract." John W. Fish, with the JEA, testified the JEA had no contract with Clay Electric (D. Fish p. 22). No written contract has ever been located. Clay Electric agrees, however, that at the very least there was a verbal agreement or understanding that Clay Electric would maintain the lights, since the lights were actually owned by Clay Electric.

Pimental, is shown peering over his privacy fence. Among other things, the photograph depicts the wide grassy shoulder. (D:Ganas at p. 77). Instead of walking on this shoulder, Dante Johnson was walking on the road on the solid white fog line. (Id. at p. 78). Ganas believes the light shown on the utility pole in this photograph was working, but he was not sure. (Id. at p. 84).

The next photograph (Appendix, Photo 2), looking in the opposite direction, or to the west, was Defendant's Exhibit 2 to the deposition of Ganas. (D:Ganas at p. 84). Ganas believes the light on this utility pole shown in the photograph was out. (Id. at pp. 84, 85). Ganas thought the impact was between this light and the light depicted above in Defendant's Exhibit 1 to his deposition. (Id. at pp. 86, 87). However, Mr. Pimental felt the boy was closer to the light depicted in Exhibit 2 of Ganas' deposition, but the decedent was still close to the road after being hit, lying only about two feet from the street. (D:Pimental pp. 18, 19).

A third photograph (Appendix, Photo 3), marked as Exhibit 3 to Ganas' deposition, (D:Ganas at p. 87), and Exhibit 3 to Pimental's deposition, (D:Pimental at p. 17), again depicts the same area, showing both utility poles and lights. (D:Ganas at pp. 87, 88). The light to the right of this photograph was out, (D:Ganas at p. 88; D:Pimental at p. 20), and is the same light shown in the photograph marked as Exhibit 2 to Ganas' deposition.

As these photographs show, there is a wooden privacy fence which runs parallel to Collins Road in this area. Numerous utility poles are located adjacent to the privacy fence and obviously carry electricity to the homeowners in the area. The utility poles are very close to the fence, but relatively far from the road. Indeed, the grassy shoulder in this area is quite wide. As the photographs depict, not all of the utility poles have lights, and even with the stem, the lights are much closer to the privacy fence of the homes than to the roadway. There are no lights on one or more of the poles immediately to the east of the light depicted in Exhibit 1 to the Ganas deposition. There are likewise no lights depicted on one or more of the poles to the west of the light depicted in Exhibit 2 to the Ganas deposition. Thus this stretch of Collins Road has two utility poles with lights, but several adjacent utility polls have no lights. To the extent that these lights cast some light on the road, there are clearly many areas along this part of Collins Road with no illumination, and gaps in lighting.

Clay Electric is an electric cooperative in the business of providing electricity to customers. (D:Chaff at p. 56). When the utility poles were first placed in this area, there were no lights on them. (Id. at p. 57). The poles were placed there for electric lines and their placement was dictated entirely by the distribution of electricity. (Id.). It was some time after the utility poles were in place that the City asked Clay Electric to place lights on some of the poles. (Id.). The lights in question were installed some

time in the early 1970s. (Id. at p. 7). All of the lights in the Clay Electric system in this district are security lights, as opposed to streetlights. (Id. at p. 49).

Streetlights are distinguished from security lights in that the former illuminates a street, whereas the latter simply lights an area. (Id. at p. 7). Streetlights are generally brighter. (Id.). Streetlights are spaced closer together so that there are no dark spots on the street. (Id. at p. 22). Streetlights are placed over or very close to the road. (Id. at p. 20). Security lights generally point in no direction and light a circle below the light, whereas streetlights are more directional with reflective heads to focus their light on the street. (Id. at pp. 24, 25). The lights on the utility poles in question at the time of the accident did not have reflective heads, and were not directional. (Id.). Clay Electric simply does not have streetlights which they own and install in this district. (Id. at p. 34). Streetlights are spaced between 100 and 150 feet apart to avoid gaps in lighting along the road. (Id. at pp. 22, 23). At the time of this accident on September 4, 1997, the lights on the utility poles along Collins Road were security lights. (Id. at pp. 21, 22).

Although Clay Electric has no streetlights in its system, it will provide security lights to customers on request. (Id. at p. 34). The utility pole with attached light in question was located 27 feet away from the side of the road. (D:Stephens p. 125). The light attached to this pole was approximately 25 feet above the ground. (D:Chaff

at p. 32). The light did not have a reflective head, and was not directed or aimed toward the road. (Id. at p. 24). The utility pole was 27 feet from the fog line of the road, thus with a four to six foot stem, the light fixture was, at least, 21 feet on a horizontal plane from the edge of the road. (D:Stephens pp. 64, 65). The wattage chosen by City was only a 100 watt bulb. (D:Chaff at p. 30). The various lights placed along these utility poles were spaced so that large gaps in illumination existed down the road. (Id. at p. 23). This is because many of the utility poles had no lights affixed to them at all.

Through the time of this accident, the electric utility equipment in this area including the lights was owned by Clay Electric and maintained as part of their equipment. (Id. at p. 46). Clay Electric does their own maintenance on the lights in their system. (D:Forehand at p. 15). The City of Jacksonville was billed monthly, on a flat rate, for each light in the area. (Id. at pp. 27, 28).

Once its security lights are installed, Clay Electric bills the customer monthly for the lease of the light. Clay Electric handles its accounts for the City of Jacksonville just as it handles its accounts for private customers. (D:Forehand at p. 21). When a customer has a problem with a light, whether it be a mechanical problem, (e.g., it stays on all day or a bulb goes out), or a physical problem, (e.g., someone has shot the light out or a branch has damaged a light), the customer calls Clay Electric, informs the

service representative as to the problem and requests the company to service the light. (Id. at p. 14). Clay Electric generally performs the repair work within three to five days. (Id. at p. 17). There is nothing in this record to suggest that Clay Electric ever received notification that this security light was out. (Id. at p. 26).

On September 17, 1998, the Jacksonville Electric Authority took ownership of the equipment along Collins Road including these utility poles and lights. (D:Fish at p. 8). Before that, and at the time of this accident this equipment was owned by Clay Electric. (Id.). The JEA purchased this equipment from Clay Electric. (Id.). Mr. Fish of the JEA was not aware of any contract between Clay Electric and the Jacksonville Electric Authority. (Id. at p. 22). The Jacksonville Electric Authority "definitely" distinguishes between streetlights and security lights. (Id. at p. 25). Although at first testifying that he would characterize these lights as streetlights, (Id. at p. 26), Mr. Fish later confirmed that he had no knowledge as to whether the lights as initially installed were intended to be streetlights or security lights. (Id. at p. 50). He also had no knowledge at the time of the accident as to whether they were streetlights or security lights. (Id.).

SUMMARY OF ARGUMENT

The Summary Judgment entered by the trial judge in this case in favor of Clay Electric should be affirmed. This is because Clay Electric breached no duty to the decedent pedestrian. Under a foreseeability or zone of risk analysis, the conduct of Clay Electric did not create a trap or unexpected danger, as the condition of the roadway was no different than millions of miles of other unlighted roads throughout Florida. Clay Electric did not create a generalized and foreseeable risk of harm to the pedestrian. Cases from other jurisdictions which have utilized a foreseeability or zone of risk analysis similar to that espoused in McCain v. Fla. Power and Light, 593 So. 2d 500 (Fla. 1992) have consistently held that utility companies have no duty to motorists or pedestrians to maintain streetlights.

The First District erroneously found a duty based on inapplicable case law and the Restatement (Second) of Torts. The Court below cited and relied on several cases where government entities owed a duty to maintain traffic signals and stop signs. These cases, which deal with traffic control devices, are easily distinguished. Motorists rely on these devices to control traffic as they use the roadways and drive through intersections. Streetlights, on the other hand, have little or nothing to do with the way motorists and pedestrians use the roads. Furthermore, the Court's reliance on Section 324A, Restatement (Second) of Torts, was erroneous. The subsection

cited by the Court imposes liability when one undertakes "a duty owed by the other to the third person." Whether a city would owe a duty to a pedestrian (undertaken by Clay Electric) is governed by Section 323 of the Restatement, which parallels Section 324A. Under Section 323 the city could not be liable to the pedestrian unless it increased the risk, or there was reliance. Here there was no more risk with a light out than if lights were never installed, and there was obviously no reliance. Therefore, under the Restatement, the government entity would owe no duty under Section 323, so Clay Electric could owe no duty under Section 324A.

Almost all jurisdictions which have considered the precise question here have found no duty. This is clearly the prevailing rule. There are numerous sound reasons for this, and these are espoused in the cases. The cost of imposing this liability on utilities is large compared to the slight benefit to the public. Streetlights will inevitably be inoperable at times, and many streets have no lights, but vehicles are equipped with headlights which are designed to illuminate the roadways for drivers. Rarely does a motorist or pedestrian rely on an operating streetlight to choose a particular path of travel. The failure to maintain a particular light creates no more risk than that which would exist if lights were never installed. Thus, whether considered from a public policy standpoint, the Restatement, or a foreseeability analysis, the Courts uniformly reach the same result and find that utilities owe no duty.

The decision below of the First District Court of Appeals also erroneously concluded that "viewing the evidence...most favorably to the Plaintiffs" the lights in question were "streetlights." There is simply no credible evidence in this record to support a reasonable inference that the inoperable light in question was a streetlight. The evidence was not in dispute on this issue. All evidence in the record was that this was a security light (not intended to light the roadway) as opposed to a streetlight. The only witness to testify to the contrary later acknowledged in his deposition he had no knowledge if this was a streetlight or security light, either as originally placed or at the time of the accident. Under this Court's de novo review standard, summary judgment for Clay Electric could be sustained on this basis alone, or alternatively, proximate cause grounds, due to the decedent's intervening and unforeseeable negligence.

UNDER THE McCAIN ZONE OF RISK ANALYSIS THE TRIAL JUDGE WAS CORRECT IN FINDING NO DUTY AND ENTERING SUMMARY JUDGMENT FOR CLAY ELECTRIC

In McCain v. Florida Power and Light, 593 So. 2d 500 (Fla. 1992), this Court explained that a legal duty arises whenever a human endeavor creates a generalized and foreseeable risk of harming others. In McCain a worker was injured when he struck high voltage underground electric cables after relying on a utility company's markings that the area was safe. The Court noted there was evidence in the record to suggest the marking of the area was done negligently causing the plaintiff to operate where an energized cable lay buried. The Court reasoned that experience has shown the severing of any energized cable is a dangerous event likely to lead to an electric shock, even if safety equipment fails for only a split second.

More recently, this Court relied upon McCain's zone of risk or foreseeability analysis to abrogate the old "agrarian rule." Whitt v. Silverman, 788 So. 2d 210 (Fla. 2001). In Whitt, two pedestrians were struck by a vehicle leaving a service station. This was due to foliage that impaired the driver's view of the sidewalk where the pedestrians were walking. This Court noted there was "a distinct lack of unanimity throughout the country," on this issue. Id. at 213. However, the Court cited cases

from other jurisdictions which applied McCain's foreseeability analysis to find a breach of duty when a landowner's foliage obstructed the view of motorists.

By the same token, cases from other jurisdictions which have decided the precise issue here, and found no duty, have also utilized a foreseeability analysis. Thus in Vaughan, the Court noted the failure to maintain a streetlight does not create a risk any greater than the risk created by the total absence of the streetlight. Vaughan v. Eastern Edison Company, 719 N.E. 2d 520 (Mass. App. Ct. 1999). Other cases from other jurisdictions are to the same effect, and have employed the same foreseeability analysis. See, for example, White v. So. Calif. Edison Co., 30 Cal. Rptr. 2d 431 (Ct. App., 2d Dist. 1994) (in determining the existence of duty the major considerations are the foreseeability of harm...) Also, unlike the lack of consensus on foliage cases in other jurisdictions, cases from other jurisdictions are virtually unanimous in holding that utility companies have no duty to motorists or pedestrians to maintain streetlights.

Even more recently, in Owens v. Publix Supermarkets, Inc., 802 So.2d 315 (Fla. 2001), this Court again referred to its earlier decision in McCain as partial support for its opinion. After citing the McCain foreseeability rule, this Court noted "a transitory substance on the floor is not a safe condition." Id. at 330.

There is a common factual thread running through all of the cases which have

imposed a duty based on foreseeability or zone of risk analysis. In all of these cases, the defendant's conduct created a trap or unexpected danger. In McCain it was an area incorrectly marked as safe by the defendant utility company. In the foliage cases, it is an actual blocking or obstruction of the driver's view. The transitory foreign substance on the floor in Owens was the unexpected trap or unsafe condition there. The same can not be said of an inoperable light, whether we label it a streetlight or a security light. Driving on unlighted roads is not extraordinary. Drivers are accustomed to this. Many roads and highways have no lighting whatsoever. A car's headlights are designed to provide illumination on the roadway in obvious recognition that many, if not most, roads are unlighted. If this Court were to find a duty here, then every road without streetlights is ipso facto unsafe and dangerous. Every road without lights is a trap. Here, the inoperable light did not create a trap or danger to Mr. Ganas any more than other areas of the exact same road, 100 yards to the east or west, where there were no lights. All dark or unlighted roads are readily apparent to both pedestrians and drivers.

The position of Johnson here is that any increased risk, however slight, creates a duty and thus potential liability. This is absurd and would result in liability without any boundaries. The concept of foreseeability as it relates to duty would become almost meaningless. Liability would be imposed in virtually every instance. Johnson

contends that since the road is darker than it would be with an operable light, there is an increased risk a pedestrian in the road will not be seen. Even though this increased risk is minuscule, it is sufficient, according to Johnson, to create a duty. Thus if Clay Electric had replaced this inoperable 100 watt bulb with a 50 watt bulb, it could also be said that the risk is increased as well since this would result in less light on the road.

Clearly when this Court espoused the zone of risk concept in McCain some real and substantial increased risk was contemplated, as opposed to a mere colorable increase in risk. Otherwise in virtually every case a defendant could be said to have increased the risk, or made an accident more foreseeable. This would render all property owners, utilities, and government entities virtual insurers for any motorist or pedestrian claiming a link between an accident and an inoperable streetlight. Rather than encourage prompt repair of streetlights, a finding of duty here will only discourage government entities from even installing streetlights in the first instance. Every installed streetlight would represent a potential liability. Here there was nothing extraordinary for Mr. Ganas. There was no trap. There was only a dark roadway which was undoubtedly dark in many other places because the City never asked Clay Electric to install lights on other adjacent utility poles.

THE FIRST DISTRICT COURT OF APPEALS ERRED IN

DETERMINING THAT GOVERNMENT ENTITIES AND THEREFORE UTILITY COMPANIES HAVE A DUTY TO MAINTAIN STREETLIGHTS

In the decision by the First District below, the Court cited a number of cases finding a duty on a government entity to maintain traffic lights and stop signs which it undertakes to provide. The cases cited and relied upon for this proposition were Department of Transportation v. Neilson, 491 So. 2d 1071 (Fla. 1982), Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), Clark v. Polk County, 753 So. 2d 138 (Fla. 2d DCA 2000), Armas v. Metropolitan Dade County, 429 So. 2d 59 (Fla. 3d DCA 1983), and Wallace v. Nationwide Mutual Fire Insurance Company, 376 So. 2d 39 (Fla. 4h DCA 1979). The Court then found that since streetlights are provided at least in part for the benefit and safety of pedestrians walking along a roadway, the cases just cited "logically extend" to the failure to maintain other improvements including streetlights. This analysis and reasoning is erroneous because all of these cases dealt with intersection collisions and traffic control devices.

In Neilson, it was alleged that the government entity failed to control with traffic control devices a multi-street intersection. This Court found the failure to warn of a "known trap or danger" may be actionable. In Commercial Carrier, there were two

consolidated claims before this Court. One of these cases involved the failure to maintain a stop sign and pavement markings at an intersection. The other case was the negligent maintenance of a traffic signal at an intersection. In Clark, again an intersection collision case, a stop sign had been missing from the intersection since the day before the accident, despite being reported as such. In Armas, a motorist's view of a stop sign at an intersection was obstructed by foliage. Finally, in Wallace, the claim involved the failure of the city to restore a fallen stop sign. Thus the negligently maintained equipment in all of these cases were either traffic control devices or traffic control signals as defined in Section 316.003(23) and (24) of the Florida Uniform Traffic Control Law.

Chapter 316, Florida Statutes, specifically regulates and obligates motorists to operate their vehicles in conformity with traffic signals, stop signs, etc. Thus motorists are required by law to obey and indeed rely on these devices in the manner in which they operate their vehicles, particularly when approaching intersections, where obviously other traffic can and will be encountered. A driver necessarily relies on signals and signage at intersections to determine whether to proceed through the intersection, stop, yield, etc. Thus the driver's actual operation of the vehicle is directly affected by traffic signals and signage.

Streetlights on the other hand, have little or nothing to do with the way motorists

encounter other motorists or pedestrians on lighted, or unlighted, roadways. Thus the decision below makes a huge leap to suggest that the duty to maintain intersection traffic control devices logically extends to streetlights. The presence or absence of streetlights, when driving at night, has little or nothing to do with the manner in which a vehicle is operated. With or without the streetlights, the driver at night utilizes his headlights to illuminate the roadway. The driver is statutorily required to utilize fully operational headlights when driving at night. Section 316.217, Fla. Stat., 2001.

The First District decision below also erred in its reliance on Section 324A Restatement (Second) of Torts. In fact, closer analysis of this Restatement provision, and the companion Section 323, demonstrate that neither a government entity or Clay Electric would breach any duty to the pedestrian here for negligent maintenance of a streetlight.

The Court below cited Section 324A of the Restatement in full and emphasized subsection (b) which provides that one may be subject to liability if "he has undertaken to perform a duty owed by the other to the third person." By its very terms, it must be a duty owed by the other. Comment (a) to Section 324A provides that this rule "parallels the one in Section 323." Section 323 Restatement (Second) of Torts provides liability for the negligent performance of an undertaking only if the negligent undertaking "increases the risk of harm" or "the harm is suffered because of the others

reliance." Since the inoperable light does not increase the risk of harm, and since there is no reliance, then a government entity would not be liable to a pedestrian for negligent maintenance of the streetlight. If a government entity has no liability under Section 323, then Clay Electric can not be liable under Section 324A because there was no duty owed by the other in the first instance. Thus the First District below incorrectly applied Section 324A by ignoring its relationship with Section 323 and by incorrectly assuming the cases cited above (Commercial Carrier, etc.) would logically extend a duty to the government entity to maintain streetlights just because a city has a duty to maintain traffic control devices.

Significantly, cases from other jurisdictions have considered this exact same issue and analyzed the potential liability of the utilities under these same Restatement provisions. The Courts have uniformly held there was no duty in spite of the Restatement provisions. In Vaughan v. Eastern Edison Company, 719 N.E. 2d 520 (Mass. App. Ct. 1999), a pedestrian was hit by a vehicle in a crosswalk and sued the utility company Eastern Edison, as a result of a negligently maintained streetlight. To impose liability on Eastern Edison, the Plaintiff relied in part on Section 324A Restatement (Second) of Torts. The Court stated the issue as follows:

> The narrow legal question before us is whether an electric utility company owes a duty of care to a pedestrian injured in an accident caused in part by an inoperative streetlight

> that the utility has contracted to maintain...
> Cases in other jurisdictions almost uniformly hold that utilities are not liable to third persons for injuries caused by non-functioning streetlights.

719 N.E. 2d at 522. (Citations omitted). The Court concluded that Massachusetts should adopt the rule applied in the majority of other jurisdictions to the effect that an electric company under contract to make repairs and maintain streetlights has no duty to third persons who are injured. The Court therefore concluded that Eastern Edison had no duty to the Plaintiff and Summary Judgment was appropriate.

Nonetheless the Plaintiff urged the Court in Vaughan to disregard cases from other jurisdictions and find that Eastern Edison owed a duty under Section 324A Restatement (Second) of Torts. After citing this Restatement provision, the Court observed

> The few Massachusetts cases finding a duty to a third party under the rationale of Section 324A are distinguishable because the injured party was within a more readily defined class of those at risk and could not have protected herself by independent inspection or observation...
> Furthermore, the Plaintiff has shown neither the increased risk nor the detrimental reliance that Section 324A requires. Section 323(a), which "parallels" Section 324A(a), see Restatement (Second) of Torts Section 324A comment a, "applies only when the Defendant's actions have increased the risk of harm to the Plaintiff relative to the risk that would have existed had the Defendant never provided the services initially...The Defendant's negligent performance must

> somehow put the Plaintiff in a worse situation than if the Defendant had never begun the performance." Turbe v. Government of Virgin Islands, 938 Fed 2d at 432. The failure to maintain an installed streetlight does not create a risk greater than the risk created by the total absence of a streetlight." White v. Southern Cal. Edison Co., 25 Cal. App. 4th at 451, 30 Cal. Rptr. 2d at 431...
>
> In order to show reliance under Section 324A(c), the Plaintiff must show that she "changed [her] position in reasonable reliance on the Defendant's provision of protective services, and is thereby injured when the Defendant fails to perform those services competently."

719 So. 2d at 525.

In Turbe v. Government of the Virgin Islands, 938 F. 2d 427 (3d Cir. 1991), cited above in the Vaughan decision, the plaintiff sued the Virgin Islands Water and Power Authority for negligent failure to repair streetlights causing him to be criminally assaulted. The utility obtained a judgment on the pleadings which was appealed. The Court on appeal therefore accepted the allegations of the complaint as true. The decision of the trial court was affirmed because the Court found the utility owed no duty to the plaintiff to repair the streetlights. The Court discussed at length both Sections 323 and Section 324A of the Restatement, upon which the plaintiff relied. It noted Section 323 of the Restatement is sometimes referred to as the "Good Samaritan" provision, and generally applies to public entities as well as private individuals. However, the Court found the requirements of Section 323 were not met

in the case because there was no reliance or increased risk of harm by the defendant's alleged negligence. The Court stated that the plaintiff did not change his position in any way in response to the existence of streetlights. As to the alleged increased risk, the Court noted instead:

> Section 323(a) applies only when the defendant's actions increased the risk of harm to the plaintiff relative to the risk that would have existed had the defendant never provided the services initially. Put another way, the defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun the performance. As we have noted when interpreting Section 324A(a), a companion provision to Section 323(a), to prevail under a theory of increased risk of harm a plaintiff must "identify sins of commission rather than omission."

938 F. 2d at 432.

Thus reliance by the First District Court of Appeals in this case on Section 324A was erroneous. The Court failed to consider, in conjunction with this provision of the Restatement, Section 323 which goes hand-in-hand. Analysis of these Restatement provisions together demonstrates without question that a government entity would owe no duty to a pedestrian to maintain a streetlight. Therefore Clay Electric could have no corresponding duty even if it assumed this duty by contract with the government entity.

COURTS ARE VIRTUALLY UNANIMOUS IN

HOLDING THAT UTILITY COMPANIES HAVE NO DUTY TO MOTORISTS OR PEDESTRIANS TO MAINTAIN STREETLIGHTS.

Many courts in other jurisdictions have been faced with the precise issue here. The cases from these jurisdictions are virtually unanimous in holding that a public utility owes no duty to motorists or pedestrians to maintain streetlights. White v. Southern California Edison, Co., 30 Cal. Rptr. 2d 31 (Ct. App. 2d Dist. 1994) contains an extensive analysis and evaluation of the issue. In White, the plaintiff was driving a moped when he was hit in an intersection in Carson, California. The streetlights at this intersection were not functioning and the plaintiff alleged the collision was caused by this inadequate lighting. The city had retained Southern California Edison (SCE) to maintain and repair the streetlights at this intersection. The light was actually owned and maintained by SCE pursuant to an agreement with the County of Los Angeles. The trial court found SCE owed no duty to the plaintiff to maintain the streetlight in an operable condition. This issue framed by the Court on appeal was as follows "Does an electric utility company owe a duty to motorists injured in motor vehicle collisions caused in part by an inoperative streetlight which the utility has contracted to maintain?" Id. at p 447. The Court noted that no other California case had decided this precise issue but that other jurisdictions had answered this question

in the negative. This California court was in agreement based on public policy considerations, and foreseeability analysis. Thus the Court stated:

> The issue of duty is a policy consideration. We must take into consideration not only the foreseeability of harm to a plaintiff but also the burdens to be imposed against a defendant. In determining whether a public utility should be liable to motorists for inoperable streetlights, we must consider the cost of imposing this liability on public utilities, the current public utility rate structures, the large number of streetlights, the likelihood that streetlights will become periodically inoperable, the fact that motor vehicles operate at night with headlights, the slight chance that a single inoperative streetlight will be the cause of a motor vehicle collision, and the availability of automobile insurance to pay for damages.
>
> We are of the opinion that a public utility generally owes no duty to the motoring public for inoperable streetlights. There is no contractual relation between the utility and the injured party, and the injured party is not a third party beneficiary of the utility's contract with the public entity. The public utility owes no general duty to the public to provide streetlights. The burden on the public utility in terms of cost and disruption of existing rate schedules far exceeds the slight benefit to the motoring public from the imposition of liability. As noted, vehicles at night are driven with headlights, it is unlikely that a single inoperable streetlight will be a substantial factor in causing a collision and automobile insurance is available to cover damages.
>
> In our view, liability may not be imposed on a public utility in these circumstances where (1) the installation of the streetlight is not necessary to obviate a dangerous condition, i.e., there is a duty to install the streetlight and a concomitant duty to maintain it; (2) the failure to maintain

> and install the streetlight does not create a risk greater than the risk created by the total absence of a streetlight; and (3) the injured party has not in some manner relied on the operation of the streetlight foregoing other protective actions, e.g., a pedestrian chooses a particular route home in reliance on the available streetlighting when the pedestrian would have chosen a different route or a different means of transportation in the absence of lighting. (Cf. Rest. 2d Torts, Section 324A.)

30 Cal. Rprt. 2d at 437.

In Vaughan v. Eastern Edison Co., 719 N.E. 2d 520 (Mass. App. Ct. 1999), the plaintiff sustained severe injuries when hit by a car in a crosswalk at an intersection. A nearby streetlight was not working at the time of the accident and the plaintiff sued the utility, Eastern Edison, who owned and installed the lights. Again the Court recited the issue was whether the utility company owed a duty of care to a pedestrian injured in an accident which was caused in part by an inoperative streetlight which the utility has contracted to maintain. After noting that courts in other jurisdictions almost uniformly found no liability, the Court relied on White, and Section 324A of the Restatement to find no liability here. The Court stated:

> On review of the various considerations in the out-of-state cases, we conclude that Massachusetts should adopt the rule applied in the majority of other jurisdictions - that ordinarily an electric company under contract to make repairs and maintain streetlights has no common law duty to third persons who are injured. "Duty is an allocation of risk determined by balancing the foreseeability of harm, in light

> of all of the circumstances, against the burden to be imposed."

719 N.E. 2d at 523 (Citation omitted).

In Turbe v. Government of the Virgin Islands, 938 F. 2d 427 (3rd Cir. 1991), the plaintiff sued a utility company and the Virgin Islands government for injuries when he was assaulted due to the defendant's negligent failure to repair a streetlight in the area of his attack. The Court noted that the American Law Institute's various Restatements of the Law were the rules of decision in the Virgin Islands. Thus the Court discussed at length Sections 323 and 324A, Restatement (Second) of Torts. The Court concluded there was no reliance or change of position by the plaintiff in any way in response to the existence of streetlights, and the actions of the defendant did not increase the risk of harm to the plaintiff relative to the risk that would have existed had the defendant never provided streetlights in the first place. Thus the Court ultimately concluded that judgment on the pleadings in favor of the utility company should be affirmed.

Two cases from Louisiana are to the same effect. See Shafouk Nor El Din Hamza v. Bourgeois, 493 So. 2d 112 (La. Ct. App. 1986) and Burdis v. Lafourche Parrish Police Jury, 542 So. 2d 117 (La. Ct. App. 1989). In Shafouk, Mr. Shafouk was walking along the right side of a highway, facing away from the flow of traffic,

when he was struck and killed by a vehicle headed in the same direction. The plaintiff alleged Louisiana Power and Light Company (LP&L) failed to maintain streetlights in the area by failing to change one or more burned out bulbs. The government entity in that case had contracted with LP&L to install and maintain streetlighting along this highway. The Court found no duty was owed by LP&L to the deceased pedestrian stating:

> There is no authority to support a claim that LP&L is required to provide streetlighting as part of its general "public utility service." Thousands of miles of Louisiana highways do not have streetlighting, and even if a light were put on every utility pole, it would still be possible for a pedestrian to be "between" lights at any given moment. That is one of the reasons for requiring vehicles to use headlights after dark.
>
> The failure of LP&L to provide adequate streetlighting was at most the deprivation of a benefit; it was not the violation of a duty. LP&L did not launch a force or instrument of harm. Hence, it was not negligent.

493 So. 2d at 117. In Burdis, the plaintiff's complaint against Louisiana Power and Light was dismissed with prejudice and this was affirmed on appeal. In that case, the plaintiff failed to negotiate a curve in the road and was injured. A streetlight located at the site of the accident was not functioning. The court relied on Shafouk and concluded there was no cause of action because there was no breach of duty.

New Jersey courts have reached similar results. In Sinclair v. Dunagan, 905

F.Supp. 208 (N.J. Dist. Ct. 1995), the Court was applying New Jersey law in a diversity jurisdiction case. A pedestrian was struck by a car while he was crossing an intersection. The pedestrian sued the township and a utility, Public Service Electric and Gas Company, which owned a nearby streetlamp not functioning on the night of the accident. The defendants were sued for their negligence in failing to maintain the streetlamp which allegedly caused the accident by reducing visibility. The utility's Motion for Summary Judgment was granted with the Court finding that it did not have any duty to the pedestrian, despite the utility's longstanding contractual relationship for lighting of the township's roadways. The Court cited cases from other jurisdictions, including White, in support of its conclusion that there was no liability by the utility here. An older New Jersey case reached the same conclusion in Cochran v. Public Service Electric Co., 117 A. 620 (N.J. Ct. Err. App. 1922), when the plaintiff had an accident at an intersection because of the alleged failure of the utility company to maintain electric lights which it was under contract with the city to maintain.

In East Coast Freight Lines, Inc., v. Consolidated Gas, Electric, Light and Power, Co. of Baltimore, 50 A. 2d 296 (Md. Ct. App. 1946), there was a two vehicle accident at an intersection at night with inoperable streetlights in the area. The plaintiff alleged that the utility, by contract with the city, had undertaken to furnish inspectors to inspect the lights and maintain these lights for the safety of those lawfully using the

highway. The Court specifically addressed this negligence claim against the utility for failing to make the necessary repairs and replacement to the lights. The Court assumed the absence of lights was a contributing cause of the accident. In finding no liability the Court relied in part on Justice Cardozo's decision in H.R. Moch Co., v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928), and Cochran. The Court further noted that the contract between the utility and the city expressed no intent that the utility would become liable to the general public for its failure to perform its agreement with the city.

Finally, in Quinn v. Georgia Power Company, 180 SE 246 (Ga. Ct. App. 1935), Georgia Power was named as a defendant after a two vehicle collision in the city of Milledgeville, Georgia. It was alleged Georgia Power Company was negligent in that it owned and maintained electric lighting and a power system in the city. It was alleged Georgia Power had a duty to provide a streetlight of 150 candle power over the area where the accident occurred but that this light was inoperable at the time of the collision and had been negligently maintained by the utility. A general demurrer of Georgia Power Company to the complaint was sustained and this was affirmed on appeal. The Court noted that once a city has undertaken to voluntarily light its streets, the temporary failure of the streetlight where there is no other obstruction, excavation or other extraordinary defect would not give rise to any liability against the city. By

the same token, the utility which contracted with the city to maintain the light would likewise not be liable.

Until the consolidated decisions now under review by this Court, it does not appear that any Florida case has directly addressed the issue of a utility's liability to members of the public for a disabled streetlight. However, as the foregoing cases demonstrate, virtually every other jurisdiction which has considered this question has determined there is no duty. Whether the courts rely upon public policy considerations, the provisions of the Restatement, or foreseeability analysis, the result is consistently the same.

Although no Florida case had previously addressed the precise issue here, the trial court below found the facts of Arenado v. Florida Power & Light Company, 523 So. 2d 628 (Fla. 4th DCA 1988), petition for review dismissed, 541 So. 2d 612 (Fla. 1989), most similar to the facts in the instant case. In Arenado, the plaintiff's wife was killed in an automobile collision that occurred at an intersection where the traffic signals were not working due to a lack of electricity. The plaintiff alleged that the negligence of the defendant utility company, with whom the city had contracted to provide electrical service to the traffic signal, caused the wife's death by causing the interruption of electricity. The plaintiff alleged the utility company owed a duty to the decedent on statutory, contractual and common law grounds. Assuming that the

private power company had been negligent, the Court considered all three alleged bases of liability and, relying on H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928) found the defendant owed no duty to the decedent driver under any of the three theories.

In the instant case, no statutory violation has been alleged. However, Johnson has alleged both a contractual and common law duty owing from defendant Clay Electric to the decedent. The Arenado Court interpreted the contractual claim as a claim that the decedent was a third party beneficiary to the contract between the city and the defendant Florida Power & Light. The Court found that while, in a general sense, every city contract is intended for the benefit of the public, more is required to create a private right of action against the contracting utility by a person not a party to the contract. The Court distinguished the utility company's contractual duty to the city from the utility's alleged duty to the inhabitants of the city.

In considering the common law claim, the Court found "the utility [company] had not assumed the duty which [was] sought to be imposed upon it..." 523 So. 2d at p. 629. The Court went on to state, "tort law is largely concerned with the allocation of risks; and the determination of who should bear those risks." Id. The Court found the utility company should not bear those risks and recognized that the majority of jurisdictions who had considered the issue had held similarly.

The First District Court below attempted to distinguish Arenado based on the hypertechnical difference between one who agrees to provide electricity and one who maintains the electrical equipment. The Arenado opinion makes no such distinction. It focuses not on the function the utility company performs, but instead on the relationship between the defendant utility and the general public. The Court found no duty exists on either contractual or common law grounds between a utility under contract with a municipality and the general public. The parties in the instant case stand in the exact same relationship.

Significantly Martinez v. Florida Power & Light Co., 785 So. 2d 1251 (Fla. 3d DCA 2001), found no distinction in Arenado, and indeed relied upon Arenado in part for its decision. In Martinez, Florida Power & Light (FP&L) obtained a judgment on the pleadings. The plaintiff alleged FP&L negligently maintained a streetlight which was not functioning and contributed to the death of a minor pedestrian who was hit by a motor vehicle while crossing the street. On appeal the judgment in favor of FP&L was affirmed. Like Arenado, the Third District Court of Appeals also relied in part on Justice Cardozo's decision Moch. The Court also cited cases from other jurisdictions which had declined to extend liability to public utilities for their alleged failure to maintain streetlights, citing both Vaughan and White. More recently, the Fourth District Court of Appeals has also found Arenado to be consistent with these cases

finding no duty on the part of utility companies to maintain streetlights. Thus, in Levy v. Florida Power & Light, 798 So. 2d 778 (Fla. 4th DCA 2001), the Court stated: "Arenado is consistent with another line of cases holding that an electric company responsible for maintaining streetlights has no common law duty to motorists or pedestrians injured in vehicular accidents caused, at least in part, by inoperative streetlights." Id. at p. 788.

Thus not only have courts from other jurisdictions consistently found that utility companies have no duty to motorists or pedestrians to maintain streetlights, but other courts in Florida have expressly or implicitly reached the same conclusion. Martinez expressly reached this conclusion and is, of course, the companion case on this appeal. The Fourth District implicitly made the same finding in Arenado, and recently reaffirmed this in Levy.

THE SUMMARY JUDGMENT ENTERED AT THE TRIAL LEVEL FOR CLAY ELECTRIC SHOULD BE AFFIRMED ON ALTERNATIVE GROUNDS PURSUANT TO THIS COURT'S DE NOVO REVIEW.

As argued above, Clay Electric was entitled to Summary Judgment because it owed no duty to Dante Johnson to maintain this light. This is true even if the light is labeled a "streetlight," as it was, by the First District Court of Appeals below. Thus the resolution of this appeal is not dependant on whether this Court, in its de novo review, concludes the light was a security light, or a streetlight. However, Clay Electric would submit the record in this case demonstrates, without material dispute, the light was a security light. The First District Court of Appeals below erred to find a reasonable inference otherwise.

Clay Electric has always maintained that the inoperable light on Collins Road was a security light, and not a streetlight. The trial judge, in his Order granting Clay Electric's Motion for Summary Judgment, did not appear to specifically address this issue. Instead, the Court referred to the light as "typical of lights located along streets and highways throughout the Jacksonville area." The First District Court of Appeals, however, stated, "viewing the evidence in the present case most favorably to the Plaintiffs, the lights installed by the government entity were "streetlights" Johnson v.

Lance, Inc., 790 So. 2d at p. 1146. Clay Electric obviously does not take issue with the requirement that all reasonable inferences must be resolved in favor of the Plaintiffs. However, it is respectfully submitted there was no reasonable inference to support the conclusion by the Court below that this was a streetlight.

The facts in the record on this point were undisputed. These are detailed in the beginning of this brief. Clay Electric has no streetlights in its system in this district. The light was positioned relatively far from the roadway, and always considered by Clay Electric to be a security light. The physical characteristics of the light were those of a security light (low wattage, non-directional, non-reflective head, spacing relative to other lights around it, etc.). One witness, Mr. Fish of the Jacksonville Electric Authority, initially labeled this as a streetlight in his deposition but then acknowledged he had no knowledge of this, and no knowledge or information as to whether the light was intended as a streetlight or security light. Perhaps the District Court below labeled this a streetlight simply because it was somewhere near the road. In fact, it is much closer to the privacy fence, on a utility pole almost abutting the wooden fence. While the light may have cast some illumination on the road, due to its proximity to the privacy fence and the homeowner's property, its purpose as a streetlight is dubious at best. If the city's purpose was to provide streetlights in this area, one would think poles closer to the road would be installed, and lights furnished on a consistent basis

all along the roadway directly above the road, or at least on the edge of the road.

It is submitted the only reasonable inference from the evidence here is that this always was intended to be a security light, and this was exactly its purpose at the time of the accident. This Court can so find under its de novo review of the case, since the Summary Judgment here passes on a pure question of law. See Major League Baseball v. Morgani, 790 So. 2d 1071 (Fla. 2001) and Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126 (Fla. 2000). If this Court concludes the light was a security light, obviously Clay Electric's liability is even further attenuated. Also, if this Court reaches this conclusion, Summary Judgment for Clay Electric is even more compelling than the judgment entered for Florida Power and Light in the companion and consolidated Martinez case, where there apparently is no issue on this.

Summary Judgment for Clay Electric can also be sustained on proximate grounds. The Decedent in this case was walking on the right side of the roadway in the same direction as traffic despite an almost identical accident in the same location just 9 months before. His grandmother and father directed him at that time to walk on the grassy shoulder on the opposite side of the road so he would be facing traffic. He ignored these instructions and violated Section 316.130(4), Fla. Stat., 1997, by walking with the flow of traffic. Decedent's conduct and clear violation of the statute could similarly be an intervening cause and serve as an independent basis for summary

judgment under this Court's *de novo* review. See Metropolitan Dade County v. Colina, 456 So. 2d 1233 (Fla. 3d DCA 1984).

In Colina, the Court determined as a matter of law that a county's failure to repair a malfunctioning stop light was not the proximate cause of a death in a vehicular accident occurring at an intersection. The Court found that reasonable people could not differ on whether the county's omission was a proximate cause of the accident. Therefore, as a matter of law, the county's failure to act was not a proximate cause of the death. The Court also determined, as a matter of law, that both drivers in the accident had not complied with the law, and as such their actions were intervening causes, relieving the county of liability.

In a more recent case, a driver's failure to stop at an intersection was determined to be a superseding intervening case relieving the defendant of liability for a malfunctioning traffic light. Levy v. Florida Power & Light, 798 So. 2d 778 (Fla. 4th DCA 2001). In this case a minor was struck and killed when the driver failed to stop at the intersection with the malfunctioning light. The Court followed the reasoning in Colina and affirmed the summary judgment for the electric company.

CONCLUSION

The Court below relied upon inapplicable cases and incorrectly applied the Restatement and reached a result inconsistent with this Court's McCain foreseeability analysis. The decision below by the First District is also at odds with the clear weight of authority from other jurisdictions, and even other decisions from Florida. These other courts have expressed sound public policy considerations which further dictate the result here. This Court should therefore hold that public utilities have no duty to motorists or pedestrians to maintain streetlights, and affirm the summary judgment entered for Clay Electric by the trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to Steven J. Pajcic, Esquire and Thomas F. Slater, Esquire, One Independent Drive, Suite 1900, Jacksonville, Florida 32202; Dennis R. Schutt, Esquire, 2700-C University Boulevard West, Jacksonville, Florida 32217; Steven R. Browning, Esquire, 701 West Adams Street, Suite 2, Jacksonville, Florida 32204; Mark Hicks, Esquire, and Ralph O. Anderson, Esquire, 799 Brickell Plaza, 9th Floor, Miami, FL 33131; Stewart G. Greenberg, P.A., 11440 North Kendall Drive., PH 400, Miami, FL 33176; Elizabeth K. Russo, Esquire, 6101 S.W. 76th Street, Miami, FL 33143; and to Robert Boan, Esquire, FPL Law Department, P. O. Box 029100, Miami, FL 33102, by U.S. Mail, this the _____ day of June, 2002.

COLE, STONE, STOUDEMIRE,
MORGAN & DORE, P.A.

_____

WILLIAM T. STONE, ESQUIRE
Florida Bar No. 263397
201 N. Hogan Street, Suite 200
Jacksonville, Florida 32202
(904) 353-9664/Fax: (904) 353-1055
Attorneys for Petitioner, Clay
Electric Cooperative, Inc.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Response complies with the font requirements of Rule 9.100(1), Florida Rules of Appellate Procedure.

COLE, STONE, STOUDEMIRE, MORGAN & DORE, P.A.

_____

WILLIAM T. STONE, ESQUIRE
Florida Bar No. 263397
201 N. Hogan Street, Suite 200
Jacksonville, Florida 32202
(904) 353-9664/Fax: (904) 353-1055
Attorneys for Petitioner, Clay Electric Cooperative, Inc.