SUPREME COURT OF FLORIDA

CASE NO. SC01-1505

Consolidated with SC01-1955 and SC01-1956

IVAN MARTINEZ, ET AL.,
Petitioners,

v.

FLORIDA POWER & LIGHT CO.,
Respondent.

On Discretionary Review from the
Third District Court of Appeal of Florida
Case No. 3D99-2795

RESPONDENT FLORIDA POWER & LIGHT COMPANY'S AMENDED BRIEF ON THE MERITS

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INTRODUCTION

Respondent Florida Power & Light Company ("FPL") respectfully files this brief on the merits in support of the decision of the Third District Court of Appeal in this case. (App. 1-8).[1] FPL submits that the decision under review is correct in all respects and therefore should be approved by this Court. The procedural background of the case and pertinent facts -- as alleged in Petitioners' Amended Complaint -- are set forth next.

STATEMENT OF THE CASE AND FACTS

1. Petitioners' Amended Complaint

This lawsuit arises out of the unfortunate death of Petitioners' decedent, Albert Martinez ("Martinez"). (R. 21-28). Martinez was struck and killed by a Ford Bronco driven by Gregory Nadeau ("Nadeau") while Martinez was walking across Southwest 132nd Avenue in Miami, Florida, north of the intersection of Southwest 127th Drive. The accident occurred at night. (R. 23).

Petitioners brought a wrongful death action against Nadeau, the driver, Stephen Nadeau, the Bronco's owner, Allstate Insurance Company, Petitioners' underinsured motorist carrier, and FPL, the entity which allegedly maintained the streetlights in the

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[1] "App." refers to the Third District's opinion appended to this brief on the merits. The opinion may also be found at *Martinez v. Florida Power & Light Co.*, 785 So. 2d 1251 (Fla. 3d DCA 2001), *rev. granted*, ___ So. 2d ___ (Fla. May 14, 2002)(on motion for rehearing denied).

vicinity of the accident. (R. 21-28). Petitioners asserted in their Amended Complaint that Nadeau's reckless and careless operation of the Bronco at an unsafe speed caused the accident as follows:

> 28. That at all times material hereto the Defendant, GREGORY NADEAU, operated a 1988 Ford Bronco II automobile owned by Defendant, STEPHEN NADEAU, in a wreckless [sic] and careless manner; that said Defendant drove northbound on SW 132nd Avenue in a speed exceeding that which was safe under the circumstances; and that further, said Defendant failed to observe the decedent, MARTINEZ, a minor, crossing the roadway in question which failure resulted in the Defendant, GREGORY NADEAU, driving his car and striking the decedent. (R. 26).[2]

Petitioners also claimed negligence against FPL. In this connection, the Amended Complaint asserts that FPL had erected streetlights on Southwest 132nd Avenue at or near the vicinity where Martinez was struck by the Bronco; the street-lights were erected to provide the general public with improved visibility at night; FPL knew or should have known that one or more of the streetlights were burnt out or otherwise not working for some period prior to the accident; FPL provided electrical power service and maintenance to the streetlights; FPL failed to reasonably maintain one or more of the streetlights, resulting in darkness in the area of the accident; and this darkness contributed to pedestrian Martinez not being visible to driver Nadeau when the accident occurred. (R. 24-26).

[2]All emphasis has been supplied by counsel unless otherwise noted.

Significantly, Petitioners did not allege in their Amended Complaint that any negligence on FPL's part resulted in the streetlights becoming inoperable; they did not allege that Martinez relied on the illumination provided by functioning streetlights when he decided to cross Southwest 132nd Avenue at night; and they did not allege that FPL had contracted with any governmental entity to maintain the streetlights.

2. The Judgment on the Pleadings

FPL answered the Amended Complaint and asserted several affirmative defenses. (R. 32-35). After Petitioners settled their claim against Defendant Allstate Insurance Company (R. 40-41), FPL moved for judgment on the pleadings. (R. 42-69). FPL urged that the Amended Complaint was defective as a matter of law because it failed "to state any actionable breach of duty." FPL also contended that any alleged negligence on FPL's part was not the legal or proximate cause of the accident giving rise to the lawsuit. (R. 42).

The trial court held a hearing on FPL's motion. (R. 106-116). At the conclusion of the hearing, the court ruled that FPL was entitled to the relief it requested, stating:

> I'm going to grant the motion for judgment on the pleadings. I don't think that the facts alleged impose a duty or in any way create liability on the part of FPL under the facts that have been pled, so I'm going to grant the motion.

(R. 112).[3]

[3]All emphasis has been supplied by counsel unless otherwise noted.

Following the trial court's ruling, Petitioners' counsel asked for leave to file a second amended complaint. (R. 112). The court responded: "If you want to have a motion for leave to amend, I will let you file that motion and attach a proposed amendment." (R. 112).

Petitioners never followed up on their request to further amend their operative complaint. The trial court subsequently entered an order granting FPL's motion for judgment on the pleadings and a final judgment in FPL's favor. (R. 97-98, 119). Petitioners' appeal to the Third District ensued. (R. 99-101).

3. The Third District's decision

The Third District affirmed the order granting FPL's motion for judgment on the pleadings. (App. 1-8). Relying primarily on the Fourth District's decision in *Arenado v. Florida Power & Light Co.*, 523 So. 2d 628 (Fla. 4th DCA 1988), *rev. dism.*, 541 So. 2d 612 (Fla. 1989) and three out-of-state cases, *H.R. Moch v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928), *Vaughn v. Eastern Edison Co.*, 48 Mass. App. Ct. 225, 719 N.E.2d 520 (1999), *White v. Southern Cal. Edison Co.*, 25 Cal. App. 4th 442, 30 Cal. Rptr.2d 431 (1994), the Third District concluded that FPL did not owe Petitioners' decedent a duty to maintain or repair a nonfunctioning streetlight under the facts alleged in the Amended Complaint. The court reasoned as follows:

> The issue of whether a duty exists is a question of law that may be determined by the court. *See Florida Power & Light, Co. v. Periera*, 705 So.2d 1359 (Fla.1998).

* * *

The leading case addressing the duty of a public utility company is *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928). *Moch* involved a private water company which, under its contract with the city and statutory imposition, was obligated to furnish water through hydrants for fire protection. A third-party brought suit against the water company after it suffered fire damage, as a result of alleged low water pressure to the fire hydrants, claiming breach of contract, common-law tort, and breach of statutory duty. After considering whether the water company may be liable under any of the alleged theories, the Court declined to impose any duty upon the water company. The Court found that neither the contract nor statute inured to the benefit of individual members of the public, barring any potential liability under either theory. *See Moch*, 159 N.E. at 897-99. Additionally, the Court described the failure to furnish an adequate supply of water as the denial of a benefit, not the commission of a wrong, and found that no common-law duty was owed to the plaintiff because the indefinite number of potential beneficiaries "would be unduly and indeed indefinitely extended by [ ] enlargement of the zone of duty." *Moch*, 159 N.E. at 899.

Following Judge Cardozo's reasoning in *Moch*, the Fourth District in *Arenado v. Florida Power & Light Co.* declined to extend liability to utility companies in similar situations. 523 So.2d 628 (Fla. 4th DCA 1988). In *Arenado*, plaintiff was killed after her vehicle and another vehicle collided in an intersection controlled by a traffic signal which was inoperative due to a down FP & L transmission line. Plaintiff alleged that the cause of the interruption of the electric service was the negligence of FP & L. The Court first noted that there was no statutory basis from which to impose a duty on FP & L. *See Arenado*, 523 So.2d at 628. The Court then, relying on *Moch*, held that there was similarly no breach of contractual and or common law tort duty. *See Arenado*, 523 So.2d at 629. The Court found that there

> was no contractual relationship between plaintiff and FP & L, where FP & L's contract was between itself and the County to provide electricity for the County, and recognized that the benefit to the public is incidental rather than immediate, exposing FP & L to liability only as it affects the County. *See Arenado,* 523 So.2d at 629. The Court similarly found that FP & L did not owe plaintiff any common law duty of care recognizing that FP & L did not assume the duty which plaintiff sought to impose upon it. Accordingly, the Court held that the public utility owed no duty to the plaintiff. *See Arenado,* 523 So.2d at 629.
>
> Other jurisdictions have similarly declined to extend liability in situations akin to the one here. *See Vaughan v. Eastern Edison Co.,* 48 Mass.App.Ct. 225, 719 N.E.2d 520 (1999); *White v. Southern Cal. Edison Co.*, 25 Cal.App.4th 442, 30 Cal.Rptr.2d 431 (1994).
>
> * * *
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> For the foregoing reasons, we affirm the Order granting FP&L's Motion for Judgment on the Pleadings. (App. 2-5).

4. The First District's *Johnson* case

The Third District issued its decision in the instant case on June 6, 2001. A little more than a month later, the First District, on July 9, 2001, decided *Johnson v. Lance, Inc. and Clay Electric Cooperative, Inc.*, 790 So. 2d 1144 (Fla. 1st DCA 2001), *rev. granted,* ___ So. 2d ___ (Fla. May 14, 2002). In *Johnson*, the First District held that a utility which had contracted with a governmental entity to maintain streetlights owed a duty to a pedestrian struck by a vehicle to exercise reasonable care in its contractual undertaking.

5. The proceedings in this Court

Petitioners sought discretionary review of the Third District's decision. Clay Electric in turn sought discretionary review of the First District's decision in *Johnson*. On May 14, 2002, this Court entered orders consolidating the instant case with the *Johnson* matter, accepting jurisdiction over the consolidated cases, and setting a briefing and oral argument schedule. FPL files this respondent's brief on the merits in accordance with the orders of this Court entered on May 14, 2002.

SUMMARY OF ARGUMENT

The Third District correctly held that FPL did not owe a duty of care to Petitioners' decedent under the facts alleged in their Amended Complaint. FPL does not owe a duty to pedestrians to maintain or repair streetlights. Moreover, a duty does not arise based on FPL's alleged undertaking to maintain the streetlights because the alleged undertaking did not increase the risk of harm to Martinez, and he did not detrimentally rely on FPL's undertaking. In addition, public policy precludes the imposition of a duty to pedestrians on the part of FPL.

The Third District's decision is consistent with and directly supported by prior decisions from this Court and the Fourth District in the analogous contexts of claims against utilities for the interruption of power to traffic signals and the provision of water under contracts with governmental entities. The Third District's decision also is in keeping with the "foreseeable zone of risk" analysis which this Court enunciated

in *McCain*, the undertaking doctrine as applied by the Court in *Union Park*, and the majority of courts from across the country which have considered this very issue.

In the alternative, the judgment on the pleadings for FPL can be upheld on the independent and compelling ground that FPL's alleged failure to maintain the streetlights at issue was not the proximate cause of Martinez's death as a matter of law. Martinez's injury was caused by the intervening negligence in the operation of Nadeau's Bronco, and/or by Martinez's negligence in failing to exercise reasonable care while crossing the street. At most, any negligence on FPL's part was merely a remote condition that provided the occasion for the negligence of Nadeau and/or Martinez.

The decision of the Third District accordingly should be approved.

ARGUMENT

THE THIRD DISTRICT CORRECTLY HELD THAT FPL OWED NO DUTY TO PETITIONERS' DECEDENT AS A MATTER OF LAW. THE THIRD DISTRICT'S DECISION ACCORDINGLY SHOULD BE APPROVED. IN THE ALTERNATIVE, THE ORDER GRANTING JUDGMENT ON THE PLEADINGS SHOULD BE UPHELD ON THE GROUND THAT FPL'S ACTIONS WERE NOT THE PROXIMATE CAUSE OF THE ACCIDENT GIVING RISE TO THIS LAWSUIT.

ISSUE I

FPL owed no duty to Petitioners' decedent to maintain or repair the streetlights in question.

1. General principles on legal duty of care

The threshold requirement for asserting a negligence cause of action is the existence of a legal duty of care owed by the defendant to the injured party. *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). Under Florida law, the plaintiff bears the burden to demonstrate the existence of this duty of care, and [t]he issue of whether a duty of care exists is a question of law" for the court and not for the jury. *Michael & Philip, Inc. v. Sierra*, 776 So. 2d 294, 296 (Fla. 4th DCA 2000); *Florida Power & Light Co. v. Periera,* 705 So. 2d 1359, 1361 (Fla. 1998).

"Foreseeability is a key factor in defining the boundaries of the general duty to avoid negligent acts or omissions." *Sierra,* 776 So. 2d at 296 (citing *McCain,* 593 So. 2d at 503). In this connection, the Fourth District has observed:

> In applying the "foreseeable zone of risk" test to determine the existence of a legal duty, the Supreme Court has focused on the likelihood that a defendants' conduct will result in the type of injury suffered by the plaintiff. This aspect of foreseeability requires a court to evaluate whether the type of negligent act involved in a particular case has so frequently resulted in the same type of injury or harm that 'in the field of human experience' the same type of result may be expected again.

Sierra, 776 So. 2d at 296-97 (quoting *Palm Beach-Broward Medical Imaging Ctr. v. Continental Grain Co.,* 715 So. 2d 343, 345 (Fla. 4th DCA 1998)(citation omitted by the court)); *see also Florida Power & Light Co. v. Lively,* 465 So. 2d 1270, 1274 (Fla. 3d DCA 1985)("There is no duty to safeguard against occurrences that cannot be reasonably expected or contemplated. A failure to anticipate and guard against a happening which would not have arisen but for exceptional or unusual circumstances is not negligence . . . .").

Moreover, while

> it is foreseeable in the practical sense that planes and cars will crash or have emergencies . . ., only acts which are likely to result in injury are compensable. Acts which cause injury but are foreseeable only as remote possibilities, those only slightly probable, are beyond the limit of legal liability.

Lively, 465 So. 2d at 1276.

Florida law also is settled that "tort law involve[s] the public policy decision of whether a defendant should bear a given loss, as opposed to distributing the loss

among the general public." *Levy v. Florida Power & Light Co.*, 798 So. 2d 778, 780 (Fla. 4th DCA 2002)(review in this Court pending disposition of the instant case).

2. The *Arenado* case

FPL submits that it does not owe a duty to pedestrians or motorists to maintain or repair streetlights under the facts alleged in Petitioners' Amended Complaint. As the Third District in the decision under review recognized, the Fourth District has held on analogous facts that FPL does not owe a duty to noncustomer members of the public involved in vehicular collisions at intersections where traffic signals are rendered inoperable due to the utility's alleged negligence in causing an interruption of power. *Arenado v. Florida Power & Light Co.*, 523 So. 2d 628, 629 (Fla. 4th DCA 1988), *rev. dism.*, 541 So. 2d 612 (Fla. 1989); *see also Levy*, 798 So. 2d 778 (affirming summary judgment for FPL where plaintiff's decedent was killed on bicycle while crossing intersection where traffic signal was inoperable due to FPL's alleged negligence).

In *Arenado*, as explained in the Third District's decision here, a traffic signal controlling an intersection was not working because FPL's transmission line went down and caused a power outage. Arenado's vehicle and a vehicle approaching from a different direction entered the intersection at the same time and collided, resulting in Arenado's death. The plaintiff brought a wrongful death action against FPL and alleged that its negligence resulted in the power interruption which caused the accident.

The trial court held that FPL did not owe a duty to Arenado and thus dismissed the complaint. The Fourth District affirmed on appeal.

The Fourth District in *Arenado* rejected the plaintiff's three-pronged argument that FPL's duty arose under statute, contract, and the common law of torts. As for the alleged statutory duty, the Court ruled that the undertaking to provide sufficient, adequate, and efficient electrical service does not create a private cause of action under section 366.03, Fla. Stat. As for the alleged contractual and common law duties, the court reasoned:

> The leading case deciding the duty of a public utility upon the theories of breach of contractual [sic] and common law tort is *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928), authored by Chief Justice Cardozo.
>
> With regard to the contractual theory, which involved the doctrine of third party beneficiary, the [Moch] court stated:
>
> > 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.... <u>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</u>.
>
> 159 N.E. at 897.
>
> The [*Moch*] court also pointed out that

> [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.

Id.

> The *Moch* court disposed of the claim of common law tort duty as did Judge Nesbitt in *Abravaya v. Florida Power and Light Co.,* 39 Fla.Supp. 153 (Cir.Ct., Dade County, 1973), upon the grounds that the utility had not assumed the duty which is sought to be imposed upon it; that, in the general sense tort law is largely concerned with the allocation of risks; and the determination of who should bear those risks, which determinations have far-reaching consequences.
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> * * *
>
> Concluding that there was no duty from FPL to Arenado, the dismissal of the fourth amended complaint, with prejudice, is affirmed.

Arenado, 523 So. 2d at 630.

In *Abravaya*, which the *Arenado* court cited with approval, the plaintiff brought a negligence action against FPL for injuries sustained in an intersection collision allegedly caused by an inoperative traffic signal. *Abravaya,* 39 Fla. Supp. at 153-54. Then circuit Judge Nesbitt identified the central issue in the case as "whether or not the defendant utility owed a duty to the plaintiff driver, who, admittedly, was not a customer of the defendant for purposes relevant to this case." *Id.* at 155. After reviewing several New York decisions involving similar facts, including Chief Justice Cardozo's seminal opinion in *Moch*, Judge Nesbitt held that:

> [FPL] had no duty to regulate the flow of traffic for the City of Miami, and there is no factual allegation which would indicate that any such duty was assumed. Moreover, . . . the loss of electrical power was simply the deprivation of a benefit and nothing more . . . There being no duty, as a matter of law, there can be no breach of duty.

Id. at 157-58.

Importantly, the decision in *Abravaya* was influenced by public policy concerns. The court said:

> 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.
>
> 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 [sic] 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).

Id. at 158.

This Court was asked to review the Fourth District's decision in *Arenado* which, as we have shown, relied upon *Moch* and *Abravaya* in holding that FPL owed no duty

as a matter of law to a noncustomer member of the motoring public. The Court, however, dismissed the petition for review in *Arenado* for lack of conflict jurisdiction on the very basis that, unlike the alleged conflict cases, *Woodbury v. Tampa Waterworks Co.,* 57 Fla. 243, 49 So. 556 (1909) and *Mugge v. Tampa Waterworks Co.,* 52 Fla. 371, 42 So. 81 (1906), there was no contract in *Arenado* containing the requisite "special language" so as to give rise to a duty on the part of FPL in favor of the motorist who was killed in the collision at the intersection where the traffic signal was inoperative. *Arenado,* 541 So. 2d at 613-14.

In *Mugge,* this Court held that a member of the public, whose building had burned because of the failure of the defendant waterworks to supply sufficient water pressure, had a valid claim for breach of contractual duty where the utility's contract with the city provided that the utility "shall assume all liabilities to person or property arising from constructing or operating said [water] works," and had a provision permitting a special tax levy upon city property for payment of the utility's services. *Mugge,* 42 So. at 81; *Arenado,* 523 So. 2d at 629; *Arenado,* 541 So. 2d at 613. The same contract existed in *Woodbury,* where the Court approved the duty analysis set forth in *Mugge. Woodbury,* 49 So. at 560; *Arenado,* 523 So. 2d at 629; *Arenado,* 541 So. 2d at 613. In the words of this Court in its *Arenado* decision, the utility's contract with the municipality "is the measure of its duty to the [public]." *Arenado,* 541 So. 2d at 614 (quoting *Mugge,* 42 So. at 86).

Petitioners do not dispute that the analysis set forth in the Fourth District's decision in *Arenado* would foreclose their claim against FPL were it followed. In this connection, Petitioners do not claim that FPL owed Martinez a statutory duty, and they do not assert that FPL owed him a contractual duty, much less that FPL owed him a duty under a contract containing the "special language" present in *Woodbury* and *Mugge*. Petitioners likewise do not assert that their common law tort duty theory would survive scrutiny under *Arenado.* Petitioners all but ignore *Arenado* and its significance, contending instead that *Arenado* is no longer valid given this Court's subsequent decision in *McCain*, 593 So. 2d 500, and cases citing it. As will be shown, Petitioners' reliance on *McCain* and its progeny is sorely misplaced.

3. *McCain's* foreseeable zone of risk analysis.

Like a broken record, Petitioners repeatedly assert that the Third District's decision in this case cannot be reconciled with the rule set forth in *McCain.* For example, Petitioners' erroneously assert that the Third District has improperly held that public utility companies like FPL now "have *no* duties to the general public under any theory, whether statutory, contractual, or common law," and that the decision under review "holds FPL immune from tort liability" even though "FPL's negligent maintenance of the street lights in question created an obvious 'zone of risk' to motorists and pedestrians." (Petitioner's Brief, pp. 10, 15; italics in original).

Petitioners severely misread the Third District's decision and this Court's holding in *McCain.*

The first case cited by the Third District in its decision is *Florida Power & Light Co. v. Periera,* 705 So. 2d 1359 (Fla. 1998). In *Periera,* this Court held that FPL was potentially liable to a plaintiff who was injured on a bicycle path when his motorcycle struck a guy wire which FPL had maintained. Petitioners' claim that the Third District concluded that an electric utility is immunized from liability as a matter of law in any and all circumstances accordingly is absurd.

What's more, the Third District's decision only affirmed the judgment on the pleadings on the facts alleged in Petitioners' Amended Complaint. The court did not announce a blanket, across-the-board, "no-duty" rule for electric utilities as Petitioners erroneously contend. Indeed, the other cases cited by the Third District suggest that a duty may arise under the scenario present in *Woodbury* and *Mugge,* or where -- unlike the instant case -- the elements of the undertaking doctrine, discussed in further detail below, have been met. Petitioners' exaggerated characterization of the Third District's decision is totally without merit.

Petitioners' interpretation of *McCain* does not bear scrutiny either. In *McCain*, an employee of Florida Power Corporation ("FPC")[4] went out to a construction site

[4]Petitioners incorrectly identify the defendant in *McCain* as FPL. (Petitioner's Brief, pp. 10-11). In fact, the defendant was FPC, an unrelated electric utility.

and undertook to mark the areas where it would be safe to use a mechanical trencher. Later that day, McCain was injured by electrical shock when the blade of the trencher he was operating struck an underground FPC cable carrying 7,200 volts of electricity. McCain was in the area which had been marked as a "safe" location to use the trencher, and he had "relied upon the markings in conducting his digging in the area." *Florida Power Corp. v. McCain,* 555 So. 2d 1269, 1271-72 (Fla. 2d DCA 1989). The Second District reversed the jury's verdict for the plaintiff, and remanded for entry of a directed verdict for FPC, holding that the plaintiff's injury was not foreseeable. This Court quashed the appellate court's decision because:

> there can be no question but that [FPC] had the ability to foresee a zone of risk. By its very nature, power-generating equipment creates a zone of risk that encompasses all persons who foreseeably may come in contact with that equipment. The extensive precautionary measures taken by [FPC] show that it understood the extent of the risk involved. The very fact that [FPC] marked the property for McCain itself recognizes that McCain would be within a zone of risk while operating the trencher.
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> * * *
>
> [I]f there is any general and foreseeable risk of injury through the transmission of electricity, the courts are not free to relieve the power company of this duty.

McCain, 593 So. 2d at 504.

In *Whitt v. Silverman,* 788 So. 2d 210 (Fla. 2001), a service station customer struck two pedestrians when leaving the defendant's premises in her car. The issue before this Court involved the liability of a property owner and operator of a

commercial business, which specifically relied on frequent vehicular ingress and egress, for an accident occurring off premises but allegedly due to a visual obstruction on the premises (foliage). The Court rejected the district court's application of the antiquated and absolute "agrarian rule" of nonliability, holding instead that the "foreseeable zone of risk" analysis articulated in *McCain* was applicable. Under that analysis, the Court held that the landowner owes a duty to pedestrians injured in such an accident. The Court explained:

> In the instant case, the landowners were the owners of a commercial establishment, a service station, which by its very nature involves continuous flow of traffic entering and exiting the premises for the commercial benefit of the landowners. In addition, it is undisputed that the landowners had exclusive control over the foliage and landscaping on the business premises, and it does not appear that it would have been unduly burdensome for the landowners to have maintained this foliage consistent with the safe egress and ingress of vehicles attracted to the business and persons affected thereby.

Id.

It is readily apparent that this case is nothing like *McCain* or *Whitt*. *McCain* involved negligent safety advice given directly to the injured party who relied on the knowledge and expertise of a power company, express recognition by the power company of the risks of injury, and an injury resulting from direct contact with electrical equipment owned and maintained by the power company. *Whitt* similarly

involved creation of an obviously hazardous condition which could have been made safe without any undue burden.

Neither *McCain* nor *Whitt* addressed the duty issue in the context of claims against a public utility brought by noncustomer members of the general public. Neither case therefore vitiates *Arenado, Abravaya* and *Levy* or the other policy-driven decisions which hold that power companies owe no duty to those of the motoring public who are involved in collisions at intersections with inoperable traffic signals. It thus follows that *Arenado* and these other decisions should also be followed here, as the Third District correctly held.[5]

In short, FPL submits that Petitioners are wrong in asserting that *McCain* constitutes a wholesale alteration of Florida duty analysis where public utilities are concerned. To the contrary, public policy always was and still is the benchmark for determining whether a duty should be imposed on a defendant in any given case. Here, public policy forecloses imposition of a common law duty on FPL, and the Third District's decision therefore should be approved.

4. There is no liability here under any theory because FPL's conduct did not increase the risk of harm to Petitioners' decedent and he did not rely on FPL's alleged undertaking.

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[5]In *Palm Beach-Broward Medical Imaging v. Continental Grain Co.*, 715 So. 2d 343 (Fla. 4th DCA 1998), the Fourth District -- the same court that decided *Arenado* -- reaffirmed the continued vitality of *Arenado* post-*McCain*. More recently, the Fourth District did the same thing in *Levy,* 798 So. 2d 778.

Petitioners' challenge to the Third District's decision is grounded on their claim that the court supposedly overlooked that FPL undertook to maintain the streetlights and thus created a foreseeable zone of risk by not repairing or replacing the malfunctioning light prior to the accident involving Martinez. As we have shown, Petitioners erroneously assume that *Arenado, Abravaya,* and *Levy* have no application here. In any event, Petitioners' argument is fatally flawed since it cannot be reconciled with the Court's treatment of the undertaking theory of liability, ignores the import of section 316.217, Fla. Stat., which requires motorists to use their headlights whenever it is dark outside, and turns a blind eye to the legion of cases from outside of Florida exonerating utilities and other defendants in cases like this one.

In *Union Park Memorial Chapel v. Hutt,* 670 So. 2d 64 (Fla. 1996), this Court applied *McCain's* "foreseeable zone of risk" standard in the context of a defendant's voluntary undertaking. Citing *Restatement (Second) of Torts* § 324A (1965),[6] the

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[6]This section states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
> (a) his failure to exercise reasonable care increases the risk of such harm, or
> (b) he has undertaken to perform a duty owed by the other to the third person, or
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. The rule stated in

Court held that a funeral director who voluntarily undertook to organize and lead a funeral procession owed a duty of reasonable care to procession participants. 670 So. 2d at 67. The Court concluded:

> Voluntarily undertaking to do an act that if not accomplished with due care might increase the risk of harm to others or might result in harm to others due to their reliance upon the undertaking confers a duty of reasonable care because it thereby "creates a foreseeable zone of risk." *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992)[further citations omitted].
>
> In joining a funeral procession that had been organized by the funeral director, procession participants are likely to rely to some degree on the director for their safety in transit. Thus, depending on the circumstances, the director's failure to exercise reasonable care in planning and leading a procession foreseeably may increase the risk of harm to procession members.

Id. Given this Court's clear statement in *Union Park,* it follows that a "foreseeable zone of risk" is not created, and a corresponding duty does not arise, unless the undertaking increases the risk of harm to others or there is detrimental reliance on the undertaking.

> *Restatement* § 324A deals with the voluntary undertaker's alleged liability to third persons and parallels the rule stated in §323 which deals with its liability to the one to whom he has purportedly undertaken to render services. *See* § 324A, comment a. The undertaking doctrine is also referred to as the "Good Samaritan" rule where a rescue/offer of assistance is involved . *See Fondow v. United States*, 112 F.Supp.2d 119, 130 (D. Mass. 2000).

5. Like the Third District, the majority of courts from across the country have held that an electric utility's failure to maintain a streetlight does not give rise to a legal duty to members of the general public.

Prior to the instant case and the First District's decision in *Clay Electric*, which has been consolidated with this one, no Florida reported decision addressed an electric utility's alleged duty to maintain streetlights. Courts from across the country, however, have repeatedly held -- in complete accord with this Court's analysis in *McCain* and *Union Park* -- that the defendant municipality's and/or utility's failure to maintain a streetlight does not give rise to a legal duty. These holdings are based on sound public policy grounds, the fact that the defendant at most failed to decrease the negligible risk resulting from darkness which occurs naturally, and the absence of detrimental reliance on the defendant's undertaking. Since there was no affirmative creation of a risk, there is no duty under the foreseeable zone of risk analysis.

The Third District favorably cited *White v. Southern California Edison Co.*, 25 Cal. App. 4th 442, 30 Cal. Rptr.2d 431 (Cal. App. 1994), in support of its decision here. In that case, the plaintiff moped driver collided with another vehicle. The plaintiff sued the electric utility (SCE) and alleged that the intersection was in a dangerous condition because the streetlights which it owned and contracted with the city to maintain were not functioning adequately.

On appeal from the summary judgment for SCE, the appellate court framed the issue as: "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." 25 Cal. App. 4th at 447. The court surveyed the law from other jurisdictions and concluded that liability was foreclosed on public policy grounds and a foreseeability analysis akin to that discussed in *McCain*:

> Duty is an allocation of risk determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed.
>
> * * *
>
> 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 numbers 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 costs 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 street-light 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 an installed 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, § 324A.)
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> * * *
>
> In this case, the complaint alleges no facts which would impose a duty on SCE in favor of plaintiff to maintain the streetlight in an operative condition. The complaint alleges no facts which indicate the intersection is in special need of lighting. Nor does the complaint allege facts indicating an increased risk of harm from the failed lighting over and above the absence of lighting. Finally, the complaint alleges no facts indicating any reliance on the part of plaintiff. The complaint alleges in conclusory fashion that the inadequate lighting created a dangerous condition because visibility was diminished. This is not sufficient to impose a duty on SCE.

Id. at 450-52.

The Third District in the decision under review also cited *Vaughn v. Eastern Edison Co.*, 719 N.E.2d 520 (Mass. App. 1999) with approval. There, the plaintiff was severely injured when she was struck by an automobile as she was crossing a street in a public crosswalk. She alleged that the accident occurred as a result of the defendant electric utility's negligent maintenance of two streetlights on either side of the crosswalk which were inoperative at the time of the accident. Like the California

appellate court in *White*, the *Vaughn* court identified the "narrow legal question" before it as "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." *Id.* at 522. Since there were no reported Massachusetts decisions on point, the court carefully considered pertinent case law from elsewhere, noting as follows:

> Cases in other jurisdictions almost uniformly hold that utilities are not liable to third persons for injuries caused by nonfunctioning street lights [citing *White* and other cases].
>
> * * *
>
> More often, however, the cases [rejecting liability] stress the public policy implications of expanding the duty of utilities to individual members of the general public for lapses in contracts for general maintenance and repair ....
>
> * * *
>
> 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 street lights 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 the circumstances, against the burden to be imposed." [citation omitted].
>
> [T]he imposition of tort liability on those who must render continuous service of this kind to all who apply for it under all kinds of circumstances could . . . be ruinous and the expense of litigation and settling claims over the issue of whether or not there was negligence could be a greater burden to the rate payer than can be socially justified.

Id. at 523-524 (quoting Prosser & Keeton, *Torts*, § 93 at 671).

Significantly, the court in *Vaughn* considered and rejected the plaintiff's assertion that the electric utility had a duty to maintain the streetlights under *Restatement (Second) of Torts* § 324A. The court explained:

> [T]he plaintiff has shown neither the increased risk nor the detrimental reliance that § 324A requires. Section 323(a), which "parallels" § 324A *see Restatement (Second) of Torts* § 324A comment 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. . . . [T]he defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun the performance." [citation omitted] "[T]he failure to maintain an installed street light does not create a risk greater than the risk created by the total absence of a street light." [citation omitted].
>
> * * *
>
> In order to show reliance under § 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." [citation omitted].

Because there was no evidence that the electric utility's failure to maintain the streetlights increased the risk of harm to the plaintiff, and no evidence that the plaintiff had relied on the existence of the streetlights when assessing when and how to cross the roadway, the *Vaughn* court held that there was no basis for imposing a duty pursuant to an undertaking theory of liability. *Id.* at 525.

The Louisiana appellate court's decision in *Shafouk Nor El Din Hanuza v. Bourgeous,* 493 So. 2d 112 (La. App. 1986) also is instructive. In that wrongful death

action, the plaintiff's decedent was struck and killed by an automobile while he was walking along a highway. The plaintiff asserted that the electric utility was negligent in failing to maintain streetlights it had already installed in the area and in failing to change one or more of the bulbs which were inoperative. The court found that while the utility had contracted with a governmental entity to maintain the streetlights, the obligation did not extend to the decedent, who was not a party to the agreement. The court held that the utility owed no duty to the decedent, reasoning in language directly applicable here that: "Thousands of miles of Louisiana highways do not have street lighting, and even if a light were put on every utility pole, it would still be possible for a pedestrian to be 'between' lights at a given moment. This is one of the reasons for requiring vehicles to use headlights after dark." *Id*. at 117. The court concluded: "The failure of [the utility] to provide adequate street lighting was at most the deprivation of a benefit, it was not the violation of a duty. [The utility] did not launch a force or instrument of harm. Hence, it was not negligent." *Id; see also Burdis v. Lafourche Parish Police Jury*, 542 So. 2d 117 (La. App. 1989)(relying on *Shafouk*, court holds that electric utility owed no duty to decedent in case where streetlight was not functioning).

Another case which is often cited in this context is *Turbe v. Government of the Virgin Islands,* 938 F.2d 427 (3d Cir. 1991). The plaintiff in *Turbe*, a victim of a criminal assault, alleged that the attack was caused by the electric utility's negligent failure to repair streetlights in the area despite prior notice that they were inoperative.

On appeal from the judgment on the pleadings which had been entered against the plaintiff, the Third Circuit Court of Appeals affirmed on the ground that the electric utility "did not owe Turbe a duty to repair the street lights at issue." Citing Justice Cordozo's opinion in *H.R. Moch* and *Restatement (Second) of Torts* §§ 323 and 324A, the court held that liability may attach 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 service 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 performance." *Id.* at 432. In this connection, the court found that the utility's "failure to repair the streetlights did not 'launch a force or instrument of harm,' but is only alleged to have facilitated a third-party attack." *Id.* at 433. As for section 323(b)'s reliance element, the court concluded that the plaintiff had not alleged that he changed his position in any way in response to the existence of streetlights, or that the utility could reasonably foresee that pedestrians would forego other protective measures in response to the existence of streetlights. *Id.*

Other courts have likewise held that no duty as a matter of law was owed under similar facts. *See City of Santee v. County of San Diego,* 259 Cal. Rptr. 757,761-762 (Cal. App. 1989) (where bicyclist was injured in an accident allegedly caused by improper streetlights at an intersection, court holds that the county's failure to report light outage was not actionable under voluntary undertaking doctrine: "[T]he failure to

report the light outage did not increase the risk posed by the inoperative light; instead, the risk posed by the inoperative light remained unaltered. The failure to report the light outage only failed to decrease the risk"); *Sinclair v. Dunagan*, 905 F.Supp. 208 (D.N.J. 1995)(holding that power company's contract with municipality did not create a duty to pedestrian struck by automobile to maintain and repair streetlights, where contract did not obligate power company to repair broken light fixtures in any specific time period without regard to notice to company of their failure); *Cochran v. Public Serv. Elec. Co.*, 117 A. 620 (N.J. App. 1922)(holding that electric utility had no duty to general public to maintain street lighting over obstruction because the contract between the municipality and utility did not indicate that third party should have right of action on the contract); *White v. Tilcon Gammino, Inc.*, 1992 WL 813636 (R.I. Super. 1992)(holding that electric utility had no duty to general public to repair streetlight where there was no special legislation or language in applicable tariff establishing that plaintiff was a third-party beneficiary of the agreement between the utility and township); *East Coast Freight Lines v. Consolidated Gas, Electric, Light & Power Co.*, 50 A.2d 296 (Md. 1946)(holding that utility had no duty to general public to repair streetlight where contract between utility and city did not indicate any intent that utility should become liable to the general public for failure to perform its agreement with the city); *Paz v. State of California*, 93 Cal. Rptr. 703 (Cal. 2000) (where plaintiff motorcyclist was injured in a collision at an intersection without a

traffic signal, defendant's negligent delay in installing the signal did not increase the risk under section 324(A) beyond that which already existed nor was there any reliance).[7]

Based on these authorities, FPL submits that the Third District properly held that FPL had no duty to Petitioners' decedent to maintain and repair streetlights. For the same reasons expressed in the foregoing cases which employ a foreseeable zone

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[7]The following cases, involving injuries occurring during blackouts, are also instructive. In *Strauss v. Belle Realty Co.*, 482 N.E.2d 34 (N.Y. 1985), the highest court of New York considered whether an electric utility owed a duty of care to a tenant who suffered personal injuries in a common area of an apartment building allegedly resulting from a blackout, where the landlord, and not the tenant, had a contractual relationship with the utility. The court, on public policy grounds, held that liability under those circumstances was limited by the contractual relationship, stating: "While limiting recovery to customers in this instance can hardly be said to confer immunity from negligence on [the utility], permitting recovery to those in plaintiff's circumstances would, in our view, violate the court's responsibility to define an orbit of duty that places controllable limits on liability." *Id*. at 38.

In *Milliken & Co. v. Consolidated Edison Co. of N.Y.*, 619 N.Y.S.2d 686 (N.Y. 1994), the supply of electricity to Manhattan's "Garment District" was interrupted for several days during a fashion event. Several plaintiffs with no contractual relationship with the electric utility sued for damages caused by the lack of electricity. The Court of Appeals considered whether the utility owed a duty of due care to "commercial tenants who do not have service contracts with the utility, but who are obligated under their leases to reimburse their landlords for apportioned electricity costs." *Id*. at 687-688. The Court held: "[T]he utility does not owe such a duty to these commercial tenants who lack a direct contractual arrangement with it." *Id*. at 688.

Furthermore, in *Shubitz v. Consolidated Edison Co. of N.Y.*, 301 N.Y.S.2d 926 (N.Y. Sup. Ct. 1969), a tenant sued an electrical utility for injuries sustained in a hallway of an apartment building during a blackout. The court granted summary judgment in favor of the utility, holding that the utility owed no duty to the plaintiff. In doing so, the court stated: "To hold to the contrary would introduce new parties with new rights and would subject the defendant to a multitude of suits for damages that could not have been intended or in the contemplation of the parties at the time the contract was made." *Id*. at 928.

of risk analysis similar to that in *McCain* and in *Union Park*, the cost of imposing a duty on electric utilities to pedestrians to ensure their safety with continuously illuminated streetlights far outweighs the slight benefit to the public to impose such a liability. Imposing a duty on FPL will have an adverse effect on rates for electricity and may well discourage utilities (as well as governmental entities) from providing streetlights at all. Pedestrians and drivers are alerted to the lack of street lighting by the presence of darkness. Florida law requires drivers to use headlights to account for darkness and thus the absence of functioning streetlights does not create a hazardous or dangerous condition. It is also impossible for FPL to guaranty that all of the streetlights in the counties which it serves are functioning at all times. The risk of failure to maintain or repair a streetlight is no greater than the risk that would have existed had the streetlights never been provided in the first place.

Furthermore, Martinez knew that the streetlights were not working at the time of the accident because, as alleged in the Amended Complaint, the sun had already set and it was dark out when he crossed the street. Consequently, he could not have relied on the existence of streetlights in deciding to cross the street when he did, nor could he have relied on the existence of streetlights in deciding to forego other protective measures in crossing the street at the area of the accident. The Third District's decision therefore should be approved.

6. Petitioners' other cases are distinguishable and do not support overturning the Third District's decision.

Petitioners criticize the Third District for not explaining why FPL "should not be liable, just as a governmental entity or private person would be, for negligent maintenance of street lights it erected and undertook to maintain." (Petitioners' Brief, p. 16). To support this argument, Petitioners cite one Florida decision for the proposition that a municipality "which undertakes to protect a street or bridge by lights . . . is liable for negligence if it does so in an insufficient manner," *Shealor v. Rudd,* 221 So. 2d 765 (Fla. 4th DCA 1969), and a number of out-of-state cases. Petitioners' argument is without merit.

First of all, Petitioners should find no comfort in cases such as *Commercial Carrier Corp. v. Indian River County,* 371 So. 2d 1010 (Fla. 1979). These cases involve duties owed by governmental entities to the motoring public to maintain traffic signals and stop signs which the entities owned and maintained. FPL, of course, is not a governmental entity and the instant case involves an alleged inoperative streetlight.

Moreover, in *Shealor,* the Fourth District merely held on the facts of that case that a municipality that installed a warning system at a railroad crossing was potentially liable under the voluntary undertaking doctrine to the occupant of an automobile which struck a train. 221 So. 2d at 769. The warning system which the municipality had installed was "misleading, confusing, a nuisance and a trap to drivers," including the

driver of the vehicle in which the plaintiff was a passenger. *Id.* at 769. In contrast to the instant case, *Shealor* involved a situation where the defendant created a dangerous condition and drivers detrimentally relied on the functioning and understanding of the railroad warning system. Indeed, the Florida courts have distinguished *Shealor* precisely on this ground. *See Freuhauf Corp. v. Aetna Ins. Co.,* 336 So. 2d 457 (Fla. 1st DCA 1976)("The underlying basis for the decision in the *Shealor* case was the reliance placed by the aggrieved party upon the act voluntarily taken by the party sought to be charged . . . . Sub judice, there is no indication in the record whatsoever that the truck owner was aware that appellant employed a guard service or that he relied thereon").

Petitioners' cases from other jurisdictions are likewise distinguishable and do not support overturning the Third District's decision.

David v. Broadway Maintenance Corp., 451 F.Supp. 877 (E.D. Pa. 1978), *Greene v. City of Chicago,* 382 N.E. 2d 1205 (Ill. 1978), and *Cossa v. JWP, Inc.*, 661 N.Y.S.2d 929 (Sup. Ct. 1997), do not recognize that an electric utility owes the general public a common law duty to maintain streetlights. These cases instead hold only that a duty may arise under the voluntary undertaking doctrine depending on the specific facts of the case. As we established above, no liability exists in this case pursuant to that theory.

Petitioners' other cases are off point. *Todd v. Northeast Utilities,* 484 A.2d 247, 248-49 (Conn. Super. 1984), *Wojdyla v. Northeast Utilities Service Cos.*, 1997 WL 429595 (Conn. Super. 1997), and *Espowood v. Connecticut Light & Power Co.*, 1997 WL 220091 (Conn. Super. 1997) involved a statutorily imposed duty to warn. *Wilson v. Kansas Gas & Elec. Co.*, 744 P.2d 139 (Kan. App. 1987) involved the defendant's waiver of the argument that it had no legal duty to maintain streetlights. *Withers v. Regional Transit Authority,* 669 So. 2d 446 (La. App. 1996) involved statutory strict liability. *Lemire v. New Orleans Public Service, Inc.*, 538 So. 2d 1151 (La. App. 1989) involved statutory strict liability. *Ridley v. Collins,* 590 N.W.2d 69 (Mich. App. 1998) involved statutory liability too.

7. *Johnson* was wrongly decided.

The First District in *Johnson*, 790 So. 2d 1144, found that Clay Electric owed a duty to a pedestrian struck by an automobile to exercise reasonable care in maintaining streetlights pursuant to its contract with a governmental entity. According to the *Johnson* court, a governmental entity in Florida has a duty to maintain traffic lights for the protection of the public, and the electric utility therefore assumed a duty of care to the public under *Restatement (Second) of Torts* § 324A(b) when it undertook performance of its contract with that entity. The First District's reasoning, FPL submits, is fatally flawed.

The First District in *Johnson* erroneously overlooked the significance of this Court's decision and that of the Fourth District in *Arenado,* Judge Nesbitt's *Abravaya* decision, and the Court's decisions in *Mugge* and *Woodbury.* Those cases, as noted previously, plainly exonerate electric utilities like FPL from liability to noncustomer members of the general public under circumstances present here. The First District's decision does violence to and cannot be squared with the sound public policy concerns articulated in that long line of cases.

Johnson furthermore overlooks that for a plaintiff to recover under section 324A(b), he or she must first establish that the electric utility which contracted with the governmental entity intended to fully displace the government and assume liability for breach of any duty to maintain. *See Mininson v. Allright Miami, Inc.,* 732 So. 2d 389 (Fla. 3d DCA 1999)(rejecting application of section 324A(b) because general maintenance contract did not establish assumption of city's duty by defendant). *Hutcherson v. Progressive Corp.,* 984 F.2d 1152, 1156-67 (11th Cir. 1993)("section 324A(b) liability attaches only when the alleged tortfeasor's performance is to be substituted completely for that of the party on whose behalf the undertaking is carried out"). To be sure, the opinions from this Court and the Fourth District in *Arenado* establish that in order for a utility to assume a duty to the public, its contract with the governmental entity must specifically establish an intent to compensate the public in the event of a default. *See also Little v. City of New York,* 704 N.Y.S.2d 793, 796

(Sup. Ct. 2000), *aff'd* 728 N.Y.S.2d 379 (App. Div. 2001) (holding that defendant which contracted with city to maintain traffic light had no duty to injured motorist occasioned by malfunctioning traffic light where the contract with the city did not establish that all responsibility for light passed to contractor). Petitioners' Amended Complaint contains no allegations that FPL contracted with any governmental entity to maintain the streetlights in question, let alone that FPL had entered into a contract with the "special language" necessary to create a duty owing to Petitioners' decedent. This Court accordingly should quash *Johnson* and approve the Third District's decision here.

ISSUE II

The trial court's judgment on the pleadings should be approved because FPL's alleged wrongdoing was not the proximate cause of the accident.

As noted previously, FPL moved for judgment on the pleadings on two grounds: (1) FPL owed no duty to Martinez; and (2) FPL's alleged failure to maintain the streetlights was not the proximate cause of the collision resulting in Martinez's death. The Third District never reached the proximate cause issue in light of its holding that there was no actionable duty in this case. FPL submits that even if this Court disagrees with the Third District's ruling that FPL owed no duty under the circumstances alleged in the Amended Complaint, the trial court's entry of judgment on the pleadings nevertheless should be upheld on FPL's alternative basis for dismissal of Petitioners' claim against it.

The issue of proximate cause concerns whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. *McCain*, 593 So. 2d at 502. In this connection, this Court has held: "Not every negligent act of omission or commission gives rise to a cause of action for injuries sustained by another. It is only when injury to a person . . . has resulted directly and in ordinary natural sequence from a negligent act without the intervention of any independent efficient cause, or is such as ordinarily and naturally should have been regarded as a probable, not a merely possible, result of the negligent

act, that such injured person is entitled to recover damages as compensation for his loss." *Cone v. Inter County Tel. & Tel. Co.*, 40 So. 2d 148, 149 (Fla. 1949). If an active and efficient intervening cause, such as the negligence of the plaintiff or a third party, occurred between the time of the alleged negligence of the defendant and the injury, the defendant's negligence is considered a remote cause and is deemed not to be the proximate cause of the injury. *See Department of Transp. v. Anglin*, 502 So. 2d 896 (Fla. 1987).

Petitioners' Amended Complaint alleged that Martinez attempted to cross an unlit street at night. Petitioners also alleged that Nadeau's reckless and careless operation of the Bronco at an unsafe speed resulted in the collision which killed Martinez. Judgment on the pleadings for FPL thus was proper because FPL's alleged failure to maintain the streetlight at issue was not the proximate cause of the accident giving rise to this action.

As direct analogy, the courts have held time and again that an electric utility's failure to supply electricity to a traffic signal is not the proximate cause of injuries occurring at an intersection with an inoperative traffic signal. *See Adoptie v. Southern Bell Tel. & Tel. Co.*, 426 So.2d 1162 (Fla. 3d DCA 1983). In *Adoptie*, the plaintiff was involved in an automobile accident in an intersection with an inoperative traffic signal and alleged that FPL and the telephone company negligently cut a power line that supplied electricity to the device. The Third District held that dismissal of the

complaint was proper because, as a matter of law, FPL's alleged conduct was not the legal cause of the plaintiff's damages.

Similarly, in *Derrer v. Georgia Electric Co.*, 537 So. 2d 593 (Fla. 3d DCA 1988), the court held that the defendant electric utility was not liable for injuries which occurred when the plaintiff drove through an intersection with an inoperative traffic signal. Holding that the defendant's alleged negligence in causing the signal to become inoperable was not, as a matter of law, a proximate cause of the ensuing automobile collision, the court stated that the plaintiff's "oblivious behavior in not realizing she was entering an intersection was not a reasonably foreseeable consequence of the defendants' negligence in causing the traffic light to become inoperable." *Id*. at 594. The court further observed: "[I]noperable intersectional traffic lights do not, in the range of ordinary human experience, cause automobile drivers to miss seeing the entire intersection where the light is located . . ." *Id*.

Metropolitan Dade County v. Colina, 456 So. 2d 1233 (Fla. 3d DCA 1984) likewise held that the negligence of the drivers -- and not the actions of the county in failing to repair a malfunctioning traffic signal -- proximately caused a fatal collision at an intersection. The court reasoned: "Any negligence on Dade County's part simply provided the occasion for the actions of [the other driver and Mr. Colina], which together were the proximate cause of Mrs. Colina's death. Both Masferrer and Colina could see that the traffic signal was not functioning and, by complying with statutory

requirements, could have avoided the collision. To hold the county liable on these facts would make it an insurer of motorists acting in disregard of their own safety and that of others. Such a responsibility would be an unwarranted social burden." *Id*. at 1235. *See also Metropolitan Dade County v. Tribble,* 616 So. 2d 59 (Fla. 3d DCA 1993)(reversing judgment for plaintiff and holding that county was not liable for failure to maintain traffic signal where driver's negligence was separate and unusual action rendering it a superseding and intervening cause of the accident); *Wright v. Metropolitan Dade County*, 547 So. 2d 304 (Fla. 3d DCA 1989)(affirming summary judgment for county and holding that plaintiff's negligence precluded liability on the part of county for failure to maintain traffic signal).

More recently, the Fourth District came to the same conclusion. In *Levy,* 798 So. 2d 778, 781, the court cited *Colina, Tribble, Wright,* and *Derrer,* and held that a driver's failure to stop at an intersection with an inoperative traffic signal "was a superseding intervening cause relieving FPL of any liability" for the collision between a vehicle proceeding through the intersection and a bicyclist who was attempting to cross the street.

The reasoning in the decisions holding that an inoperable traffic signal is not the legal cause of accidents occurring at the intersection applies with equal force to the circumstances of this action. In those cases, the drivers' negligence was based on not seeing an obviously inoperable traffic signal, and ignoring the rules regulating an

intersection with a such a signal. In both situations, this intervening negligence was deemed the sole proximate cause of the plaintiffs' injuries. Here, it was manifestly obvious to both driver Nadeau and pedestrian Martinez that the street was not illuminated when Martinez attempted to cross it. Therefore, any failure to maintain the streetlights in the area of the accident could not be the proximate cause of Martinez's death.

Petitioners' argument that Nadeau's negligence in colliding with Martinez was a foreseeable intervening act has also been rejected by cases involving traffic signals. Where a traffic signal is not operable as a result of a failure to maintain it, a driver's failure to obey traffic laws constitutes "a separate and unusual action rendering it a superseding and intervening cause" of any resulting accident. *Tribble*, 616 So. 2d at 60. In fact, contrary to Petitioners' argument, when visibility is diminished it is foreseeable that drivers will proceed with caution, since Florida law requires drivers and pedestrians to use due care in regard to the surrounding conditions. For instance, Florida law requires motorists to exercise due care to not hit pedestrians, § 316.130(15), Fla. Stat., and to not drive at a speed "greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards existing." § 316.183(1), Fla. Stat. Florida law also requires drivers to control their speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance or object on . . . the highway . . ." § 316.183(1), Fla. Stat. Even if a

motorist drives at a speed below the speed limit, he is not relieved of his duty to decrease speed when special hazards exist or may exist with respect to pedestrians. § 316.185, Fla. Stat. Pedestrians similarly have a duty to not walk or run into the path of a vehicle so that it is impossible for the driver to yield. § 316.130(8), Fla. Stat.

Petitioners' attempt to distinguish cases involving inoperable traffic signals is without merit.

"[A] remote condition or conduct which furnishes only the occasion for someone else's supervening negligence is not a proximate cause of the subsequent negligence." *Pope v. Cruise Boat Co., Inc.*, 380 So. 2d 1151, 1153 (Fla. 3d DCA 1980). The plaintiff in *Pope* had been walking on the shoulder of a road when she approached vehicles parked on the shoulder in front of a business premises. In attempting to walk around the vehicles, the plaintiff walked into the street and was struck by a truck. She then sued the business for its alleged failure to maintain the premises in a reasonably safe condition. The trial court granted summary judgment for the business and the appellate court affirmed, holding that the conduct of the business was not the proximate cause of the injury as a matter of law: "In short, conduct prior to an injury or death is not legally significant in an action for damages like this, unless it is a legal or proximate cause of the injury or death — as opposed to a cause of the remote conditions or occasions for the later negligence." *Id*. at 1153.

The Fourth District followed the *Pope* reasoning in *Fellows v. Citizens Federal Savings & Loan Association of St. Lucie County*, 383 So. 2d 1140 (Fla. 4th DCA 1980), and affirmed a summary judgment in favor of the defendant construction company and business owner on whose property the plaintiff was injured. The plaintiff in *Fellows* had driven off of a highway and into the driveway of the defendant's business premises. When the plaintiff attempted to exit the driveway, his vehicle was struck by a truck running a red light. The plaintiff sued the business owner and a company doing construction work on the driveway, alleging that the driveway was negligently designed and that the defendants had failed to provide warning signs or other traffic control devices at the entry of the highway. In affirming the summary judgment, the Fourth District stated: "Our review of the record indicates that the clear proximate cause of plaintiff's accident was the truck on the highway which ran the light. The record conclusively shows that negligent design of the driveway, if any, was not the legal cause of the eventual accident which occurred on the far side of this four-lane divided highway." *Id*. at 1141.

Because the darkness was not the legal cause of this accident, FPL's alleged failure to maintain the streetlights in the area was not the proximate cause of Martinez's death. The judgment on the pleadings in favor of FPL can be affirmed on this basis as well as on the ground that FPL owed no duty to Petitioners' decedent as a matter of law.

CONCLUSION

Based on the facts and authorities discussed above, Respondent Florida Power & Light Company respectfully requests that the decision of the Third District Court of Appeal be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Brief on Jurisdiction complies with the font standards. It is typed in Times New Roman 14 point proportional font.

INDEX TO APPENDIX