# In the Supreme Court of Florida

**CONSOLIDATED**

**CASE NO. SC01-1505**
**CASE NO. SC01-1955**
**CASE NO. SC01-1956**

**IVAN MARTINEZ,** et al.,

Petitioners,

v.

**FLORIDA POWER & LIGHT CO.,**

Respondent.

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**CLAY ELECTRIC COOPERATIVE, INC.**,

Petitioner,

v.

**DELORES JOHNSON**, et al.,

Respondents.

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**CLAY ELECTRIC COOPERATIVE, INC.**,

Petitioner,

v.

**LANCE, INC.**, et al.,

Respondents.

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ON DISCRETIONARY REVIEW FROM THE FIRST AND THIRD DISTRICT COURTS OF APPEAL

## MARTINEZ PETITIONERS BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

This case was decided by the trial court on a motion for judgment on the pleadings filed by Respondent Florida Power & Light Company ("FPL"). (R 42-55, 119).[1] Accordingly, the only facts available at this juncture are those alleged in Petitioners' Amended Complaint, which are taken as true for purposes of ruling on the legal question presented. *See, e.g., Reinhard v. Bliss,* 85 So. 2d 131 (Fla. 1956); *Domres v. Perrigan*, 760 So. 2d 1028, 1029 (Fla. 5th DCA 2000); *Jaramillo v. Dubow*, 588 So. 2d 677 (Fla. 3d DCA 1991).

### 1. The accident and FPL's failure to repair malfunctioning streetlights it had undertaken to maintain

On the evening of November 4, 1996, the minor child of Petitioners Ivan and Yamile Martinez was struck and killed by a car while crossing Southwest 132nd Avenue in Miami, Florida. (R 23). The accident took place at or about 7:18 p.m. after the sun had set and it was already dark. (R 25). Respondent Florida Power & Light had erected the street lights on Southwest 132nd Avenue some time previously for the specific purpose of providing improved visibility on the road at night for

[1] References to the record on appeal in this brief appear as (R ___ ), as the record consists of only one volume. All emphasis in the brief is supplied by undersigned counsel unless otherwise indicated.

pedestrians and motorists. (R 24). Respondent Florida Power & Light had also undertaken to maintain the streetlights at that locale, and yet one or more of the streetlights by the place where Petitioners' minor child was killed were burnt out or otherwise inoperative and had been in that condition for a considerable period of time before the accident. (R 24).

At all times material to the safety of Petitioners' minor child, FPL had actual or constructive knowledge that the streetlights in question were not functioning. (R 25). And, "it was reasonably foreseeable to [FPL] that traffic accidents [like that in which Petitioners' son was killed] could and would occur as a result of the darkened situation that was created." (R 25). Despite FPL's actual or constructive knowledge of the malfunctioning streetlights that it was in charge of maintaining, FPL failed to correct the problem. (R 25). FPL failed to use reasonable maintenance measures to restore the lights to a functioning condition so they could serve their intended purpose of providing sufficient light at night for pedestrians and motorists using Southwest 132nd Avenue. (R 25-26).

**2. Petitioners' wrongful death suit**

After their child was killed in the accident, Petitioners brought a wrongful death suit against, *inter alia*, Respondent FPL. (R 1-9). In addition to the facts set out above, Petitioners alleged that by its actions in undertaking to maintain the streetlights

on Southwest 132nd Avenue, FPL acquired the duty to maintain the lights in reasonably safe condition. (R 25). And, Petitioners alleged, FPL breached its duty in that regard by failing to reasonably maintain and service the 132nd Avenue streetlights such that dark areas where the lights had burnt out were allowed to remain for considerable periods of time with the actual or constructive knowledge of FPL. (R 25-26).

Petitioners alleged that FPL knew that the very purpose of the lights was to provide light for improved visibility for pedestrians and motorists at night so they would not get involved in accidents on the road in question. (R 24-26). FPL had itself erected the lights to serve that purpose. (R 24). When FPL breached its duty to repair lights known to be burnt out and inoperative, Petitioners alleged, it was entirely foreseeable that pedestrians and motorists would be placed in danger of getting into accidents due to poor visibility, and that injuries and deaths could - and in the case of Petitioners' son *did* - occur as an equally foreseeable result. (R 24-26). Petitioners accordingly sought recovery from FPL for the wrongful death of their son on grounds that FPL's negligence was a legal cause of the death. (R 21-25).

**3. FPL's answer and motion for judgment on the pleadings**

Respondent FPL filed an answer and affirmative defenses asserting, *inter alia*, that it was "not guilty of any negligence whatsoever"; that the minor decedent was

guilty of negligence; that it was not in privity with the decedent or his survivors; that it had no duty to light public roadways; and that the lighting condition was not the proximate cause of the accident in question. (R 32-35).

FPL then filed a motion for judgment on the pleadings, contending that as a matter of law it had no duty to provide street lighting in the vicinity of the accident or anywhere and/or that as a matter of law any negligence on FPL's part was not the proximate cause of Petitioners' son's death. (R 42-55, 78-80). FPL's motion asserted that the liability of a utility company is "not that of an insurer, but of ordinary negligence" (R 48), but also said that "even where the loss of a street light is the result of negligence on the part of the power company, that negligence cannot, as a matter of law, constitute a breach of duty owed to a plaintiff involved in a motor vehicle accident allegedly because of the failure of the street light." (R 43).

**4. The trial court's entry of judgment on the pleadings in favor of FPL**

The Petitioners opposed FPL's motion for judgment on the pleadings. (R 81-96). The trial court, however, granted the motion and entered judgment on the pleadings in favor of FPL. (R 119). Petitioners then initiated a timely appeal to the Florida Third District Court of Appeals. (R 99-100).

**5. The Third District's decision of affirmance**

With virtually no reference to the facts alleged by the Petitioners about the maintenance duties FPL's had undertaken in connection with these specific streetlights, the Third District affirmed on the basis of a generalized and sweeping conclusion that utilities should never be deemed to have any duty to any member of the public. *Martinez v. Florida Power & Light Co.*, 785 So. 2d 1251 (Fla. 3d DCA 2001).

Discussing three out-of-state cases - *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N. E. 896 (1928), *Vaughan v. Eastern Edison Co.*, 48 Mass. App. Ct. 225, 719 N.E.2d 520 (1999), *and White v. Southern California Edison Co.*, 25 Cal. App. 4th 442, 30 Cal. Rptr. 2d 431 (1994) - and the Florida Fourth District Court of Appeals' decision in *Arenado v. Florida Power & Light Co.*, 523 So.2d 628 (Fla. 4th DCA 1988), the Third District basically concluded that under no facts or circumstances do utility companies owe any duty to members of the general public.

The 1928 New York decision in *Moch* was described by the Third District as the "leading case addressing the duty of a public utility company." 785 So. 2d at 1252. *Moch* involved a suit brought by a claimant against a water company for fire damage allegedly sustained as a result of the fact that the claimant felt that the waterr

company was not supplying high enough water pressure to the city's fire hydrants. The Third District discussed with approval the analysis through which the *Moch* court concluded (1) that no duties are owed by utilities to members of the public as a matter of statute or contract, and (2) that neither should any duties be imposed under the common law because the resulting liabilities might be too indefinite and too wide-ranging:

> 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."159 N. E. at 899.

785 So. 2d at 1252.

Based on the *Moch* reasoning, the Third District went on to hold that electric utilities like FPL have no duty to pedestrians to maintain or repair street lights, ***even if they have assumed a duty to do so***, for example, by contract. Citing *Aranedo* and the Massachusetts *Vaughan* case as authorities, the Third District held that even where an electric company has by contract with a governmental entity assumed the duty to maintain and repair street lights, the electric company will be held to have no duty to pedestrians to perform such maintenance and repairs. 785 So. 2d at 1253.

**6. The First District's subsequent decision reaching a conflicting conclusion**

After the Third District's decision was entered in this case, the Florida First District Court of Appeals issued a directly conflicting decision in *Johnson v. Lance, Inc. and Clay Electric Cooperative, Inc.*, 790 So. 2d 1144 (Fla. 1st DCA 2001). On facts substantively identical to those presented here, the First District held that a public utility which had undertaken to maintain street lights[2] "could reasonably foresee that pedestrians walking along the roadway would be in danger of physical harm as a result of its failure to maintain the streetlights." 790 So. 2d at 1146. Therefore, the First District concluded, the electric company "owed a legal duty to

[2] In *Johnson*, the undertaking was by contract. See 790 So. 2d at 1145.

[the plaintiffs' deceased son] to maintain the lights for his protection." 790 So. 2d at 1146.

Based on the direct conflict with the First District's *Johnson* decision as well as on the other express conflicts set out in Petitioners' brief on jurisdiction, Petitioners sought discretionary review by this Court.

**7. Discretionary review proceedings before this Court**

After the jurisdictional briefing was completed herein, this Court issued orders dated May 14, 2002 which: (1) consolidated this case with Clay Electric Cooperative v. Johnson, et al., Case No. SC01-1955 and Clay Electric Cooperative v. Lance, Inc., et al., Case No. SC01-1956 for all purposes; (2) accepted jurisdiction over the consolidated cases; and (3) set briefing and argument schedules. This brief on the merits is filed pursuant to the Court's May 14, 2002 orders.

## SUMMARY OF ARGUMENT

The analytical framework established by this Court in *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992) and recently reaffirmed in *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001) requires the courts of Florida to find that duty exists wherever a foreseeable zone of danger has more likely than not been created by a defendant's actions. And, this Court's decision in *Union Park Memorial Chapel v. Hutt*, 670 So. 2d 64 (Fla. 1996), using the 'zone of danger' analysis, reaffirmed the long-

established tenet of Florida negligence law that one who undertakes to act simultaneously assumes a duty of using reasonable care in performing the undertaking.

In the case of an electric company that undertakes to maintain streetlights intended to provide visibility on streets in the dark of night, this Court's decisions compel the conclusion that such a company has a duty to use reasonable care in repairing or replacing malfunctioning lights lest injuries be caused to motorists or pedestrians because of the visibility is poor. In the *Clay Electric* case consolidated herewith, the First District correctly so concluded by following the Florida law set by this Court in *McCain* and *Union Park Memorial.* The Third District failed to do so in these Martinez Petitioners' case, and reached the wrong result.

The First District's *Clay Electric* decision should be approved; the Third District's *Martinez* decision should be reversed.

## ARGUMENT

### A. Duty

Prior decisions of this Court have demonstrated that electric utility companies - and Respondent FPL in particular - can have duties to the general public, breach of which will give rise to tort liability. *See, e.g.*, *Florida Power & Light Co. v. Periera*, 705 So. 2d 1359 (Fla. 1998)(FPL owed duty to maintain safe conditions on bicycle

path, even to motorcyclists who were prohibited by law from driving on the paths); *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992)(FPL had a duty to general public to use reasonable care when marking the location of its underground wires where failure to do so created a generalized and foreseeable risk of harming others). The Third District's decision in this case is directly conflicts with the law established by this Court by holding that *as a matter of law* public utility companies - including Respondent FPL here - have *no* duties to the general public under any theory, whether statutory, contractual, or common law.

As this Court noted in *McCain*, duties may arise "from the general facts of the case." 593 So. 2d at 503. This Court explained that legal duty arises "whenever a human endeavor creates a generalized and foreseeable risk of harming others," and may originate from various sources:

> Obviously, the duty can arise from other sources such as statutes or a person's status (e.g., the duty a parent owes a child). The Restatement (Second) of Torts, for example, recognizes four sources of duty: (1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) *a duty arising from the general facts of the case*. Restatement (Second) of Torts, Sec. 285 (1965).

*Id.* at 503 n.2. In deciding whether public utility FPL was to be deemed to have a duty to the general public under the facts presented in *McCain* (marking the location

of underground electrical cables), this Court noted: "In the present case we are dealing with the last category [a duty arising from the general facts of the case], i.e., that class of cases in which the duty arises because of a foreseeable zone of risk arising from the acts of the defendant." 593 So. 2d at 503.

In addition to answering the specific question presented by the *McCain* facts by holding that FPL did have a duty to prevent persons from coming into contact with buried electrical cable, the *McCain* decision issued a general directive, to wit, that "the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant." 593 So. 2d at 503.

This Court's decision in *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001) recently confirmed the intended broad scope of *McCain's* directive, explicitly mandating that the *McCain* analysis be applied to *all* negligence cases arising in this state. Courts called upon to determine whether the existence of certain facts has given rise to a duty must look not simply to status, e.g., whether a defendant is a utility company or not, but to the defendant's conduct. And, under *McCain*, the key question will always be whether a foreseeable zone of risk more likely than not was created by the defendant .

It was the *McCain* inquiry that was presented in this case such that it was necessary for the lower courts to determine whether there was a duty arising from the

general facts of the case. The critical facts alleged by the Petitioners were that FPL erected and ***then undertook to maintain*** the street lights in question, that FPL knew or should have known that one or more of the street lights in the area where Petitioners' son was killed were burnt out or otherwise not working for a considerable period of time before the accident such that the area suffered from poor visibility at night after it was dark. (R. 24, 25).[3]

Notwithstanding the *McCain*-mandated inquiry into the general facts of the case, the Third District looked only to FPL's status as a utility and concluded - without even mentioning *McCain* - that "an electric company under contract to make repairs and maintain street lights has no common law duty to third persons who are injured." 785 So. 2d at 1253, citing the Massachusetts *Vaughan* decision. Had the Third District analyzed the duty issue under *McCain*, as it should have done, it would have been readily apparent that FPL's failure to maintain the streetlights on Southwest 152nd Avenue, as it had undertaken to do, created a foreseeable zone of risk to those exposed to poor visibility on the road at night.

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[3] In order to make a proper *McCain* inquiry into the 'general facts of the case' to determine whether they gave rise to a duty, the trial court and the Third District were required to - but did not - take the facts pled by the Petitioners as true. *See, e.g., First Financial USA, Inc. v. Steinger*, 760 So.2d 996, 997 (Fla. 4th DCA 2000).

Indeed, there are many circumstances in which Florida courts have recognized the obvious "zone of risk" created by a failure to provide or maintain proper lighting. *See, e.g.. Golden v. Lipkin,* 49 So. 2d 539 (Fla. 1950)(hotel owner had duty to use reasonable care in lighting hallway); *Green v. School Board of Pasco County,* 752 So. 2d 700 (Fla. 2d DCA 2000)(police officer could bring negligence action against school board for failure to properly illuminate area on school property); *Reed v. Ingham,* 125 So. 2d 301 (Fla. 2d DCA 1960)(business owner had duty to properly light parking lot).

Moreover, the very fact that FPL had *undertaken* to maintain the street lights in question made the Third District's "no duty" holding clearly contrary to the established tenet of Florida jurisprudence that the law imposes on everyone who attempts to do anything, even gratuitously, a duty to use due care in the undertaking. In *Union Park Memorial Chapel v. Hutt,* 670 So. 2d 64 (Fla. 1996), this Court applied the "zone of risk" analysis reiterating the long-established principle of Florida law that a voluntary undertaking will subject a person to liability, stating:

> 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 harms to others due to their reliance upon the undertaking confers a duty of reasonable care, because it thereby "creates a foreseeable zone of risk." [Cites omitted.]

670 So. 2d at 67 (holding that a funeral director who voluntarily undertakes to organize and lead funeral procession owes duty of reasonable care to procession participants). *See also Slemp v. City of North Miami,* 545 So. 2d 256 (Fla. 1989)(once city undertook to provide property owners with protection from flooding, city had duty to use due care); *Banfield v. Addington,* 140 So. 893, 896 (Fla. 1938)("in every situation where a man undertakes to act ... he is under an implied legal obligation or duty to act with reasonable care, to the end that the person or property of others may not be injured."). *See also Restatement (Second)* of Torts § 324A (1965).

An undertaking always gives rise to a concomitant duty to use reasonable care in performance of the undertaking. *See, e.g., Union Park Memorial, supra*. It was precisely the fact that FPL here undertook to maintain the streetlights that gave rise to its duty to use reasonable care in so doing. *Id.* Protracted failure to repair malfunctioning streetlights created a clearly foreseeable zone of risk to motorists and pedestrians operating without the lights intended to provide them visibility in the dark. *McCain, supra*. The Third District was clearly wrong in ignoring the 'foreseeable zone of risk' analysis required by *McCain*, particularly in connection with a defendant who has *undertaken* responsibility for certain tasks such that duty is

virtually a given pursuant to the undertaker doctrine reiterated in *Union Park Memorial.*

Despite the fact that FPL's negligent maintenance of the street lights in question created an obvious "zone of risk" to motorists and pedestrians, the Third District's decision holds FPL immune from tort liability. In making that holding, the Third District afforded FPL a form of tort immunity that is not granted even to the sovereign. It is well established that once a governmental entity undertakes the maintenance of any type of property, it has the same common law duty as a private person to maintain the property in a non-negligent manner. *See Trianon Park Condominium Association, Inc. v. City of Hialeah,* 468 So. 2d 912, 921 (Fla. 1985)(once a governmental entity takes control of property it has same common law duty as a private person to properly maintain the property). *See also Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979)(governmental entity had duty to use care once it undertook to maintain existing traffic control devices and roads); *Town of Bellair v. Taylor*, 425 So. 2d 669 (Fla. 2d DCA 1983)(duty of governmental entity to maintain foliage on median where it undertook maintenance of median).

In *Shealor v. Rudd,* 221 So. 2d 765 (Fla. 4th DCA 1969), the court recognized the basic principle that where a municipality provides street lights it must do so in a non-negligent manner:

> Cases are uniform in all jurisdictions which allude to the principle that where a municipality undertakes to protect a street or bridge by lights, it is liable for negligence if it does so in an insufficient manner.

221 So. 2d 768. The Third District' decision does not explain 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.

Many courts in other jurisdictions have imposed a duty to maintain street lights in a non-negligent manner on both utilities and governmental entities and their agents. *See, e.g., David v. Broadway Maintenance Corp.,* 451 F. Supp. 877 (E.D. Pa. 1978) (municipal street light maintenance company's motion for summary judgment denied in action involving pedestrian fatality where company was negligent in maintaining or failing to replace street lights); *Ridley v. City of Detroit, et. al.*, 590 N. W. 2d 69, 73 (Mich. App. 1998)(city subject to liability for pedestrian fatality caused by inadequate street lights - "Given the danger imposed on pedestrians and motorists, we find theat the lack of illumination on Jefferson Avenue created an unreasonably unsafe condition"); *Espowood v. Connecticut Light & Power Co.,* 1997 WL 220091

(Conn. Super. 1997)(utility companies owed duty of care to maintain street light to pedestrian struck and killed while crossing street); *Wojdyla v. Northeast Utilities Service Companies*, 1997 WL 429595 (Conn. Super. 1997)(defendant utility companies owed a duty of care to person crossing street who was struck by a motor vehicle in the vicinity of a non-functioning street light where complaint alleged the defendants had actual or constructive notice the street light was in disrepair prior to the accident and failed to timely repair the light); *Withers v. Regional Transit Authoriy*, 669 So. 2d 466 (La. App. 1996)(utility company could be required to indemnify city in action arising from injuries suffered by pedestrian allegedly caused by poor lighting due to street light outages); *Lemire v. New Orleans Public Service, Inc.*, 538 So. 2d 1151 (La. App. 1989)(city public service liable for fatal automobile accident which was caused in part by broken street lights over accident site); *Todd v. Northeast Utilities*, 484 A.2d 247 (Conn. Super. 1984)(electric utility notified of defective street light had a duty to rectify the dangerous condition within a reasonable time); *Green v. City of Chicago*, 382 N.E.2d 1205 (Ill. 1978)(where a city undertakes to provide street lights, it is liable for injuries which result from deficient or inadequate lights); *Wilson v. Kansas Gas and Electric Co.*, 744 P.2d 139 (Kan. App. 1987)(electric utility liable for accident caused in part by lack of illumination at intersection where utility failed to make timely repairs to street lights). *See also Cossu*

*v. JWP, Inc.,* 661 N.Y.S.2d 929 (N.Y. Sup. 1997)(duty assumed by company to repair and maintain street lights extended to noncontracting parties reasonably within zone and contemplation of its intended safety services, including motorists injured when light pole fell on their vehicle).

In *Todd v. Northeast Utilities,* 484 A.2d 247 (Conn. Super. 1984), a woman sued a utility company alleging she fell and was injured due to lack of visibility caused by an inoperable street light. The plaintiff alleged that the utility company knew of the defective street light and failed to repair it. Rejecting the utility's "no duty" argument, the court stated:

> The defendant's assertion that it had no duty to repair the street light is unfounded in light of the facts set forth in the complaint. "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised....[T]he test is, would the ordinary man in the defendant's position, knowing what he knew...anticipate that harm of the general nature of that suffered was likely to result?" [Citations omitted.] Moreover, the fact that the defendant was under contract with the city and not with the plaintiff to provide street lighting for the benefit of the public should not be determinative of the issue surrounding the defendant's legal duty.***[T]he issue was one of foreseeability, not the contractual relationship of the parties. If we assume the truth of the facts contained in the complaint, the defendant was under a duty to make necessary repairs to the defective light within a reasonable time after notice of the defect.

484 A.2d at 161.

The reasoning in the above-cited cases from other jurisdictions is consistent with the decisions of this Court in *McCain* and Union Park Memorial. The Third District's contrary holding is not supported by the applicable Florida law or by sound reasoning.

Unlike the Third District, the First District in *Johnson v. Lance, Inc. and Clay Electric Cooperative, Inc.*, 790 So. 2d 1144 (Fla. 1st DCA 2001) - now consolidated with the instant case for purposes of these discretionary review proceedings - *did* correctly apply the *McCain* analysis on facts substantively identical to those presented in this case and correctly found a duty on the part of the electric company. Reversing a summary judgment entered by the trial court for the electric utility company in reliance on *Arenado v. Florida Power & Light Co.*, *supra*, also relied upon by the Third District here, the First District set out the facts presented in the case, which, again, are virtually identical to those presented here:

> At this stage of the litigation, the material facts must be viewed in the light most favorable to the appellants. In the early morning darkness of September 4, 1997, a panel truck owned by Lance, Inc., and driven by Larry Ganas, struck a fourteen-year-old boy walking to his school bus stop. The boy, Dante Johnson, had been walking on or near the edge of the roadway. Due to a non-functioning light suspended over the roadside, Ganas was unable to

> see Dante until it was too late to avoid striking him with the truck. Dante died of his injuries later that morning.
>
> The appellants filed suit against Lance, Inc., Larry Ganas, and Clay Electric. They alleged that Clay Electric had failed to provide, maintain, or inspect the light, as required by its contract with either the Jacksonville Electric Authority (JEA) or the City of Jacksonville. Clay Electric subsequently moved for summary judgment, asserting that it had not breached any legal duty it owed to pedestrians. Citing *Arenado v. Florida Power & Light Co.*, 523 So. 2d 628 (Fla. 4th DCA 1988), *review dismissed*, 541 So. 2d 612 (Fla. 1989), the judge concluded that Clay Electric had no legally recognized duty to maintain these lights for the benefit of the decedent. The trial judge therefore granted final summary judgment in favor of Clay Electric.

In issuing its decision of reversal, the First District held that a public utility which had undertaken by contract to maintain street lights "could reasonably foresee that pedestrians walking along the roadway would be in danger of physical harm as a result of its failure to maintain the streetlights." 790 So. 2d at 1146. Therefore, the First District concluded, correctly applying the reasoning from this Court's decision in *McCain*, the electric company "owed a legal duty to [the plaintiffs' deceased son] to maintain the lights for his protection." 790 So. 2d at 1146.

The First District clearly applied the correct analysis required by this Court's precedent, and clearly reached the correct result. The Third District in the instant case did not apply the correct analysis, and reached the wrong result. The Third District

itself seems to have recognized its mistake, at least *sub silentio*, because its very recent decision in *Florida Power & Light Co. v. Goldberg*, 27 Fla. L. Weekly D1177 (Fla.3d DCA Decision issued May 22, 2002) follows *McCain* and *Union Memorial Chapel*, making no mention at all of its decision in the instant -i.e. *Martinez* - case. In *Goldberg*, the Third District rejected FPL's 'no duty' argument made in connection with its asserted liability for the wrongful death of a child resulting from an intersectional accident that occurred while FPL had the power off to make line repairs.

We respectfully submit that the 'no duty' holding by the Third District in this case was wrong. The Third District's decision should be reversed and the First District's *Clay Electric* decision should be approved and held to govern.

FPL may seek to make the argument it urged upon the Third District below to the effect that FPL should in any event be shielded from potential liability for its negligence because of the high costs it would incur in paying judgments. FPL warned the Third District, as it may also warn this Court, that a ruling adverse to FPL will result in higher electric bills. We submit that such unprincipled arguments should not be proffered, and that FPL should focus its attention instead on recalling that the best way to prevent judgments against it is to use reasonable care in the performance of

the duties it undertakes. In weighing policy considerations, the cost of replacing burnt out light bulbs is relatively insignificant when compared with the loss of a child.

**B. Proximate cause**

The Third District's decision below addressed only FPL's contention that it was entitled to judgment as a mater of law because it had no duty. We anticipate, however, that FPL will continue to urge that judgment in its favor as a matter of law was proper on the basis of its proximate causation argument, even if it is found to have a duty. We accordingly point to the law negating FPL's position on that issue as well.

FPL has argued in this cause that *as a matter of law* the negligence of the driver who struck Petitioners' son should be deemed an "efficient intervening" cause, which relieves FPL of liability for its original negligence. Florida law does not, however, support this argument.

In its simplest terms, proximate cause means that the alleged wrong of the defendant caused the damage that the plaintiff claims. *McDonald v. Florida Department of Transportation,* 655 So. 2d 1164 (Fla. 4th DCA 1995). There can be more than one proximate cause of an injury. *Sears, Roebuck & Co. v. Geiger,* 167 So. 658 (Fla. 1936); *Zigman v. Cline,* 664 So. 2d 968 (Fla. 4th DCA 1995), *rev. denied,* 661 So. 2d 823 (Fla. 1995). In order to be considered an intervening,

superseding cause, the negligent conduct must be independent of and not set in motion by the initial wrong. *Gibson v. Avis Rent-A-Car System, Inc.,* 386 So. 2d 520 (Fla. 1980); *DWL, Inc. v. Foster,* 396 So. 2d 726 (Fla. 5th DCA 1981), *rev. denied,* 402 So. 2d 609 (Fla. 1981). If an intervening cause is foreseeable, the original act of negligence is still a proximate cause of injury. *Rawls v. Ziegler,* 107 So. 2d 601 (Fla. 1958).

An intervening cause is foreseeable if the harm that occurred was within the scope of the danger or risk attributable to the defendant's negligent conduct. *Gibson v. Avis Rent-A-Car System, Inc.,* 386 So. 2d 520 (Fla. 1980). Questions regarding proximate causation ordinarily must be resolved by the trier of fact based on a consideration of all facts and circumstances in a case. *Periera, supra,* 705 So. 2d 1359 (Fla. 1998). Foreseeability, as it relates to proximate causation, may be decided as a matter of law only if it appears to the court highly extraordinary that the conduct could have brought about the harm. *McCain, supra,* 593 So. 2d 500, 503 (Fla. 1992).

In the case at bar, it is obvious that the alleged negligence of the driver is not an intervening, superseding cause because it was entirely foreseeable. The risk of an automobile accident due to reduced visibility is exactly the risk attributable to FPL's negligent conduct in failing to properly maintain the street lights. The very reason the

street lights were installed was to provide better visibility at night. The reduced visibility caused by the burned out street lights is what set the accident in motion.

FPL relied below on a series of Third District cases[4] dealing with inoperative traffic signals, but that reliance was misplaced. In such cases, courts have held that drivers approaching an intersection have a duty to look, see the traffic signal is inoperative, and proceed with caution. In cases involving a non-functioning overhead traffic light, a person can see that the light is not operating. With a non-functioning overhead street light, on the other hand, the crucial issue is the inability to see the road clearly due to the reduced visibility caused by the lack of light. FPL cited no cases dealing with burned out street lights.

In cases from other jurisdictions involving burned out or inoperative street lights, some of which were cited above, courts have repeatedly held that the failure to properly maintain the lights was a proximate cause of injury. In *Green v. City of*

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[4] *See, e.g.*, *Derrer v. Georgia Electric Co.*, 537 So. 2d 593 (Fla. 3d DCA 1988); *Metropolitan Dade County v. Colina*, 456 So. 2d 1233 (Fla. 3d DCA 1984); *Adoptie v. Southern Bell Telephone & Telegraph Co.*, 426 So. 2d 1162 (Fla. 3d DCA 1983). It is not significant for purposes of this case because the cases are based on such different facts, but we note that the holdings in those cases are at odds both with this Court's decision in *Palm Beach County Board of County Commissioners v. Salas*, 511 So. 2d 544 (Fla. 1987) and with the Court's explicit recognition in *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979) of the duty to maintain traffic lights in operable condition.

*Chicago,* 382 N.E. 2d 1205 (Ill. 1978), for example, a motorist whose car had stalled on a highway was struck by a drunk driver as he stood behind his vehicle. The Illinois Supreme Court rejected the city's argument that burned out overhead street lights were not a proximate cause of the plaintiff's injuries. The city contended that the drunk driver's failure to observe the pedestrian was an intervening, superseding cause and that a motorist using ordinary care would have seen the pedestrian in his headlights. The Court rejected that argument, stating:

> The intervening act of a third person does not necessarily relieve the author of an earlier negligent or wrongful act from responsibility when the intervening cause of an injury is of such nature as could reasonably have been anticipated, in which case the earlier negligent act, if it contributed to the injuries, may be regarded an the proximate cause. [Citations omitted.]

382 N. E. 2d at 1211.

Similarly, in *Lemire v. New Orleans Public Service, Inc.*, 538 So. 2d 1151 (La. App. 1989), the court recognized that poor visibility caused by broken street lights was a proximate cause of a fatal accident, stating:

> [New Orleans Public Service, Inc.] is the custodian of the street lights. The fact that they were not operating is certainly a defect. The evidence supports the conclusion that the poorly lit street contributed to the accident. The purpose of street lights is obvious. They are intended to illuminate the pathway of the motoring public. When not functioning, it can be concluded that an unreasonable risk of harm may occur [.]

538 So. 2d 1155. *See also David v. Broadway Maintenance Corp.*, 451 F. Supp. 877, 882 (E.D. Pa. 1978)(where pedestrian crossing street was struck by a motorist, jury could reasonably conclude that the absence light from street lights in the area of the accident was both a "but for" cause of the collision and a "substantial factor" in bringing about the collision); *Ridley v. Detroit,* 590 N.W. 2d 69, 73 (Mich. App. 1998) (rejecting intervening cause argument in case where pedestrian was killed by motorist on a street with inadequate lighting because "it is foreseeable that a pedestrian would be in the roadway for a variety of reasons.")

Respondent FPL's intervening cause arguments will present no alternative basis for affirming the incorrect result reached by the Third District. The question of proximate cause in this case is a classic fact question which should be decided by a jury. *McCain*, *supra*.

## CONCLUSION

Based on the foregoing facts and authorities, Petitioners respectfully submit that Third District's decision should be reversed and the case remanded with instructions that the judgment on the pleadings in favor of Respondent Florida Power & Light Company be vacated for the case to proceed on the merits.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Petitioners' Brief on the Merits was sent by U.S. mail this 10th day of June, 2002 to: Mark Hicks, Esquire, Esquire and Ralph Anderson, Esquire, Hicks, Anderson & Kneale, P.A., Counsel for Respondent Florida Power& Light Company, 799 Brickell Plaza, 9th Floor, Miami, Florida 33131; Robert E. Boan, Esquire, Co-Counsel for Respondent Florida Power & Light Company, FPL Law Department, P.O. Box 029100, Miami, Florida 33102; Stephen J. Pajcic, III and Thomas F. Slater, Esquire, Counsel for Delores Johnson, Pajcic & Pajcic, P.A., One Independent Drive, Suite 1900, Jacksonville, Florida 32202; William T. Stone, Esquire and Scott S. Gallagher, Esquire, Counsel for Clay Electric Cooperative, Inc., 76 South Laura Street, Suite 1700, Jacksonville, Florida 32202; Steven R. Browning, Esquire, Spohrer, Wilner, Maxwell & Matthews, Counsel for Michelle Boone, 701 West Adams Street, Suite 2, Jacksonville, Florida 32204; and Dennis R. Schutt, Schutt, Humphries & Becker, 2700-C University Boulevard West, Jacksonville, Florida 32217.

## CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief on the Merits complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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ELIZABETH K. RUSSO