In the Supreme Court of Florida

CONSOLIDATED

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

IVAN AND YAMILE MARTINEZ,
Petitioners,

v.

FLORIDA POWER & LIGHT CO.,
Respondent.

CLAY ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

DELORES JOHNSON, et al.,
Respondents.

CLAY ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

LANCE, INC., et al.,
Respondents.

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

REPLY BRIEF OF MARTINEZ PETITIONERS

Respectfully submitted,

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REPLY TO BRIEFS OF RESPONDENT FPL AND ITS AMICI

The Martinez Petitioners hereby respectfully file this reply brief in response to the answer brief of Respondent Florida Power & Light Company ("FPL") and to the amicus briefs submitted in support of FPL's positions.[1]

REPLY REGARDING FPL'S STATEMENT OF THE CASE AND FACTS

FPL's statement of the case and facts presents no disagreement of any significance with that of the Petitioners, and thus requires no extended reply. The case was disposed of by the trial court via judgment on the pleadings, so Petitioners have never been afforded the opportunity to develop the facts in their case beyond what is alleged in their complaint.

As documented in our initial brief, the most pivotal allegations in Petitioners' complaint were that - whatever FPL may or may not do elsewhere in connection with maintaining overhead streetlights - FPL had undertaken the job of maintaining the streetlights in a specific area of Miami, Florida, and that the Petitioners' son was killed in that area while crossing the street at night. The other allegations of significance were that one or more of the streetlights in the area had been burnt out or otherwise

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[1] For ease of reading, we address collectively the arguments made by FPL and the amici which have filed briefs in support of FPL's positions, referring simply to FPL rather than 'FPL and amici' or designating specific amicus' contentions. Unless otherwise indicated, all emphasis in this brief is supplied by undersigned counsel.

inoperative for a considerable period of time, and that FPL had acquired actual or constructive notice of the malfunctioning condition of the streetlights in question and had not exercised reasonable care in repairing them in a timely manner.

The lack of further particulars in the record as to, e.g., the means by which or reasons that FPL undertook to maintain this specific area's streetlights, or the extent to which the malfunctioning of some of the lights heightened the danger that motorists would strike pedestrians because the motorists were passing from light to dark sections of the street, is due to the fact that FPL sought and obtained judgment on the pleadings before any discovery or development of the facts was allowed to proceed.

REPLY TO ARGUMENTS

FPL contends that this Court should rule in its favor based on lack of duty or lack of proximate causation or both. Petitioners disagree, and address the arguments in turn below.

A. Duty

1. Overview of FPL's arguments

FPL offers a series of arguments as to why the Court should rule that FPL had no duty to maintain the streetlights in question notwithstanding its undertaking to do so. The arguments include: (1) that there are prior decisions indicating that tort law issues as to duty are to be decided as matters of policy, and that policy calls for no

duties to be imposed on utility companies like FPL; (2) that even if FPL's undertaking did create a duty of due care, liability may not be imposed unless there has also been reliance by the victim and/or increased hazard created by the failure to use due care in the undertaking; (3) that while FPL is precluded by prior decisions of this Court from maintaining that it has *no* duties, whatever duties it does have should not be deemed to include the streetlight maintenance duty FPL undertook here; and (4) that if FPL ***is*** found to have a duty as to the streetlights it undertook to maintain, electricity rates will be 'affected' in unspecified manners and unquantified amounts that, this Court is called upon to speculate *dehors* the record, will certainly be bad for us all. We respond to these arguments seriatim below.

2. Reply to FPL's case law and policy arguments

FPL disputes our initial brief's contention that *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992) is a watershed decision on the subject of how Florida courts are to determine duty issues such that all pre-*McCain* duty cases must be re-examined for continuing viability. *McCain* held that "a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others." 593 So. 2d at 503.

FPL disagrees that *McCain* marks a turning point in Florida tort law. FPL thus seeks to rely on earlier cases in which the courts had made 'no duty' holdings as to

utility companies without subjecting them to re-examination under *McCain*. FPL's main cases in this regard are the Fourth District's 1988 decision in *Arenado v. Florida Power & Light Co.*, 523 So. 2d 628 (Fla 4th DCA 1988), *rev. dismissed*, 541 So. 2d 612 (Fla. 1989), and the *Abravaya v. Florida Power and Light Co.,* 39 Fla. Supp. 153 (Cir. Ct. Dade County 1973) and *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (N. Y. 1928) decisions cited in *Arenado.*

In furtherance of its theme that *Aranedo* and its predecessors are not subject to re-analysis in light of *McCain*, FPL claims that Petitioners' initial brief placed too much emphasis on *McCain* ('like a broken record', says FPL in its answer brief at page 16). But, the emphasis was created by this Court, not Petitioners, when *McCain's* 'foreseeable zone of risk' analysis was held to apply across-the-board. This Court stated its holding without equivocation: "[T]he 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. That statement was recently reiterated by this Court in *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001).

FPL's efforts to evade *McCain* scrutiny of the *Aranedo* line of cases in the end serve only to underscore their inherent incompatibility with *McCain*. The problem with the *Aranedo* line of cases is that the courts in those cases did not approach the duty issue from the generalized perspective mandated by *McCain*, under which a duty is

to be imposed on *any defendant* whose conduct creates a foreseeable zone of danger. The approach under the *Aranedo* line of cases was to single out *utility company defendants* and afford them special treatment in determining duty issues, for 'policy' reasons.

In *Aranedo*, for example, the court expressly noted that the 1973 Dade County Circuit Court *Abravaya* decision and the 1928 New York *Moch* decision were based on policy considerations as to proper risk allocation: "[I]n 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." 523 So. 2d at 629. *Aranedo* adopted the *Abravaya* and *Moch* conclusion that *as a matter of policy* the risk of tort liability should not be allocated to utility companies for their failures *in providing the utility in question* (a factual distinction which we discuss further below) lest the consequences in some manner prove too 'far reaching'

The *Arenado* approach, in short, is based on the premise that for policy reasons utility companies must be treated differently than other defendants and thus a different legal analysis must be employed in determining their potential tort liability. *McCain*, however, allows for no such special treatment. The *McCain* rule itself is that duty ***must*** be found as to any defendant's conduct that foreseeably created a zone of danger. The *McCain* focus is exclusively on the *conduct* in question, and exceptions

are not permitted - not based on the occupation of the defendant, not based on status of the defendant, not based on policy arguments, and not based on the status of the plaintiff or specific injury. The Court has made this point abundantly clear in its post-*McCain* decisions, which have rejected all attempts to create special rules and exemptions. Examples follow.

In *Nova Southeastern University, Inc. v. Gross,* 758 So. 2d 86 (Fla. 2000), this Court held that a university had a duty to a student who was sexually assaulted while participating in an off-campus internship because, as the Fourth District decision approved by the Court had noted, "[a] student can certainly be said to be within the foreseeable zone of known risks engendered by the university when assigning such student to one of its mandatory and approved internship programs." 758 So. 2d at 88 (*citing McCain*). The *Nova* decision expressly rejected any notion that some defendants may be treated differently than others when it comes to analyzing tort liability: "There is no reason a university may act without regard to the consequences of its actions while *every other legal entity is charged with acting as a reasonably prudent person* would in like or similar circumstances." 758 So. 2d at 90.

Similarly, in *Whitt*, *supra*, this Court looked only to whether the defendant's conduct had created a foreseeable zone of danger (foliage on the landowner's property obstructed the view of a departing motorist causing her to run into pedestrians on an

adjacent property), and concluded that because landowners can foreseeably create a zone of risk to persons on adjacent properties, a duty must be found to exist. In reaching this conclusion, the Court's opinion made it clear that *McCain* applies to the exclusion of older principles of law that would have drawn distinctions between on-site and off-site accidents; between natural and artificial conditions; and between urban and rural properties. The Court also disregarded the landowner's 'policy' argument that imposition of such a duty unduly burdens landowners by making them insurers of motorists using their abutting streets.

In *Florida Power & Light Co. v. Periera*, 705 So.2d 1359 (Fla. 1998), the Court refused to alter the *McCain* analysis on the basis of the *plaintiff's* status. The *Periera* plaintiff was injured on a bicycle path when his motorcycle struck a guy wire which was maintained by FPL. FPL argued that it had no duty to the plaintiff because motorcycles are prohibited by statute, §316.1995, from riding on bicycle paths. This argument, focusing on the injured plaintiff's status as a motorcyclist who was riding illegally on the path in question, was rejected because of its deviation from the analysis required by *McCain*: "The proper way of determining whether a duty existed is to decide whether the defendant's actions created a foreseeable zone of risk, not by whether the specific injury suffered was foreseeable by the defendant." *Id.*

We agree with the Fourth District Court of Appeal that Periera's violation of

> section 316.1995 does not relieve FP & L of a duty as a matter of law. As the district court stated, "FP & L's guy wire was as much as a hazard to bicyclists, who were lawfully on the bike path, as to motorcyclists, who were not." [cited omitted].

705 So. 2d at 136.

We submit, in sum, that *McCain* did usher in a new era for tort liability analysis. The *McCain* rule governs to the exclusion of prior inconsistent case law. Cases like *Arenado* and its predecessors must now be re-analyzed to determine whether they comport with *McCain*. And, when the analysis is performed as to the *Arenado* line of cases, it is clear that they do not pass *McCain* muster. *Arenad*o and its predecessors determined the issue of duty on the basis of : (a) the status of the defendants as utility companies, and (b) the courts' notions of policy reasons for refusing to 'allocate risk' to utility companies via imposition of tort liability. Such distinctions and special considerations are impermissible under *McCain*: "[T]he 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.

In order to avoid undue repetition, we adopt the arguments articulately presented in the Clay Respondents' brief and additionally distinguishing the *Arenado* line of cases on the basis of the entirely different factual context in which they were decided. *Arenado* and its predecessor cases involve claims arising from utility companies'

failures in providing the utility they contracted to provide the public at large. The claims in these consolidated cases are quite different.

Here, the failures complained of were in the performance of entirely separate *maintenance* work that Clay Electric[2] and FPL had undertaken to perform in certain locations. Such maintenance work has nothing to do with these companies' status *qua* utility companies, and represents merely a separate endeavor voluntarily undertaken. Thus, even if this Court were to decide that utilities should continue to be afforded special protections under the law in connection with their provision of utilities to the public, as held in *Arenado*, such protections would not apply in these cases.

The Third District's decision in Petitioners' case completely ignored *McCain*, and based its holding of no duty on the *Arenado* line of cases. As set forth above, those cases are legally incompatible with *McCain*.[3] Further, the *Arenado* cases are entirely factually distinguishable because the instant cases do not arise from claims against utilities acting in their capacity as such. The Third District's decision should

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[2] Clay Electric undertook the maintenance responsibilities by contract, a distinction without significance to the duty analysis, as discussed in text below.

[3] So, too, are the out-of-state cases cited by the Third District in its decision, and by FPL in its brief, e.g., *Vaughan v. Eastern Edison Co.*, 719 N. E. 2d 520 (Mass. App. Ct. 1999) and *White v. Southern Cal. Edison Co.*, 25 Cal.App.4th 442 (Cal. App. 1994).

be quashed on either or both of these grounds.

3. Reply to FPL's arguments that it has no undertaker liability

FPL also argues that although FPL undertook to maintain the streetlights in question here, FPL should not be subject to Florida's long established principles of law as to the duties that are imposed upon those who undertake to act, summarized by this Court recently in *Union Park Memorial Chapel v. Hutt,* 670 So.2d 64, 66 (Fla. 1996): "It is clearly established that one who undertakes to act, even when under no obligation to do so, thereby becomes obligated to act with reasonable care." The Court cited numerous Florida decisions supporting the principle including the original and seminal Florida decision on the subject, *Banfield v. Addington*, 140 So. 893, 896 (Fla. 1932) and *Slemp v. City of North Miami*, 545 So.2d 256 (Fla.1989)(holding that even if city had no general duty to protect property owners from flooding due to natural causes, once city has undertaken to provide such protection, it assumes the responsibility to do so with reasonable care). This Court's *Hutt* decision thus makes it clear that *all* persons and entities who undertake to act - even governmental entities like the City of North Miami in *Slemp* - thereby acquire the duty to use due care in performance of the undertaking.

Citing the Restatement of Torts (Second) §324A, FPL argues that these established principles should nonetheless not apply to FPL here either because there

was no showing of reliance or because there was no showing that the undertaking increased any risk.[4] Both arguments are unsupportable.

FPL first contends that it should not be held to have a duty here because Petitioners and their son had no contract or privity with FPL such that they could show reliance on FPL's undertaking to maintain the streets. But, as long ago as this doctrine was confirmed by this Court as the law of Florida in *Banfield*, *supra*, it was also made clear that (1) the only 'privity' required is between the act of the wrongdoing undertaker and the injury complained, and (2) a contractual relationship is wholly irrelevant to the tort liability imposed on an undertaker:

> ***'[I]t is only necessary to fix liability that a privity must exist between the act of a wrongdoer and the injury complained of, in order to lay the foundation for a recovery.'*** [cite omitted]. ... ***no privity of contract [is] necessary to support an action in tort for the infraction of a duty implied by law[.]***

Banfield v. Addington, 140 So. at 896.

FPL's other contention is that no duty arises for an undertaker absent a showing of increased risk. This contention ignores the holding in *Hutt*, *supra,* that under *McCain*, it is the ***undertaking itself that creates the duty*** if the act undertaken is one

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[4] Section 324A on which FPL relies has a third alternative under which liability is imposed, to wit, if the undertaker has undertaken to perform a duty owed by another to the third party. As discussed in text, *infra*, FPL here undertook to perform the City's duty to maintain its existing streetlights. §324A(a).

that *might* increase the risk of harm if not performed with due care. "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."*** [citing *McCain*]. 670 So. 2d at 67.

It is also clear that established law directly imposes liability on FPL for this undertaking because it committed FPL to perform maintenance work on government improvements. The First District pointed out in *Clay* the significance of the fact that the undertaking was for maintenance of streetlights, a governmental improvement, "because a governmental entity in Florida owes a legal duty to the motoring public to maintain the traffic lights and stop signs that it undertakes to provide." *Johnson v. Lance, Inc.*, 790 So. 2d at 1146 (Fla. 1st DCA 2001), *citing, e.g.,Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979). FPL's duty upon undertaking to perform the maintenance work on City streetlights could be no less than that of the governmental entity itself. And, the fact of FPL's undertaking to perform the duty already owed by the City meets the requirements of Restatement §324A(a).

We here also adopt the arguments ably presented in the Clay Respondents' brief at pages 21 through 25 pointing out the fallacies in the contention made by Clay Electric [and by FPL here] that because they did not create nighttime darkness, they

did not increase any risks when their negligent maintenance of the streetlights allowed some portions of some streets to return to darkness. And, we finally note that because this case was disposed of via judgment on the pleadings, there has been no development of the *facts* as to increased risk, including how visibility may be adversely affected by intermittent light and darkness from unevenly operating streetlights.

4. Reply to FPL's arguments that its duties should not include streetlight maintenance and that, if they do, 'rates will be affected'

FPL is forced to concede that it does have some duties based on prior decisions from this Court, but it disingenuously remarks that: "Neither McCain nor *Whitt* addressed the duty issue in the context of claims against a public utility brought by noncustomer members of the public."(FPL's answer brief, p. 20). FPL somehow fails to mention at this point in its discussion this Court's 1998 decision in *Periera*, which clearly ***did*** address that very issue, and affirmatively held that such a duty can and does exist.

FPL thus has no available argument to make that it has never been deemed to have a duty to the category of persons FPL has designated 'noncustomer members of the public.' The question thus becomes how FPL can contend that whatever duties may be owed to noncustomer members of the public should ***not*** be deemed to include the maintenance duties FPL undertook in connection with the subject streetlights here.

The only rationale it is able to offer is a foreboding *Arenado* argument along the lines that the consequences of holding otherwise may be far reaching - and bad.

FPL says that "imposing a duty on FPL will have an adverse affect on electricity rates", and even goes on to suggest that "it may well discourage utilities (as well as governmental entities) from providing streetlights at all." (FPL answer brief, p. 33). We submit that if policy consideration is warranted at all, it should be based on something more than such vague, if sinister, speculation as FPL offers here. The remark about governmental entities is wholly unwarranted in any event as they already have the duty to maintain traffic lights and signals. *Commercial Carrier, supra.* And, we have only contended that a duty should be imposed on FPL only in connection with maintenance of streetlights that FPL undertook to maintain - ***not***, as FPL implies, that FPL should be held to have a general duty as an electric utility to maintain and repair all streetlights within its area of operations.

B. Proximate causation

As anticipated, FPL makes the same proximate causation argument that it made in the Third District, already addressed in full in our initial brief. The short answer is that causation is a question of fact for the jury, unless the injury is "utterly unpredictable in light of common human experience." *McCain*, at 503-04. And, FPL has already been advised by this Court that the fact that one of the participants in an

accident violated a traffic statute serves only to raise a question of comparative fault, but does ***not*** cut off the chain of causation as to FPL. *Florida Power & Light Co. v. Periera,* supra, 705 So. 2d at 1362.

CONCLUSION

Based on the foregoing authorities, Petitioners respectfully submit that the First District Court of Appeals' decision in Clay Electric should be approved. The Third District Court of Appeals' decision in Martinez should be quashed, and this case remanded for further proceedings

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Martinez Petitioners' was sent by U.S. mail this 30th day of July, 2002 to: Mark Hicks, 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, 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 A. Bald, Esquire, Dale, Bald, Showalter & Mercier, P.A., Co-Counsel for Delores Johnson, 200 West Forsyth Street, Suite 1100, 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; Dennis R. Schutt, Schutt, Humphries & Becker, 2700-C University Boulevard West, Jacksonville, Florida 32217; Charles T. Wiggins, Esquire, Beggs & Lane, LLP, Counsel for Amicus Gulf Power Company, 3 West Garden Street, Pensacola, Florida 32501; Joel D. Eaton, Esquire, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Counsel for Amicus The Academy of Florida Trial Lawyers, 25 West

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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