IN THE SUPREME COURT OF FLORIDA

CONSOLIDATED
CASE NO. SC01-1505
CASE NO. SCO1-1955
CASE NO. SC01-1956

IVAN MARTINEZ, et al.,

Petitioners,

v.

FLORIDA POWER & LIGHT CO.,

Respondent.

CLAY ELECTRIC COOPERATIVE, INC.,

Petitioner,

vs.

DELORES JOHNSON, et al.,

Respondents.

CLAY ELECTRIC COOPERATIVE, INC.,

Petitioner,

vs.

LANCE, INC., et al.,

Respondents.

/

RESPONDENT JOHNSON'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

We accept Clay Electric's statement of the case but include a brief supplement here to emphasize the fact that the existence of a duty was the only issue before the trial court and the court of appeal. Clay Electric correctly describes the basis of its Third Motion for Summary Judgment as the theory "that it owed no legal duty either to the decedent pedestrian or to the motor vehicle driver to maintain the light and hence, as a matter of law, could not be liable to Johnson." (Petitioner's Brief on the Merits, p. 2). What Clay Electric does not emphasize, and indeed seems to forget a page later in its statement of facts, is that duty was the *only* issue raised by the motion. (R 255; A 19).[1] The motion for summary judgment was not made or decided on intervening cause grounds. Clay Electric's argument on that theory and the facts it recites to support that argument relate to an issue that is not before this Court.

STATEMENT OF THE FACTS

Clay Electric's statements of the facts is remarkable for its utter failure to mention the extensive factual findings of the trial judge in the very order that Clay Electric seeks to uphold: the order granting Clay Electric's third motion for summary judgment. This obvious omission was apparently tactical. Clay

[1] In this brief R ___ will refer to the record on appeal; A ___ will refer to the appendix to this brief.

Electric is understandably reluctant to discuss the details of that order, in which the trial court made it clear that it was granting the motion solely because it interpreted Florida case law to hold that the maintainer of streetlights has no legal duty to users of the roadway. Reviewing the record on a motion for summary judgment and giving the non-moving party, Johnson, the benefit of all inferences that could be drawn from the record, the trial court found:

> (A) The decedent, DANTE JOHNSON, was struck by a motor vehicle being driven by Defendant Larry Ganas. The collision occurred while the decedent walked on or near a public street.
>
> (B) The collision occurred during the early morning hours while it remained very dark. The decedent was wearing dark clothing and was walking in the same direction that Defendant Ganas was driving.
>
> (C) Defendant Ganas was alert and operating his vehicle in a prudent manner and his head lights were on and operating properly. His vision was not impaired or obstructed. Despite these facts, he was unable to see the decedent in time to take evasive actions that would have avoided the collision due to the extreme darkness at the site of the collision.
>
> (D) Several years before the subject collision, the Jacksonville Electric Authority had installed lights along the street where the decedent was struck and killed. These lights are typical of lights located along streets and highways throughout the Jacksonville area. Also, several years before the subject collision, Defendant Clay Electric entered into a contract with the Jacksonville Electric Authority which required that Defendant Clay Electric maintain the lights. That contract remained in force at the

> time of the collision and Defendant Clay Electric had been paid to maintain the lights.
>
> (E) If the lights had been operating properly, Defendant Ganas would have seen the decedent in time to avoid the collision. The light nearest the site of the collision was not illuminated and it had not been illuminated for several years prior to the collision. Defendant Clay Electric, although being contractually obligated to maintain the light and having been paid to do so, failed to maintain the light. Defendant Clay Electric never instituted a system to regularly inspect the lights at night to determine which lights needed replacement bulbs or repairs.
>
> R 383-384; A 14-15

Clay Electric did not argue in the Court of appeal that these findings were erroneous, and it does not make that claim in this Court. Instead, Clay Electric disingenuously proceeds as if the trial court never made any factual findings. Clay Electric asserts as "facts" three propositions that were explicitly rejected by the trial court:

(1) The lights along the roadway where the accident occurred were not streetlights at all but "security lights" not intended to illuminate the street. (Petitioner's Brief on the Merits, p. 7). (The trial court found that the lights were typical of lights found along streets throughout the Jacksonville area.);

(2) The lights, even when working, leave "large gaps in illumination," suggesting that even if operable they might not have lighted the area where Dante Johnson was walking. (Petitioner's Brief on the Merits, p. 8). (The trial court found

that Ganas was unable to see Johnson but would have been able to see him if the lights had been working.); and,

(3) Clay Electric had not undertaken to do anything more than respond to calls informing it that lights were not working and thus had no obligation to fix the lights in question because they had not been reported as being out. (Petitioner's Brief on the Merits, p. 9). (The trial court found that Clay Electric, having been paid to maintain the lights, breached its contract with the JEA by failing to institute a program of regular inspection to determine which lights needed replacement bulbs or repairs.).

In addition to these facts contradicted by the trial court's findings, Clay Electric's statement of facts contains many details that are not material to the issue before this Court. Clay Electric begins its statement of facts by trotting out facts that clearly pertain only to the question of whether Dante Johnson's conduct was an intervening cause of his death. These facts include Dante Johnson's prior accident and his grandmother's advice "to walk on the left side of the road." (Petitioner's Brief on the Merits, p. 3).[2] Clay Electric also bombards this Court with minutiae about where certain lights were located, which lights were on and which lights were out, and

[2] Clay does end its 41 page brief with approximately one page of argument that Dante Johnson's decision to walk on the right was an intervening cause of his accident. This claim was not raised in the motion for summary judgment on review here or in the Court of appeal.

the exact location of the collision. We mention these factual assertions here only to point out their lack of relevance to the duty issue.

It is also notable that, for all of the attention Clay Electric pays to the definitional nuances that supposedly separate "streetlights" from "security lights," it never claims that the lights in question, if operable, would not have illuminated a portion of the roadway or that the original purpose of the lights was not, at least in part, to make the road safe for pedestrians. Clay Electric also acknowledges that Mr. Fish of the JEA testified in his deposition that he would characterize the lights as streetlights. (Fish deposition, p. 26).

Thus, for purposes of Clay Electric's motion for summary judgment and this Court's resolution of this case, these are the facts: (1) the lights in question were streetlights within the common understanding of that word; (2) when working they illuminated the roadway, (3) Clay Electric agreed to maintain them but failed to do so; (4) the light closest to the collision point had been out for several years; and (5) Dante Johnson would be alive today if Clay Electric had not failed to maintain the lights.

SUMMARY OF THE ARGUMENT

The only serious issue properly before this Court is whether a company that has a contractual obligation to maintain streetlights has a legal duty to users of the roadway where those lights are located. This question can be answered by a straightforward application of the analysis articulated by this Court in *McCain v. Florida Power*

Corp., 593 So.2d 500 (Fla. 1992), which defines the duty issue as whether the defendant's conduct foreseeably created a zone of risk. The First District decided this case correctly because the failure to maintain streetlights increases the risk of injury to persons walking along the roadway at night. The conflicting decision from the Third District Court of appeal, *Martinez v. Fla. Power & Light Co.*, 785 So.2d 1251 (3d DCA 2001), reached the wrong result because it failed to apply *McCain.*

While Clay Electric pays perfunctory homage to *McCain* in its brief, its argument, constructed on the basis of *Martinez, Arenado v. Florida Power & Light Co.*, 523 So.2d 628 (Fla. 4th DCA 1988), *petition for review dismissed*, 541 So. 2d 612 (Fla. 1989), and decisions from other states, is in fact a plea for an exemption from *McCain*. This Court should reject Clay Electric's request for special treatment. *McCain,* itself a case involving a public utility, articulates a universally applicable duty rule, a fact that this Court confirmed in *Whitt v. Silverman*, 788 So.2d 210 (Fla. 2001).

The reliance on *Arenado* by Clay Electric and the Third District in *Martinez* misses a fundamental difference between this case and *Arenado*, which the First District Court of appeal recognized in its opinion below. The plaintiff's claim in *Arenado* was predicated on a general failure to supply power, not the failure to maintain specific devices. While there might be valid reasons to modify the *McCain* duty standard in a power outage case, no such reasons exist where the claim is negligent maintenance. Decided before *McCain, Arenado* now has questionable value

as precedent, but even if it is good law today it is simply irrelevant where the claim is failure to maintain.

Clay Electric's argument that it cannot be liable because it did not create a "trap" or "unexpected danger" has no basis in the law. The only cases in which the "trap" issue is relevant are tort claims against governmental entities, which have an operational level duty to warn when a planning level decision creates a trap or hidden danger.

The First District Court of appeal correctly found additional support for its decision in Section 324A of the Restatement (Second) of Torts. As the First District's opinion notes, governmental bodies have a duty to maintain traffic control devices such as stoplights once they are installed, and this principle logically extends to streetlights. Therefore, the Jacksonville Electric Authority did have a duty to maintain the streetlights once they were installed. This duty, in the words of §324A, is "a duty owed by another to a third person," which Clay Electric undertook to perform for the JEA. Under §324A, Clay Electric is liable for harm caused by its failure to use reasonable care in that undertaking.

Clay Electric's "alternative grounds" arguments regarding the purpose of the lights and proximate cause have no merit. Clay Electric vaguely asserts that its liability is "further attenuated" if the lights in question are "security lights," not streetlights. This statement has no legal meaning. Moreover, the trial court found the lights in

question to be typical of lights along streets throughout Jacksonville. Thus, in essence, the trial court found them to be streetlights. Furthermore, there is no evidentiary basis for Clay Electric's attempt to win the case on labels, because there is no evidence that these lights, whatever one calls them, were not intended for the protection of roadway users.

The intervening cause question was not before the trial court or the court of appeal, and is not before this Court. If it were, Clay's position would be without an ounce of merit. An intervening cause only breaks the chain of causation if it is unforeseeable, and foreseeability in this context is a question of fact. A jury could obviously find that a pedestrian walking on the right at night is a foreseeable occurrence.

ARGUMENT

I

THE DUTY ISSUE IN THIS CASE MUST BE RESOLVED BY APPLICATION OF THE *McCAIN* STANDARD, UNDER WHICH CLAY ELECTRIC HAD A DUTY TO DANTE JOHNSON TO MAINTAIN THE STREETLIGHTS.

A. Under *McCain*, a defendant's conduct gives rise to a duty of care when the defendant's conduct foreseeably creates a zone of risk to others:

In *McCain v. Florida Power Corp.,* 593 So.2d 500 (Fla. 1992), this Court chose a case involving an electric utility company to provide the courts of this state with a definitive standard by which to decide whether a defendant in a negligence case

has a duty to the plaintiff. The injury in *McCain* occurred when the blade of a mechanical trench-digging machine struck a live underground power line. At trial, Florida Power moved for a directed verdict on the ground that the injury claimed by the plaintiff was not foreseeable, because the severing of the cable should theoretically have blown a fuse, thereby instantly de-energizing the line and because there had been numerous other instances of trenchers severing underground lines without injury to persons using the trenchers. The trial judge denied the motion and the jury found for the plaintiff. The Second District Court of appeal reversed, holding that the directed verdict motion should have been granted because plaintiff's proof lacked the "critical element" of foreseeability. *Florida Power Corp. v. McCain,* 555 So.2d 1269, 1271 (Fla. 2d DCA 1989), *decision quashed,* 593 So.2d 500 (Fla. 1992). This Court quashed the decision of the Court of appeal and reinstated the jury verdict for the plaintiff, holding that Florida Power & Light did have a legal duty of care to the plaintiff. In doing so it gave the courts of this state a clear and straightforward analysis by which to determine if the defendant in negligence cases owed the plaintiff a duty of reasonable care.

Under *McCain,* the foreseeability of risk is the key element in the duty equation. The key question for the court is whether the defendant's conduct creates "a generalized and foreseeable risk of harming others." (593 So.2d at 503). A duty arises whenever the defendant's conduct foreseeably creates a "zone of risk" that others will

be harmed. (593 So.2d at 502). The defendant is "required to exercise foresight whenever others may be injured as a result [of the defendant's actions]." (593 So.2d at 503). For proximate cause purposes, on the other hand, the foreseeability question is whether, on the basis of human experience "the same harm can be expected to recur if the same act or omission is repeated in a similar context." (Id.).[3] Thus, foreseeability as an element of duty is less specific than foreseeability required to establish proximate cause. Duty is only the "minimum threshold requirement for opening the courthouse doors . . . ." (593 So.2d at 502).

Under *McCain*, the dispositive question in this case is whether Clay Electric's failure to maintain the streetlights along the roadway foreseeably created a generalized zone of risk to persons using that roadway. The summary judgment in favor of Clay Electric is only sustainable if the trial court could have found, giving Johnson the benefit of all inferences that could be drawn from the record, that Clay Electric could not have foreseen that failure to maintain the streetlights would create a general risk of harm to users of the roadway.

B. The First District decided this case correctly by applying *McCain's* foreseeability standard; the Third District decided *Martinez* wrongly because it failed to apply *McCain*:

[3] As *McCain* notes, duty is a question of law for the court, while proximate cause is a question for the trier of fact. (593 So.2d at 504).

In the decision now under review, the First District Court of appeal correctly found that the trial court had erred when, to paraphrase *McCain,* it "closed the courthouse door" to Johnson. The First District held that a public utility that had undertaken to maintain streetlights "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." (Emphasis added.) (790 So.2d at 1146). As a result, the court held that Clay Electric owed a legal duty to Dante Johnson. Although explicit reference to *McCain* does not appear in *Johnson* until Judge Polston's concurring opinion, the court's analysis of the duty issue in terms of the foreseeability of the danger to pedestrians shows that it arrived at its result by following the *McCain* roadmap.

The Third District started at the same point as the First District but arrived at the opposite conclusion. The reason for such a divergence is clear: the First District was following *McCain,* and the Third District was not. The Third

District's opinion neither cites *McCain* nor mentions the pivotal issues of foreseeability and zone of risk. Instead of following *McCain*, the Third District chose to steer by the Fourth District's pre-*McCain* decision in *Arenado v. Florida Power & Light Co.*, 523 So.2d 628 (Fla. 4th DCA 1988), *petition for review dismissed*, 541 So. 2d 612 (Fla. 1989), its reading of Justice Cardozo's opinion in the venerable case of *H. R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928), and decisions from California and Massachusetts, *White v. Southern Cal. Edison Co.*, 25 Cal.App. 4th 442, 30 Cal.Rptr.2nd 431 (1994) and *Vaughan v. Eastern Edison Co.*, 48 Mass.App.Ct. 225, 719 N.E.2d 520 (1999). Clay Electric, naturally, joins the Third District in asserting that these cases and other out-of state decisions provide the basis for a correct result here. Clay Electric is mistaken. The cases relied upon by the Third District are either distinguishable from this case or apply definitions of duty that conflict with the *McCain* definition.

We discuss *Arenado* and *H. R. Moch* together, for they both involve the question of a public utility's liability for failure to supply the commodity that it has agreed to provide to its customers—electricity in *Arenado*, water in *H. R. Moch*. In *Arenado*, Florida Power & Light ("FP&L") was sued by a motorist injured at an intersection where the traffic light was out because of a downed power line. In *H. R. Moch*, the plaintiff sued a waterworks company, which had agreed to supply water to the City of Rensselaer for various public and private uses, including the operation of

fire hydrants. The plaintiff in *Arenado* claimed that the power outage caused his accident; the plaintiff in *H. R. Moch* alleged that its warehouse burned down as a result of inadequate water pressure supplied to nearby water hydrants.

Affirming a summary judgment for FP&L, the *Arenado* court reasoned that while a power company has a contractual duty to supply electrical power to the purchaser of that power, such a duty does not extend to members of the public. The court supported this conclusion with citations of *H. R. Moch, White,* and *Vaughan.* The plaintiff petitioned for review by this Court, which initially accepted jurisdiction but subsequently dismissed the petition for review. *Arenado v. Florida Power & Light Co.,* 541 So.2d 612 (Fla. 1989). In its decision dismissing the petition, this Court described the dispositive issue as "whether a duty is owed to a noncustomer *for failure to supply electricity*." (Emphasis added.) (541 So.2d at 613).

In *H. R. Moch* the appellate court affirmed the decision of the lower appellate court that the warehouse owner's complaint did not state a cause of action. In a passage cited in *Arenado,* Justice Cardozo found the utility's undertaking to supply water for public purposes too general to support an action by specific users of water:

> In a broad sense it is true that every contract not improvident or wasteful, is for the benefit of the public. More than this 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 . . . 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.

159 N.E. at 897.

On the basis of this reasoning, the court held that the plaintiff could not recover from the water company.[4]

The threshold inquiry about any pre-*McCain* or any out-of-state authority, including *Arenado* and *H. R. Moch,* is whether it is consistent with *McCain.* If the answer is negative, the authority has no precedential value in this state. *McCain's* applicability to the gamut of duty issues in Florida is demonstrated not only by the multitude of appeals decided under the *McCain* standard since 1992, but also by this Court's decision in *Whitt v. Silverman,* 788 So.2d 210 (Fla. 2001). In *Whitt,* this court held that *McCain's* foreseeability and zone of risk concepts had supplanted an ancient common law rule—the so-called agrarian rule that owners of

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[4] The *H. R. Moch* decision has not escaped criticism. The New Jersey Supreme Court reached a contrary result in a similar case, *Weinberg v. Dinger,* 524 A.2d 366 (N. J. 1987) and in so doing noted that Professor Seavey has called *H. R. Moch* Justice Cardozo's "most unsatisfactory decision in the field of torts." (524 A.2d 371, FN 3, quoting from Seavey, "Reliance Upon Gratuitous Promises" 64 *Harvard L.Rev. 913, 920-21 (1951)).*

real estate have no legal duty to persons who are not on their land. The clear message of *Whitt* is that *McCain* states a definition of duty that is broadly applicable across the spectrum of negligence cases in this state.

Applying *McCain* to the facts of *Arenado* and *H. R. Moch,* one can make a persuasive argument that those cases are inconsistent with *McCain* and, therefore, would be decided differently by a Florida court in 2002. However, we leave that interesting hypothetical for another case, because this case is plainly distinguishable from both *Arenado* and *H. R. Moch,* which stand for the proposition that a supplier of electricity or water is not liable for the many and varied consequences of its failure to supply its product. In *Arenado* Florida Power & Light had agreed to supply electricity to users in its service area; in *H. R. Moch* Rensellaer Water Company had agreed to supply water to a broad array of users. If a person injured by the non-functioning traffic light in *Arenado* or the low water pressure in *H. R. Moch* had a cause of action, a multitude of claimants, injured in a myriad of ways, would have potential claims whenever an outage was arguably the utility's fault. The imposition of liability under those circumstances could theoretically subject the utility to such extensive liability that there might be public policy grounds to modify the *McCain* approach. This case does not raise that question, because it is about negligent maintenance, not negligent failure to supply power.

The First District found the distinction between the furnishing of power and the maintenance of streetlights significant. In its opinion below, the court distinguished *Arenado* on that precise basis:

> Like *Arenado* the present case involves a contract between a utilility and a governmental entity, but the contract in the present case is not for the provision of electricity to a governmental improvement. The contract is instead for the *maintenance* of a governmental improvement.

790 So.2d at 1146.

Until *Martinez* was decided, the Florida appellate courts had implicitly recognized the distinction between failure to supply power cases and negligent maintenance cases. *Martinez* is the only Florida negligent maintenance case that relies on *Arenado.* When the Third District decided *Metropolitan Dade County v. Tribble,* 616 So.2d 59 (Fla. 3d DCA 1993), *petition for review denied,* 626 So.2d 210 (Fla. 1993), a traffic light case where the claim was negligent maintenance, it did not even mention *Arenado.* Not only did the *Tribble* court fail to cite *Arenado,* it did not question the maintainer's duty to users of the roadway. By contrast *Arenado* has been cited to support "no duty" holdings in two cases in which the claim was failure to supply power: *Levy v. Fla. Power & Light Co.*, 798 So.2d 778 (Fla. 4th DCA 2001); and *Palm Beach-Broward Medical Imaging Center, Inc. v. Continental Grain Co.*, 715 So.2d 343 (Fla. 4th DCA 1998).

The two out-of-state cases upon which *Martinez* relies, *White v. Southern Cal. Edison* and *Vaughan v. Eastern Edison* fail to meet the threshold test of consistency with *McCain*. Both cases were decided using a very un-*McCain*-like definition of duty, here quoted from the *White* opinion:[5]

> Duty is merely a *conclusory expression* used when the total sum of *policy considerations* lead a court to say that the particular plaintiff is entitled to protection. Duty is an allocation of risk determined by *balancing the foreseeability of harm, in light of all of the circumstances, against the burden to be imposed*. (Emphasis added.)

30 Cal.Rptr. at 435.

Vaughan quotes this passage from *White* and supplements it with this similar thought:

> . . . [T]he imposition of 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. (Quoting Prosser & Keaton, Torts, §93, at 671)

719 N.E.2d at 524.

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[5] Clay Electric incorrectly claims that *White* and *Vaughan* represent a "virtually unanimous" view in other jurisdictions that the maintainer of streetlights has no duty of care to motorists or pedestrians. In fact, as petitioner *Martinez* has ably demonstrated in his brief in the consolidated case, there are many decisions from other states holding that the maintainer of streetlights can be liable for negligent maintenance. To avoid unnecessary repetition, and because we believe that the correct resolution of this case lies in *McCain*, not in decisions from other jurisdictions, we will not cite them here. Instead, we refer the Court to pages 16 through 18 of Mr. Martinez' brief on the merits.

The *White/Vaughan* analysis thus calls upon courts to attempt, without standards, to guess at when the public good requires the imposition of a duty and when it does not. In the electric utility context that inquiry calls on judges to divine not only the effect of any given type of liability on rates but what cost is "too great" for the rate payers to bear.[6] With due respect to the courts that decided *White* and *Vaughan* we submit that such an approach confuses judges with legislators or public service commissioners. It is plainly *not* the approach taken in *McCain,* where this court chose a case against a public utility to announce duty principles applicable to all negligence defendants without a single reference to the potential effect of its decision on electric rates.

The Third District's reliance in *Martinez* upon "streetlight cases" from California and Massachusetts, coupled with the lack of any mention of the *McCain* standard, suggests that the *Martinez* court either overlooked *McCain* entirely or believed that *McCain* is, for reasons that it did not articulate, irrelevant to streetlight cases. This was a mistake. The answer to the duty issue in this case is to be found in *McCain,* not in *Arenado* or any decisions from other jurisdictions.

There is simply no reason to carve out an exception to *McCain's* duty rule in this negligent maintenance case. Clay Electric contractually committed itself to maintain specific streetlights and was paid to do so. Its failure to perform its agreed task only affected those specific streetlights and only posed a direct and foreseeable risk to users of the roadways served by those lights. Unlike a failure to supply power,

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[6] This is a task that courts are not, we suggest, equipped to perform. Courts decide cases on the basis of evidence. In the typical tort case against a business that sells a product or service to the public, there is no evidence at all on the potential effect of a particular liability on the cost of the defendant's product. There certainly was no such evidence in this case.

failure to maintain streetlights does not render inoperable other devices that are remote from the defendant's contractual duty. To borrow Chief Justice Cardozo's words in *H. R. Moch*, the risk that an accident will occur because of failure to maintain particular streetlights is "primary and immediate," rather than "incidental and secondary." Under the *McCain* foreseeable zone of risk analysis the decision of the First District should be approved.

II

CLAY ELECTRIC HAD A DUTY OF CARE REGARDLESS OF WHETHER ITS NEGLIGENCE CREATED A "TRAP OR UNEXPECTED DANGER."

Clay Electric enters the realm of legal fiction when it proposes the existence of a "trap" or "hidden danger" as a *sine qua non* for the existence of a duty to Johnson. Clay Electric argues that it had no duty to users of the roadway, because non-functioning streetlights do not "create a trap or unexpected danger." (Petitioner's Brief on the Merits, p. 15). Clay Electric cites no authority for this attempt to rewrite the law of negligence.

There is no principle of Florida tort law that says a defendant can only be liable if it creates a "trap or unexpected danger." It is curious that Clay Electric places its "trap" argument right after a citation of *Owens v. Publix Supermarkets, Inc.,* 802 So.2d 315 (Fla. 2001), which involved a danger that could not be less hidden or more commonplace: the presence of a foreign substance on a supermarket floor. Other cases, far too numerous for us to cite them all, hold that the openness of a danger does not preclude liability when the danger could be avoided by reasonable care.[7]

The creation of a "trap or hidden danger" as a prerequisite to liability is a principle that is peculiar to Florida's law of sovereign immunity. In the sovereign

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[7] For example, in *Auburn Machine Works Co., Inc. v. Jones,* 366 So.2d 1167 (Fla. 1979), this Court held that the obviousness of a hazard did not bar recovery in a product liability case, and in *Pittman v. Volusia Co.,* 380 So.2d 1192 (Fla. 5th DCA 1980), the Fifth District held that the occupier of real property can be held liable for negligent maintenance despite the obviousness of the hazard.

immunity area, the creation of a trap or hidden danger by a governmental entity may give rise to an "operational level" duty to warn or protect the public from the danger. That duty may render the governmental entity liable even though the creation of the danger resulted from a "planning level" decision normally shielded

by sovereign immunity. *See, e. g., City of St. Petersburg v. Collum*, 419 So.2d 1082 (Fla. 1982). Clay Electric's argument that it can be liable only if it created a trap has no relevance to this case, which must be decided under *McCain*, not sovereign immunity principles.

III

SECTION 324A OF THE RESTATEMENT (SECOND) OF TORTS ALSO REQUIRES A FINDING THAT CLAY ELECTRIC HAD A LEGAL DUTY OF CARE TO DANTE JOHNSON.

The First District found additional support for the existence of a duty in Section 324A of the Restatement of Torts, Second.[8] That section, which is quoted in the First District's opinion, provides:

> One who undertakes, gratuitously of for consideration, to render services to another which he should recognize as necessary for the protection of a third person . . . 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.

790 So.2d at 1146 (Emphasis in opinion of First District.)

Section 324A seems to have been written to describe this case, where Clay Electric undertook to render services for the JEA that it should have recognized as

[8] Section 324A was adopted by this Court in *Union Park Memorial Chapel v. Hutt* 670 So.2d 64 (Fla. 1996).

necessary for the protection of third persons, users of the roadway. Nonetheless, in an intricate but flawed argument, Clay Electric maintains that §324A does not control, because it requires the duty undertaken to be "owed by the other to a third person," and under §323 of the Restatement, the Jacksonville Electric Authority had no duty to Johnson. This argument fails because the premise is wrong. Under §323 and the common law of Florida, a governmental entity that installs safety devices on the roadways is liable for the negligent maintenance of those devices.

Section 323 reads as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Clay Electric argues that there is no increased risk under §323(a) when a streetlight is out because the night is dark anyway, and the inoperable light simply restores things to their natural order. This analysis misapprehends the baseline from which increased risk must be measured when a defendant has allegedly failed to maintain a safety device. In such cases, once the decision to install the safety device is made, the

degree of risk from which to determine whether risk has been increased is that degree of risk that exists when the safety device is functioning. This must be so or there could never be liability for failure to maintain a safety device.

Clay Electric cannot escape liability because it did not make the night dark by failing to maintain the streetlights. The manufacturer of a defective seat belt does not make the windshield hard, nor does one who fails to replace a smoke detector battery make his building combustible or a fire hot. Clay Electric's theory that affirmative creation of a danger is an essential element of duty would absolve all manufacturers and maintainers of safety equipment from liability that occurs when that equipment fails as a result of their fault.

The conclusion that a duty to maintain safety devices arises once a governmental entity makes the decision to install the device is spelled out in case law cited by the First District in its opinion. The First District cited *Department of Transportation v. Neilson*, 419 So.2d 1071 (Fla. 1982); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979); *Clark v. Polk County*, 753 So.2d 138 (Fla. 2d DCA 2000), *review denied*, 776 So.2d 276 (Fla. 2000); *Armas v. Metropolitan Dade County*, 429 So.2d 59 (Fla. 3d DCA 1983); and *Wallace v. Nationwide Mutual Fire Insurance Co.*, 376 So.2d 39 (Fla. 4th DCA 1979) for the proposition that "a governmental entity has a duty to maintain traffic lights and stop signs that it undertakes to provide." (790 So.2d at 1146).[9] This principle, the First District concluded, "logically applies to the present case." (Id.)

Since the Jacksonville Electric Authority did have a duty to maintain streetlights that it had installed, the First District applied §324A(b) correctly. Clay Electric can be

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[9] These decisions demonstrate that *Turbe v. Gov't of the Virgin Islands*, 938 F.2d 427 (3d Cir. 1991), which holds (in a criminal assault case) that a governmental entity is not liable for negligent maintenance of streetlights because the negligent maintenance does not make the street any more dangerous than it would be in the absence of streetlights is simply out of step with Florida law.

held liable in this case under §324A(b) because it was paid to perform a duty owed by the JEA to pedestrians using the roadway and failed to exercise reasonable care in its undertaking.

Although the First District did not emphasize subsections 324A(a) and (c), Clay Electric could be liable under those provisions as well. Clay Electric could be liable under (a), requiring increased risk, because, as noted above, negligent maintenance of a safety device does increase the risk of harm over the risk present when the device is functioning. It could be liable under (c), requiring reliance by the other (Jacksonville Electric Authority) because the record does not negate (as it must for summary judgment purposes) the reasonable possibility that the JEA, acting in reliance upon Clay Electric's maintenance undertaking, thought the matter was handled and, therefore, did not undertake to maintain the lights itself.

IV

THE SUMMARY JUDGMENT CANNOT BE SUSTAINED ON EITHER OF THE "ALTERNATIVE GROUNDS" RAISED BY CLAY ELECTRIC.

We opened our summary of argument in this brief by stating that the only "serious" issue in this case was the duty issue. We made that statement advisedly. In the final portion of its brief, Clay Electric throws together two arguments: that its liability is affected by the supposed fact that the lights in question are "security lights" and not streetlights; and that Clay Electric was entitled to summary judgment on proximate cause grounds. The first of these arguments, which states that Clay Electric's liability is "further

attenuated" if this Court finds the lights to be "security lights" is legally meaningless. The second argument, based on the theory that Dante Johnson's conduct was an intervening cause of the accident, was not a basis for Clay Electric's third motion for summary judgment, is not before this Court because it was never raised in the court of appeal, and has no merit.

. . . . . The streetlight/security light question is one of pure semantics. The trial court found that the lights were typical of lights found on roadways throughout Jacksonville and that if working they would have shed enough light on the street to avoid the accident. In a statement that is grossly unfair to all judges who considered this case below, Clay Electric suggests that the First District simplistically "labeled this a streetlight simply because it was somewhere near the road." (Clay Electric's Brief on the Merits, p. 36). It would have been more candid for Clay Electric to have acknowledged that perhaps the First District "labeled" these lights streetlights because the trial court found them to be indistinguishable from streetlights and that they would have protected pedestrian Johnson from being run over.

Having said its misleading piece about the First District's finding that the lights were streetlights, Clay Electric cannot quite bring itself to claim that the label one places on these lights is dispositive in this case. Instead, it observes without conviction that its liability would be "further attenuated" if this Court concludes that the label "security lights" is more accurate than "streetlights." (Petitioner's Brief on the Merits, p. 37).

The issue at bar is whether a summary judgment was properly granted. We are not aware of any legal principle that summary judgment should be granted where liability is "attenuated" or "further attenuated," whatever those terms mean. In any event, there is no evidence that contradicts the trial court's uncontested findings that these lights, whatever their label, were typical of lights lining the streets of Jacksonville and would have prevented the accident if they had been working.

lay Electric's proximate cause argument is so perfunctory, so incorrect and so irrelevant to the only issue in this case that one suspects that Clay made it for the sole purpose of bringing before this Court otherwise irrelevant facts that relate only to comparative negligence, such as Dante Johnson's grandmother's advice to walk on the left and the fact that he had been in a similar accident one year earlier. Clearly, the possibility that a pedestrian might walk on the street with the traffic is not unforeseeable, so that Johnson's conduct is not an unforeseeable intervening cause as a matter of law. *See Gibson v. Avis Rent-A-Car System, Inc.*, 386 So.2d 520 (Fla. 1980).

The intervening cause question is not even properly before this Court. Intervening cause was not a ground for Clay Electric's third motion for summary judgment, was not mentioned by the trial court in its order granting that motion, and was not briefed by the parties in the First District.[10] Nonetheless, Clay Electric asserts,

[10] We have included the summary of argument from Clay Electric's answer brief in the First District to demonstrate that Clay Electric failed to make an intervening cause argument in the court of appeal.

this Court should treat intervening cause as an issue in this case as part of its "de novo review" of an order granting summary judgment. (Petitioner's Brief on the Merits, p. 37). This assertion misapprehends this Court's decisions in *Major League Baseball v. Morsani,* 790 So.2d 1071 (Fla. 2001) and *Volusia County v. Aberdeen at Ormond Beach, L.P.,* 760 So.2d 126 (Fla. 2000), from which Clay Electric draws the "de novo" language. Those cases simply stand for this principle of appellate review, stated in *Morsani:*

> The standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo.

790 So.2d at 1074.

Neither case suggests that, having accepted jurisdiction on conflict grounds, this Court can rule on an issue that was not even before the trial court, much less the Court of appeal. Nor does Clay Electric explain how intervening cause, so clearly a question of fact under *Gibson,* becomes a "pure question of law." Although this Court does have discretion to decide issues other than the issue upon which its jurisdiction is based,[11]

[11] In *Savoie v. State,* 422 So.2d 308 (Fla. 1982), this Court held that it had discretion to consider all issues "properly raised in the appellate process, as though the case had originally come to this Court on appeal." (422 So.2d at 312). This discretion is limited

there is no reason for it to exercise that discretion to consider an issue not even raised in the court of appeal.

CONCLUSION

The decision of the First District Court of appeal reversing the summary judgment entered in favor of Clay Electric should be approved.

Respectfully submitted,

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to issues "properly briefed and argued." (Id.). The intervening cause question has not been properly raised in the appellate process. This Court should not consider it.

MERCIER,

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The undersigned counsel hereby respectfully certifies that the foregoing brief complies with the font requirements of Fla. R. App. P. 9.210, and has been typed in Times New Roman, 14 Point.

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