IN THE SUPREME COURT OF FLORIDA

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

IVAN MARTINEZ, ETC., ET AL., *VS.* FLORIDA POWER & LIGHT CO.
CLAY ELECTRIC COOPERATIVE *VS.* DELORES JOHNSON, ET AL.
CLAY ELECTRIC COOPERATIVE, ETC. *VS.* LANCE, INC., ETC., ET AL.

Petitioner(s) **Respondent(s)**

ON APPEAL FROM THE
DISTRICT COURT OF APPEALS,
THIRD AND FIRST DISTRICTS

BRIEF OF TAMPA ELECTRIC COMPANY AND EDISON ELECTRIC INSTITUTE AS AMICI CURIAE IN SUPPORT OF FLORIDA POWER & LIGHT CO. AND CLAY ELECTRIC COOPERATIVE, INC.

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INTRODUCTION

This brief of amici curiae is submitted by Tampa Electric Company ("Tampa Electric") and the Edison Electric Institute ("EEI") in support of the positions of respondent Florida Power & Light Company ("Florida Power & Light") and petitioner Clay Electric Cooperative, Inc. ("Clay Electric"). Tampa Electric is an investor–owned electric utility whose retail operations are regulated by the Florida Public Service Commission and whose wholesale sales and service and other operations are regulated by the Federal Energy Regulatory Commission. Tampa Electric provides service to approximately 600,000 Florida customers over a four county, 2,000 square mile area. Tampa Electric provides service to over 65,000 streetlights.

EEI is the association of the nation's shareholder-owned electric utility companies and industry affiliates and associates worldwide, including companies that generate, transmit and distribute electricity and provide an array of energy and other services to their customers. Organized in 1933, EEI works closely with its members, representing their interests and advocating equitable policies in legislative, regulatory and judicial arenas. Together, EEI's U.S. members serve nearly 95 percent of the customers of

the shareholder-owned segment of the industry and about 70 percent of all consumers of electricity in the United States, generating and delivering almost 70 percent of the country's electricity.

STATEMENT OF THE CASE AND FACTS

Tampa Electric and EEI adopt the statement of the case and facts set forth in petitioner Florida Power & Light's brief on the merits and in Clay Electric's answer brief with the following addition:

Tampa Electric and EEI moved this Court for leave to appear as amici curiae on 27 June 2002.

QUESTION PRESENTED

Whether the majority rule that a public utility owes no duty to pedestrians to insure that streetlights remain lit applies when a utility has a non-specific, undefined obligation to "maintain" streetlights and, if not, what rule should replace the no duty rule?

SUMMARY OF ARGUMENT

Nothing in *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), the Restatement (Second) of Torts §§ 323 – 324A (1965) ("Restatement of Torts") or any other Florida case justifies adopting the minority implied duty rule stated in *Johnson v. Lance, Inc.*, 790 So. 2d 1144 (Fla. 1st DCA 2001) ("Implied Duty Rule") and rejecting the traditional, majority no duty rule set forth in *Martinez v. Florida Power & Light Co.*, 785 So. 2d 1251 (Fla. 3d DCA 2001) ("No Duty Rule"). Specifically, a utility has no duty to a non-customer pedestrian to insure that streetlights remain illuminated even if one assumes that the utility has a non-specific, undefined obligation to "maintain" streetlights.[1]

Alternatively, even if one accepts the premise in *Johnson* that Florida precedent and the Restatement of Torts warrant abandoning the No Duty Rule when a utility enters into a contract to maintain streetlights, Florida precedent, sound policy considerations, and common sense dictate scrutiny of the specific responsibilities and obligations set forth in the written contract

[1] Similar to *Arenado v. Florida Power & Light Co.*, 541 So. 2d 612 (Fla. 1989), "non-customer" means a person who is not a party to a contract between a utility and a governmental entity to maintain streetlights.

between the utility and the governmental entity to determine the measure of the duty that the utility has agreed to undertake for non-customers.[2] Absent a clear and unambiguous written agreement by the utility to assume specific responsibilities and obligations to non-customers, the utility should have no duty to non-customers based on its contract or undertaking with a governmental entity to "maintain" streetlights.

[2] Even if the specific holding in *Johnson*, 790 So. 2d 1144, is upheld, Florida Power & Light is entitled to an affirmance in *Martinez*, 785 So. 2d 1251, because *Martinez* never alleged that there was a contract to maintain the streetlights.

ARGUMENT

I. THE MAJORITY NO DUTY RULE

A. A UTILITY OWES NO DUTY TO NON-CUSTOMER PEDESTRIANS TO INSURE THAT STREETLIGHTS REMAIN LIT UNLESS THE DUTY IS BASED ON A STATUTORY OBLIGATION OR IS BASED ON AN EXPRESS ASSUMPTION OF LIABILITY TO NON-CUSTOMERS IN A CONTRACT.

The majority No Duty Rule states that, absent an obligation created by statute or absent an express assumption of liability in a contract, a utility owes no duty to a non-customer if the non-customer is injured as a result of a malfunctioning streetlight. In the instant consolidated case, there is no allegation that either Florida Power & Light or Clay Electric Cooperative violated a statute.[3] The seminal case articulating the No Duty Rule is *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160 (1928).

Former Supreme Court Chief Justice Cardozo authored the decision in *H.R. Moch* holding that there is no contractual or tort duty owed by a utility to non-customers. In *H.R. Moch*, Cardozo explains that every contract

[3] Therefore, this Brief of Amici Curiae contains no further discussion of a statutory duty.

between a utility and a governmental entity, not improvident or wasteful, is for the benefit of the public. *H.R. Moch*, 247 N.Y. at 164. However, for the contract to create legal rights for the non-customer, "the benefit . . . 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." *H.R. Moch*, 247 N.Y. at 164 (citations omitted). With respect to contracts between utilities and governmental entities to provide water services, Cardozo viewed those benefits to the public as "incidental rather than immediate, an assumption of the duty of the city and not to the inhabitants." *H.R. Moch*, 247 N.Y. at 165; *see also, German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220 (1912).

In articulating the policy behind the No Duty Rule, *H.R. Moch* recognizes that "the field of obligation would be extended beyond reasonable limits if less than [an assumption of a duty to make reparation directly to the individual members of the public] were to be demanded as a condition of liability." 247 N.Y. at 164. Specifically, *H.R. Moch* explains the policy considerations as follows:

> If the plaintiff is to prevail, one who negligently omits to supply sufficient pressure to extinguish a fire started by another

> assumes an obligation to pay the ensuing damage, though the whole city is laid low. A promisor will not be deemed to have had in mind the assumption of a risk so overwhelming for any trivial reward.

247 N.Y. at 166.

As above, *H.R. Moch* also holds that no tort duty arises between a utility and a non-customer based on the utility's contract with a governmental entity. 247 N.Y. at 167. In determining that no tort duty is present, *H.R. Moch* states that the conduct necessary to create a duty must not merely withhold a benefit, but the conduct must result "positively or actively in [producing] an injury." 247 N.Y. at 167-69. *H.R. Moch* analyzes the duty in tort cases as follows:

> The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good.

247 N.Y. at 168 (emphasis added).

H.R. Moch refused to adopt the Implied Duty Rule now urged by the claimants. *H.R. Moch* rejects such a global rule because as a matter of sound policy "liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty." 247 N.Y. at 168. *H.R. Moch* further

states the policy behind finding no tort duty owed by a utility to a non-customer as follows:

> Everyone making a promise having the quality of a contract will be under a duty to the promisee by virtue of the promise, but under another duty apart from contract, to an indefinite number of potential beneficiaries when performance has begun. The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together. Again, we may say in the words of the Supreme Court of the United States, 'the law does not spread its protection so far.'

247 N.Y. at 168, *quoting Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927).

Based on its sound reasoning and policy arguments, *H.R. Moch* is the basis for the No Duty Rule adopted in Florida (with the exception of *Johnson*) and by a majority of other states. *See Arenado,* 541 So. 2d 612 (electric utility had no duty to a non-customer automobile driver for interruption of power to traffic control device); *Levy v. Florida Power & Light Co.*, 798 So. 2d 778 (Fla. 4th DCA 2001)(electric utility had no duty to a non-customer bicyclist for interruption of power to traffic light); *Martinez,* 785 So. 2d 1251 (electric utility had no duty to a deceased pedestrian to maintain or repair non-functioning streetlight); *Abravaya v. Florida Power & Light Co.*, 39 Fla. L. Weekly Supp. 153 (Fla. 11th Cir. Ct. 1973)(electric utility owed no duty to non-customer automobile driver for non-functioning

traffic signal); *see also, Turbe v. Government of the Virgin Islands,* 938 F. 2d 427 (3d Cir. 1991)(utility has no common law duty to maintain street lights); *East Coast Freight Lines v. Consolidated Gas*, 50 A. 2d 246 (Md. 1946)(gas and electric utility owes no duty to truck drivers or truck passengers with respect to non-functioning streetlights that the utility had contracted to maintain);[4] *Vaughan v. Eastern Edison Co.*, 719 N.E. 2d 520, (Mass. App. Ct. 1999)(in holding that an electric utility owes no duty to

[4] Even with respect to the cases cited by the Martinez Petitioners' Brief on the Merits in support of the minority Implied Duty Rule, most of the cases are completely distinguishable: *Ridley v. Collins*, 590 S.W. 2d 69 (Mich. Ct. App. 1998)(duty analysis based on state statute); *Wojdyla v. Northeast Utilities Service Companies*, No. CV960132686, 1997 WL 429595, (Conn. Super. Ct. July 17, 1997)(unpublished opinion where utility's duty was found based on state agency regulation); *Espowood v. Connecticut Light & Power*, No. CV960563747, 1997 WL 220091 (Conn. Super. Ct. April 23, 1997)(unpublished opinion where utility's duty was found based on state agency regulation); *Cossu v. JWP Inc.*, 661 N.Y.S. 2d 929 (N.Y. 1997)(duty found based on contract setting forth utility's responsibilities and obligations including agreement to "indemnify and hold city harmless . . ."); *Withers v. Regional Transit Authority*, 669 So. 2d 466 (La. 4th Ct. App. 1996)(recognizing importance of (a) terms and conditions of contract including utility's agreement to "indemnify and save harmless city from all suits and actions . . . and (b) duty based on statute); *Lemire v. New Orleans Public Service Inc.*, 538 So. 2d 1151 (La. 4th Ct. App. 1989) (duty was found based on a statute); *Wilson v. Kansas Gas and Electric Co.*, 744 P. 2d 139 (Kan. 1987)(holds contract setting forth utility's responsibility and obligation was properly admitted into evidence without objection); *Todd v. Northeast Utilities*, 484 A. 2d 247 (Conn. Super. Ct. 1984)(duty was found based on state agency regulation).

injured pedestrian with respect to non-functioning streetlights, the court states "cases in other jurisdictions almost uniformly hold that utilities are not liable to third persons for injuries caused by non-functioning street lights"); *White v. Southern California Edison Co.,* 30 Cal. Rptr. 2d 431 (Cal. 5th Dist. App. 1994)(electric utility owes no duty to motorist with respect to non-functioning streetlights that the utility has contracted to maintain); *Shafouk Nor El Din Hamza v. Bourgeois*, 493 So. 2d 112 (La. 5th Ct. App. 1986)(electric utility owes no duty to pedestrian with respect to non-functioning streetlight that the utility had a contract to maintain); *Ahmed v. Burns*, No. CA9900004D, 2000 WL 1511756 (Mass. Super. September 20, 2000)(ordinarily, utility owes no duty to injured pedestrian with respect to non-functioning streetlights that the utility has contract to maintain).

More importantly, *H.R. Moch* is consistent with *Arenado*, 541 So. 2d 612, *Woodbury v. Tampa Waterworks Co.*, 49 So. 556 (Fla. 1909), and *Mugge v. Tampa Waterworks Co.*, 42 So. 81 (Fla. 1906). The crux of *H.R. Moch, Arenado, Woodbury,* and *Mugge* is that a utility, which has an obligation to the city to maintain water or electric facilities that ultimately benefit the public, is not liable under theories of contract or tort based on the non-functioning of those facilities unless the utility assumes all liabilities to

the public arising from the installation or the maintenance of those facilities. *Arenado,* 541 So. 2d at 614 (duties in *Woodbury* and *Mugge* were "predicated upon special language [stating that the waterworks company should assume all liabilities to persons and property from constructing or operating the water system] in the Tampa Waterworks' Contract"); *Woodbury*, 49 So. at 560 (contract between the City of Tampa and Tampa Waterworks states "the waterworks company 'shall assume all liabilities to persons and property arising from constructing or operating said works'"); *Mugge*, 42 So. at 81 (contract between the City of Tampa and Tampa Waterworks states "the waterworks company should assume all liabilities to persons and property for constructing or operating the same."); *see also, H.R. Moch*, 247 N.Y. at 164 (non-customer may not pursue a cause of action based on breach of contract "unless an intention appears that the promisor is to answerable to individual members of the public as well as to the city for any loss ensuing from the failure to fulfill the promise."). Here, neither Florida Power & Light nor Clay Electric agreed to "assume all liabilities to persons or property" for installing or maintaining streetlights. Neither utility owed the non-customer a duty to make sure the streetlights were operating at the time of the accident. *Arenado*, 541 So. 2d at 614

("'The contract of the [utility] is the measure of its duty to the property owner,'" quoting, *Mugge*, 42 So. at 86).

Moreover, the No Duty Rule and the foregoing cases are consistent with *McCain*, 593 So. 2d at 500. *McCain* addresses whether a duty exists as follows:

> Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon the defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.

593 So. 2d at 503 (emphasis added). *McCain* focuses on "creat[ing] a foreseeable zone of risk" and placing a duty on the defendant to take affirmative action to "lessen the risk [that the defendant creates] or to see that sufficient precautions are taken to protect others from the harm [that the defendant's conduct creates]." 593 So. 2d at 503. *McCain* is consistent with the statement in *H.R. Moch* that "the query always is whether the putative wrongdoer has . . . launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good." 247 N.Y. at 168 (emphasis added).

For example, if a utility installs streetlights in a manner that blinds or otherwise obstructs the vision of operators of motor vehicles or pedestrians,

the utility has "created a foreseeable zone of risk" within the meaning of *McCain* and in "launch[ing] a force or instrument of harm" within the meaning of the synonymous description in *H.R. Moch*. In the foregoing example, *McCain* would require the utility to "lessen the risk" or "[take] sufficient precautions . . . to protect others" by affirmatively reconfiguring the blinding or obstructing lights, diverting traffic or pedestrians away from the lights, or taking similar precautions. *McCain*, 593 So. 2d at 503.

McCain addresses only the creation of a risk or a zone of danger (lights shining in the eyes of automobile operators) and not situations involving a remote contractual obligation to confer a benefit (maintaining lighting pursuant to a contract) or other obligation. In the latter circumstances, the utility's failure to fulfill the alleged contractual duty and insure enhanced lighting returns automobile operators and pedestrians on the roadway at night to the same circumstances that pre-existed streetlights. Automobile operators and pedestrians are returned to the situation present on many unlit roadways wherein automobiles rely on their own lights to drive. *See, e.g., Acree v. Hartford South Inc.,* 724 So. 2d 183, 185 (Fla. 5th DCA 1999). Automobiles are equipped with lights so that they are safe to operate at night. Pedestrians are expected to protect themselves by refraining from

walking in roadways or crossing roadways when traffic, as observed by approaching automobile lights, makes walking in the roadway or crossing the roadway dangerous. *Acree*, 724 So. 2d at 185; Fla. Stat. § 316.130(10) (2001); Fla. Stat. 316.130(12) (2001)[5]. Thus, *McCain* and *H.R. Moch* are consistent in that neither creates a pure tort duty to non-customer pedestrians based on a contract obligation between a utility and a governmental entity to confer a benefit in the foregoing streetlights.

Likewise, the Restatement of Torts does not create a global duty to all non-customers based on a utility's contractual obligations with a governmental entity. Section 324A of the Restatement of Torts states as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

[5] Section 316.130(10) provides that "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." Section 316.130(12) provides that "No pedestrian shall, except in a marked crosswalk, cross a roadway at any other place than by a route at right angles to the curb or by the shortest route to the opposite curb."

> (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.

Subsection (a) of Section 324A does not apply because the failure to maintain streetlights does not increase any risk when compared with the risk of having no lights. Likewise, subsection (c) is not applicable because there is no record evidence that either Albert Martinez, Dante Johnson or the respective utility relied on the utility's contract or undertaking with the governmental entities in selecting Albert Martinez or Dante Johnson's walking route or point for crossing the street.

Although *Johnson* recognizes that neither subsections (a) or (c) apply, *Johnson* found a duty based on subsection (b). 702 So. 2d at 1146. However, like subsections (a) and (c), subsection (b) of Section 324A is not applicable to this consolidated case. *See Minnison v. Allright Miami, Inc.*, 732 So. 2d 389, 391 (Fla. 3d DCA 1999) (contract or undertaking must assume complete responsibility and obligation for subsection (b) to apply); *Hutchinson v. Progressive Corp.*, 984 F. 2d 1152, 1156-57 (11th Cir.

1993)(contract or understanding must assume complete responsibility and obligation for subsection (b) to apply under Georgia law).

In *Vaughan*, a pedestrian struck by a vehicle in a crosswalk sued the electric utility for negligently maintaining a street light. 719 N.E. 2d at 520. The plaintiff asserted support for his position based upon Section 324A. *Vaughan,* 719 N.E. 2d at 520. In rejecting the plaintiff's position and in adopting the No Duty Rule, *Vaughan* states:

> The few Massachusetts cases finding a duty to a third party under the rational of Section 324A are distinguishable because the injured party was within a more readily defined class of those at risk and could not have protected herself by independent inspection or observation . . . Furthermore, the Plaintiff has shown neither the increased risk nor the detrimental reliance that Section 324A requires. Section 323(a), which 'parallels' Section 324A(a), see Restatement (Second) of Torts, Section 324A comment a, 'applies only when the Defendant's actions have increased the risk of harm to the Plaintiff relative to the risk that would have existed had the defendant never provided the services initially . . . [T]he Defendant's negligent performance must some how put the Plaintiff in a worse situation than if the Defendant had never begun the performance.' '. . . [T]he failure to maintain an installed street light does not create a risk greater than the risk created by the total absence of a streetlight.' . . . In order to show reliance under Section 324A(c), the plaintiff must show that she 'changed [her] position in reasonable reliance on the Defendant's provision of protective services, and is thereby injured when the Defendant fails to perform those services competently.'

719 N.E. 2d at 525 (citations omitted).

In *Turbe*, the plaintiff was attacked while walking the street at night and sued the Virgin Islands water and power authority for failure to repair the street lights in the area of the attack. 938 F. 2d at 427. In holding that the utility owed no duty to the plaintiff to repair the street lights, the court reasoned that the requirements of Sections 323 and 324A were not satisfied. Specifically, the court concluded that there was no reliance or increased risk of harm by the defendant's alleged negligence.

In addressing the increased risk requirement, *Turbe* found that the defendant's "failure to repair the street lights" did not "launch a force or instrument of harm," but is alleged only to have facilitated a third party attack. 938 F. 2d at 433. In noting that the plaintiff did not change his position in any way in response to the presence of street lights as to the alleged increased risk, the court found:

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

Turbe, 938 F. 2d at 432.

In *Fishbaugh v. Utah Power & Light*, 969 P. 2d 403 (Utah 1998), the Supreme Court of Utah held that Section 323 did not support a duty on the part of municipality to maintain street lights. The court stated:

> [L]iability under that section is generally limited to instances where failure to exercise reasonable care in the undertaking has placed the injured party in a worse position than he would have been in had the undertaking not occurred, or where the injured party relies upon the undertaking. In the present case, the lack of lighting did not put [the plaintiff] in a worse position than if the street lights had never been installed, and there is no suggestion of reliance.

969 P. 2d at 407 (citations omitted).

Moreover, *Johnson's* statement that, because a governmental entity owes a duty to the motoring public to maintain traffic lights and stop signs, the governmental entity owes that same duty with respect to streetlights is unsupported. 790 So. 2d at 1146. *Johnson* cites no authority for its proposition and no case in Florida supports *Johnson's* "leap" from traffic lights and stop signs to streetlights. 790 So. 2d at 1146. Although *Commercial Carriers v. Indian River County*, 371 So. 2d 1010 (Fla. 1979) refers to a governmental entity's duty to maintain existing traffic control devices, there is no concomitant case law for streetlights. Traffic lights and

stop signs serve completely different functions from streetlights. In this consolidated case, subsection (b) of Section 324A does not apply.[6]

In summary, *Martinez* correctly applied the No Duty Rule. *Martinez* recognizes as this Court did in *Arenado* that, absent a statute imposing a duty and absent an express assumption of liability, a utility assumes no duty to a non-customer by entering into a contract with the governmental entity and not with the non-customer to maintain streetlights. Sound policy decisions and logic first articulated by this Court in *Mugge*, reiterated by Judge Cardozo in *H.R. Moch* and recently reaffirmed by this Court in *Arenado,* mandate the application of the No Duty Rule in cases wherein the utility's alleged duty to non-customers is rooted solely in an alleged contract or an alleged undertaking to maintain streetlights.

[6] Even if subsection (b) is remotely applicable to this consolidated case, a utility certainly can have no responsibility beyond the performance of the duty that the utility has "undertaken to perform." As discussed under the Express Contractual Duty Rule set forth below, the only correct measure for determining the duty that the utility has "undertaken to perform" is the specific terms and conditions of the agreement between the utility and the governmental entity.

B. POLICY BEHIND THE NO DUTY RULE

The No Duty Rule stands on sound public policy. Tort law is based on balancing the extent of the zone of danger with the cost of preventing accidents. Typically, the greater the zone of danger or risk created by a party, the greater that party's obligation becomes to prevent the accident. *McCain* reaffirms this balance in stating:

> [A]s the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken.

593 So. 2d at 503. The No Duty Rule maintains this key balance in confirming that a utility has no obligation to prevent accidents involving non-customers for streetlight outages based solely on the utility's contractual obligation with a governmental entity to "maintain" the lights. Conversely, the *Johnson* Implied Duty Rule would impose an incalculable burden on utilities to prevent streetlight outages even though the risk created by a specific streetlight outage is minimal.

Pedestrians and automobiles navigate safely on many unlit streets in Florida and nationwide. Absent negligence on the part of the pedestrian or the automobile operator or both, there is simply no reason that an accident must occur between a pedestrian and an automobile even on an unlit street.

Pedestrians and automobile drivers are the persons in the best position to eliminate or reduce the risk of pedestrian accidents. *See Acree,* 724 So. 2d at 185 and footnote 6 above. Apparently, the claimants justify turning the traditional allocation of risk on its head because the utilities are perceived as "deep pockets."

By utilizing the claimants' deep pocket approach, the claimants fail to recognize that all electric utilities in the State of Florida are subject to the policies of the Florida Public Service Commission regarding cost based rates. In short, the rates charged to utility customers in Florida are intended to track the cost of providing the service. Unfairly passing the risk for pedestrian accidents to the utilities will simply require the utilities to shift the burden to the rate payer through increased rates. Clearly, the cost outweighs the limited benefit to victims of accidents caused by streetlight outages.

Notwithstanding recent events in California and other states where the crushing result of increased rates is obvious, the claimants continue to ignore the catastrophic end result of imposing an unreasonably great burden on utilities to (arguably) eliminate a minimal risk. And, as above, the claimants' distortion of traditional tort principles through unfairly shifting the burden to the rate payers increases from grossly inequitable to intolerable when one

considers that the only alleged justification for such a burden shifting is a remote contract or undertaking between the utility and the governmental entity.

The claimants do not afford proper weight to the fact that the cost of making utilities insurers with respect to streetlights is grossly disproportionate to the price that the public is willing to pay for such a service. The expense of compelling a utility to ensure that street lights are continually operating outweighs any potential risk. Ultimately, if the Implied Duty Rule is accepted by the Court, one or more utilities in Florida applying a cost-benefit analysis could consider declining any further involvement with the repair of non-functioning streetlights and, thus, force local governments to assume the burden of insuring that streetlights remain lit without any assistance from utilities.

In summary, as stated succinctly in *White*:

> To [abandon the No Duty Rule] would expand the field of obligation of a public utility beyond reasonable limits and impose a crushing burden.
>
> * * *
>
> The 'big bang theory' which suggests that the universe is ever expanding is not applicable to the liability of [public utilities]. (brackets in original)

30 Cal. Rptr. 2d at 436.

II. AN ALTERNATIVE: THE EXPRESS CONTRACTUAL DUTY RULE

A. IF THE COURT ABANDONS THE MAJORITY NO DUTY RULE WHEN A UTILITY HAS A NON-SPECIFIC, UNDEFINED OBLIGATION TO "MAINTAIN" STREETLIGHTS, THE NEW RULE SHOULD REQUIRE A CLEAR AND UNAMBIGUOUS AGREEMENT IN WRITING SETTING FORTH THE SPECIFIC RESPONSIBILITIES AND OBLIGATIONS THAT THE UTILITY HAS AGREED TO UNDERTAKE.

Even if this Court declines to follow the No Duty Rule, the Court's new test for the extent of a utility's duty to a non-customer should limit any duty to the specific obligations agreed to by the utility in the contract between the utility and the governmental entity. Absent an express written agreement by the utility to accept specific obligations or responsibilities to non-customers, the new rule should recognize that the utility has no duty to a non-customer. Imposing a duty based solely on the express responsibilities and obligations agreed to by the utility in a written contract is consistent with existing Florida Supreme Court precedent, rational policy considerations, and the Restatement of Torts.

All existing Florida precedent recognizes that, absent a utility's specific contractual obligation or undertaking to the contrary, there is no legal

basis for imposing a duty on a utility to locate extinguished streetlights or to repair the extinguished streetlights within a specific period of time. *Arenado*, 541 So. 2d 612; *Woodbury*, 49 So. 556; *Mugge*, 42 So. 81; *Levy*, 798 So. 2d 778; *Johnson*, 790 So. 2d 1144; *Martinez*, 785 So. 2d 1251; *Abravaya*, 39 Fla. L. Weekly Supp. 153. Therefore, fairness, sound public policy, and common sense dictate that no duty should be imposed on a utility absent an express intention by the utility to accept a specific responsibility, obligation or undertaking (the "Express Contractual Duty Rule").

Under the Express Contractual Duty Rule, vague and unsupported allegations that a utility has a contract to "maintain" streetlights or has undertaken to "maintain" streetlights would be insufficient to state a cause of action against the utility for failing to locate or repair non-functioning lights within a reasonable time. Because of the soundness of the existing No Duty Rule and in view of existing Florida Supreme Court precedent recognizing an exception to the No Duty Rule only when a utility assumes specific liabilities to non-customers, any contract alleged to demonstrate a specific intent for a utility to accept obligations and responsibilities above and beyond the No Duty Rule should be in writing. *Arenado*, 541 So. 2d at 613-14; *Woodbury*, 49 So. at 560; *Mugge*, 42 So. at 81. Like any contract case, the contract

supporting the allegations should accompany the complaint. Rule 1.130(a), Fla.R.Civ.P.

The distinction between pure tort based duties and tort duties based on a contract was recognized by this Court in *Mugge* and *Woodbury* as early as 1906 and 1909, respectively. In *Mugge* and *Woodbury,* the contract stated that "[the utility shall] assume all liabilities to persons and property arising from constructing or operating said works." 42 So. at 81; 49 So. at 560. Based on an expressed acceptance of liability and other specific and comprehensive terms in the written agreement, *Mugge* and *Woodbury* determined that the utility had a duty to non-customers.

The absolute importance of the specific contractual language was not lost on this Court in *Arenado.* The Court determined that the Fourth District Court of Appeals adoption of the No Duty Rule, as articulated in *H.R. Moch* and *Abravaya*, did not conflict with *Mugge* and *Woodbury*. The Court found no conflict in *Arenado* based on the following conclusion:

> We now agree that *Mugge* and *Woodbury* were predicated upon special language in the Tampa Waterworks Contracts which does not appear [in *Arenado*] '[t]he contract of the water company is the measure of its duty to the property owner.' (emphasis added)

541 So. 2d at 614.

The foregoing authorities provide the underpinnings of the Express Contractual Duty Rule. Because a utility's contract with a governmental entity is the "measure of its duty [or undertaking] to the [non-customers]," the utility's duty to the non-customers should be restricted to those responsibilities and obligations specifically accepted and set forth in a written contract. *Arenado*, 541 So. 2d at 613-14. As a corollary, any alleged "duty" not specifically set forth in the written contract would violate the Express Contractual Duty Rule and, more importantly, violate the mandate set forth in *Arenado, Woodbury* and *Mugge.*

Determining the scope of a contractual based tort duty by examining the specific responsibilities and obligations that the utility has agreed to undertake is consistent with *McCain*. *McCain* attempts to define general tort obligations in situations where neither party has a direct or implied contractual obligation to the other party. *McCain* simply does not address contract based tort obligations. The extent of tort duties based on a contract is clearly stated by *Arenado*: "[t]he contract of the [utility] is the measure of its duty." 541 So. 2d at 613-14.

Likewise, the Restatement of Torts is inapposite. Even if one attempts to apply subsection (b) of Section 324A as in *Johnson*, 790 So. 2d 1144,

this Court's decisions in *Arenado, Woodbury* and *Mugge* dictate that the specific obligations in the contract define the "measure" of the undertaking and the utility should not have any obligation beyond the responsibilities, obligations or undertakings specifically set forth in the agreement.

The strength, fairness and wisdom of the Express Contractual Duty Rule was not lost on Judge Polston in the concurring opinion in *Johnson*, 790 So. 2d at 1147. Judge Polston recognizes that a utility owes no duty beyond the specific obligations agreed to, and set forth, in the contract between the utility and the governmental entity. *Johnson,* 790 So. 2d at 1148. Judge Polston reemphasized *Arenado's* dictate that the utility company's contract "is the measure of the duty" to the non-customer. *Johnson,* 790 So. 2d at 1148. Finally, Judge Polston recognized the key element of the alternative rule in stating as follows:

> Because I do not know what the contractual terms are that Clay Electric allegedly has with either JEA or the City of Jacksonville, I cannot yet determine as a matter of law what the measure of Clay Electric's duty is to the Plaintiffs, if any.

790 So. 2d at 1148.

In summary, if this Court does not continue to apply the No Duty Rule, it should adopt the Express Contractual Duty Rule. The Express Contractual Duty Rule is grounded in sound policy and existing Florida

Supreme Court precedent. Because the only possible basis for a utility's alleged duties or undertaking to a non-customer is the utility's contract with a governmental entity, sound public policy and fairness demand that scrutiny of the terms and conditions of the contract is required to determine the specific extent of the responsibilities and obligations assumed by the utility. Inherent in the Express Contractual Duty Rule is the corollary that, absent an express agreement by the utility to accept a specific responsibility or obligation to the non-customer, there is no duty owed by the utility to the non-customer. Finally, the Express Contractual Duty Rule should require any contract purporting to set forth the utility's specifically assumed obligations and responsibilities to be in writing.

CONCLUSION

This Court should affirm *Martinez* and reverse *Johnson* based on the No Duty Rule. Even if the Court rejects the No Duty Rule, the Court should adopt the Express Contractual Duty Rule. Under the Express Contractual Duty Rule, this Court should affirm *Martinez* and reverse *Johnson* because neither claimant alleged that the utility agreed in writing to accept or undertake the specific responsibility or obligation of locating non-functioning streetlights and repairing those lights within a specific period of time.

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CERTIFICATE OF SERVICE

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I hereby certify that the foregoing brief complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

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