IN THE SUPREME COURT OF FLORIDA

WALTER GOLDBERG, etc., et al.

Petitioners,

vs.

Florida Power & Light Company,

Respondent.

Supreme Court Case No.: SC03-1942

DCA Case No.: 3D00-63
L.T. Case No.: 97-24243-CA-27

Respondent Florida Power & Light Company's Answer Brief

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STATEMENT OF THE CASE

I. Statement of Proceedings.

Plaintiffs brought this wrongful death case in the Miami-Dade Circuit Court as the personal representatives of the estate of their deceased daughter. (R1 28-34).[1] Plaintiffs' daughter was killed in an automobile accident. Plaintiffs alleged that Florida Power & Light Company ("FPL") was liable for her death because, in the course of repairing a power line downed by lightning in a nearby residential neighborhood, the utility had terminated the power to a traffic signal at the intersection where the accident occurred.

The case was tried to a jury, which awarded plaintiffs $37 million in damages for pain and suffering. (R2 229-31). FPL asked the trial court to enter a directed verdict and a judgment notwithstanding the verdict. (R2 282-94). FPL also requested a new trial. (R2 242-65, 295-302). The trial court denied both motions. (R3 541-558).

On appeal, the Third District Court of Appeal affirmed. Florida Power & Light Co. v. Goldberg, 856 So. 2d 1011 (Fla. 3d DCA 2002). Judge Cope

[1] The Record in this case is in ten-volumes — volumes one through four contain selected filed papers and hearings, and volumes five through ten contain the trial transcript. References to the filed papers shall be in the form, (R[volume number] [page number]). References to the trial transcript shall be in the form (T. [page number]). There is also a supplemental record in this case that contains the trial exhibits. Such references shall be in the form (DX [exhibit letter]). FPL's Appendix shall be in the form, (A [tab number]).

concurred specially and wrote separately. FPL petitioned the Third District to review the panel's decision en banc. The court granted FPL's motion. Viewing the evidence in the light most favorable to the plaintiffs, the en banc court held that FPL owed no legally cognizable duty to plaintiffs in the circumstances of this case, and FPL's actions were not the legal or proximate cause of plaintiffs' loss. Florida Power & Light Co. v. Goldberg, 856 So. 2d 1011, 1033 (Fla. 3d DCA 2003) (opinion on rehearing en banc). The court vacated the panel's original decision and directed entry of judgment for FPL. The judges of the original panel dissented from the decision. Plaintiffs filed a petition seeking to have this Court review the en banc decision.[2]

II. Statement of the Facts.

Plaintiffs acknowledge that their statement of the case is argumentative. See In. Br. at 5. Most of plaintiffs' discussion of the case is also beside the point because it is relevant only to the issue of whether FPL breached a duty, not to whether FPL had a legal duty in the first place or whether FPL's actions may be deemed the legal or proximate cause of plaintiffs' loss. Viewing the evidence in

[2] Because the en banc court ruled in FPL's favor on duty and proximate cause, the court did not need to address FPL's arguments in support of its request for a new trial or remittitur. 856 So. 2d at 1034 n.1. The court simply vacated the panel's decision concerning these issues. Id. Accordingly, if this Court should disagree with the Third District on duty and proximate cause, the appropriate course would be to remand the case for the Third District, en banc, to take up the remaining issues. If this Court decides to reach these issues, however, FPL requests the opportunity to submit a supplemental brief addressing those issues.

the light most favorable to the plaintiffs, the facts that bear on the dispositive issues of duty and proximate cause are straightforward, and they are set forth below.

A. The Accident.

Plaintiffs' lawsuit concerns a vehicular accident that occurred at an intersection within the Village of Pinecrest in Dade County. Plaintiff Rosalie Goldberg was driving with her daughter north on Ludlum Road on a Friday afternoon at rush hour. (T. 450-52). Although there was some discrepancy at trial about the driving conditions, there was evidence supporting plaintiffs' view that visibility conditions were poor and the traffic was heavy. (T. 451-52). Rain was falling off and on, and the sky was overcast. (T. 451).

The north-south road, Ludlum Road (also known as 67th Avenue), is a two lane road, with one lane heading north and one lane heading south. (T. 159). The east-west road, 120th Street, likewise is a two lane road, with one lane heading east and one lane heading west. (T. 159). There are left-hand turn lanes in all directions. (DX F, DX G). The intersection is in a residential area. (T. 292).

State law requires that drivers must stop at controlled intersections where the traffic signal is not working. See § 316.1235, Fla. Stat. (1997); (T. 650). Plaintiffs, however, elicited testimony that Mrs. Goldberg could not see the traffic signal because a tree limb extended out into Ludlum Road that obstructed her view until the last moment before she entered the intersection. (T. 677-78, 682-83). As

a result, she would not have had time to stop at the intersection whether or not the traffic light had been working. (T. 683) (counsel for Goldberg stated that "even if she came out and saw it, assuming it was lighted or unlighted, she would have been there and the accident would have happened anyway"). Due to the obstruction, Mrs. Goldberg did not see the traffic signal and so followed a steady stream of traffic through the intersection without stopping. (T. 452, 475).

At the time of the accident, James Stoker was stopped at the intersection in the eastbound direction, in the left turn lane, waiting for the traffic to clear. (T. 259). He had a clear view of the traffic signal and was aware that it was not working. (T. 260). Consistent with what Mrs. Goldberg described, Mr. Stoker testified that there was a steady flow of cars heading north and south on Ludlum road, none of which was stopping at the intersection. (T. 260-61). When Mr. Stoker witnessed the accident, he had been waiting for more than five minutes to turn, unable to enter Ludlum road. (T. 261).

While Mr. Stoker waited at the intersection, Cynthia Sollie pulled up beside him, driving a Ford Expedition. (T. 262-63). She observed that the traffic signal was not operating, and she knew that she had to stop in that situation. (T. 736). Although Mr. Stoker continued to wait at the intersection for the traffic to clear, Ms. Sollie inched out towards Ludlum Road and then proceeded to cross the intersection. (T. 263). She testified that, unlike Mr. Stoker, she saw no cars in

either direction and thought the intersection was clear when she attempted to cross it. (T. 736).

Ms. Sollie hit the left rear fender of Mrs. Goldberg's car, causing it to careen into the southbound lane. (T. 328, 642). There, Mrs. Goldberg's car was struck on the passenger side by a Suburban, fatally injuring Mrs. Goldberg's twelve-year-old daughter. (T. 330).

B. The Power Outage.

Earlier that afternoon, FPL had received an emergency call from Donna Fishbein, a resident who lived in the neighborhood bounded to the east by Ludlum Road. (T. 75, 77-78, 528, DX C). She reported that lightning had struck down a power line in her backyard, causing a fire. (T. 103, 528). FPL's trouble man Ray Woodard responded to the call. (T. 80, 529). Other crew members then joined him. (T. 88-89).

Mr. Woodard assessed the situation and took steps to ensure that the downed power line was de-energized. (T. 82). This reduced but did not eliminate danger to the crew and to others in the area (such as the residents). (T. 108, 537, 562-63). The downed line had been strung parallel with another, still energized power line. (T. 86, 103-04, 535-37). Plaintiffs conceded at trial that it was necessary for Mr. Woodard to de-energize the second line to eliminate the risk of "backfeed" (the flow of electricity through the downed line) and contact with the live power line

during repairs. (T. 722). Taking the second line out of service terminated power to the area it served, which included the traffic signal at Ludlum and 120th Street. (T. 87, 536).

Plaintiffs adduced evidence at trial supporting their view that it would have been possible for Mr. Woodard to learn prior to taking the second line out of service that this would have affected the traffic signal, and plaintiffs argued that Mr. Woodard should have investigated this possibility. Plaintiffs did not assert, however, that Mr. Woodard actually knew that he was de-energizing the traffic signal. Thus, contrary to what plaintiffs suggest in their Initial Brief, plaintiffs did not try this case on the theory that Mr. Woodard deliberately disabled the traffic signal. Instead, plaintiffs' counsel argued at trial, "He just didn't look. He was negligent. Had he looked, he would have known . . . ." (T. 868).

Consistent with this position, plaintiffs opposed FPL's proposed jury instruction calling upon the jury to determine "whether [FPL] knowingly and intentionally interrupted the power supply to the traffic signal." (R2 205); (T. 409-10); Goldberg, 856 So. 2d at 1029 n.1 (Cope, J., specially concurring). At plaintiffs' urging, the trial court rejected FPL's proposed instruction. See id.

C. Prior Discussions with Pinecrest.

The Goldbergs' complaint alleged that FPL had undertaken a duty to advise Village of Pinecrest officials in advance when FPL intended to shut down power to

a particular area within the Village limits. (R1 31 at ¶15). In support of their position, the Goldbergs offered the testimony of Peter Lombardi, the Village manager. He testified that, about a month before the accident, he received calls from Village residents complaining about a power outage in their area. (T. 147-48). So he called FPL's commercial account liaison, Mr. Cope, "to inquire why the power was out." (T. 147-48).

Mr. Cope advised that FPL had turned off the power because of problems with some transformers. (T. 147). During the conversation, Mr. Lombardi asked Mr. Cope if it would be possible for FPL to give the Village notice of "planned" or "scheduled" power outages so that the Village knew how to "answer residents' calls." (T. 148-51; 162-64). Mr. Lombardi's "concern was not the kind of power outages where, you know, a lightning bolt would hit . . . ." (T. 148). Mr. Lombardi testified that Mr. Cope said he would "pass that [request] on to the appropriate department heads." (T. 148). Mr. Lombardi stated that he thought he had reached an understanding with Mr. Cope that FPL would provide advance notice of "scheduled" power outages. (T. 163).

Mr. Cope did not consent to such an arrangement. (T. 614-15). Plaintiffs adduced no evidence that the "appropriate department heads" at FPL consented, or that FPL entered into any written agreement with the Village of Pinecrest, to provide notice of even planned or scheduled outages. The evidence was

undisputed that FPL did not provide any such notice to the Village following Mr. Lombardi's discussions with Mr. Cope, and the Village never sent anything in writing to FPL memorializing any such putative agreement. (T. 614-15).

Planned and unplanned power outages are common in South Florida. Mrs. Goldberg testified that they happened frequently in the Village of Pincrest, where she lived. (T. 478, 487). FPL is called upon on a daily basis to de-energize circuits for many reasons. (T. 538).

The company distinguishes between "planned" or "scheduled" outages and "emergency restoration" work. (T. 539-40, 560-61). When FPL plans at some future date to de-energize an area or neighborhood in order to perform new construction or the upgrading of facilities, the company regards this as a "planned" or "scheduled" outage. (T. 539). Planned outages are scheduled for a date certain. (T. 560). Once the project is scheduled, FPL attempts to notify customers in advance that the company will be working in the area and will place the area out of service for an estimated period of time. (T. 539-40). Depending upon the scale of the project, the company may put signs in the street to alert customers about the planned outage. (T. 540).

By contrast, an "emergency restoration" occurs in response to a report of a downed power line or other unanticipated event. (T. 540, 560-61). This is an uncontrolled situation. (T. 560). The priority of the repairman in such situations is

to determine "where [the downed line is] fed from and do whatever he can do to mediate the energized wire if it's down." (T. 541). Where there is a line down, a repairman's "main concern is to eliminate any possible feed or backfeed to that line . . . ." (T. 578). A downed power line represents "a potential risk to every employee and every person in that neighborhood." (T. 579). For that reason, FPL classifies downed power lines as priority one calls — immediate emergencies; the highest and most serious of FPL's four-tier priority ranking system. (T. 526-528).

FPL maintains computer records of its service grid "down to a 50 foot square," indicating which electric device is serving which metered customers. (T. 518-19). The company is able to determine which feeder, lateral, and transformer may affect the service of any particular metered customer. (T. 518). Traffic signals are not individually metered. (T. 519). As such, FPL does not "have any way of knowing how a particular traffic control signal anywhere in Dade County is fed." (T. 518-19). Thus, FPL cannot ascertain from its computer system whether any particular feeder line, or lateral, or distribution line may serve any given traffic signal. (T. 518-19). This is true because FPL monitors service to its customers rather than to the electric-powered devices that FPL's customers own or operate. (T. 519). Further, "the configuration of [the] system changes every day." (T. 537).

Dade County, by contrast, monitors each of its traffic signals in the County by computer. (T. 226-27, 287-88). The County, owned, installed and operated the

traffic signal at Ludlum Road and 120th Street. (T. 206, 209, 286). The County controlled and monitored this light from a central computerized control room. The County received instantaneous notification of a problem associated with this traffic signal on the day of the accident. (T. 227, 287-88). In fact, plaintiffs relied upon the County's computer-generated records to pinpoint the time and duration of the outage as part of plaintiffs' proof at trial. (T. 226-27). But there is no evidence that the County investigated the problem in response to this notification or advised the Village of Pinecrest or anyone else that the traffic signal may be disabled.

SUMMARY OF ARGUMENT

FPL undertook in this case to do nothing more or less than to restore a power line struck down by lightning and to protect persons who might pass through the vicinity of that line and the employees involved in this emergency restoration from inadvertent electrocution. Plaintiffs base their claim against FPL not upon any violation of this undertaking but based upon FPL's failure to undertake to protect beneficiaries of the electric power supplied by FPL to Dade County from the consequences of a power outage. In short, plaintiffs call upon this Court to impose upon FPL a duty once removed from the duty FPL undertook to discharge in completing the restoration work in this case.

No appellate court in Florida has upheld liability on the part of an electric utility for injuries resulting from the interruption of service to a traffic signal.

Rather, the courts in this state have consistently and uniformly exonerated power companies from liability in such circumstances, holding either that the utility did not have a legal duty to protect motorists from harm or that the utility's failure to do so was not a proximate cause of traffic-related injuries. This is consistent with the law throughout this country.

Plaintiffs concede that they did "not contend [below] that FPL owed a duty to provide a continuous supply of electrical current to the traffic lights, and they did not contend that FPL was negligent in interrupting electric power to the traffic lights." In. Br. at 10 (emphasis in original). But plaintiffs are attempting to assert precisely such a claim by contending that FPL could not interrupt service to the traffic signal unless the company took steps to protect motorists and their passengers from foreseeable consequences of any such interruption of power.

Plaintiffs are mistaken in asserting that FPL undertook such a duty as the result of general discussions between representatives of FPL and the Village of Pinecrest concerning possible notification of planned or scheduled outages. As the Third District, en banc, correctly determined, these discussions were inconclusive, never acted upon, and at most concerned "scheduled" outages, not emergency restorations, like the situation in this case. There was no evidence whatsoever that FPL undertook a duty to safeguard intersections that might be affected by emergency repair work at remote locations.

Thus, in rejecting plaintiffs' claim that FPL should be held liable for the accident at the intersection, the Third District, en banc, adhered to well-settled tort principles. Indeed, the court followed an unbroken line of appellate authority exonerating public utilities from liability in cases such as this. That being the case, there is no conflict among appellate authority that would suffice to confer jurisdiction on this Court to review this case. Accordingly, this Court should dismiss the review of this case or, if this Court retains jurisdiction, it should affirm the judgment below.

STANDARD OF REVIEW

The Third District made a legal determination on both the issue of duty and proximate cause. Therefore, this case is governed by a de novo standard of review. See McCain v. Florida Power Corp., 593 So. 2d 500, 503-04 (Fla. 1992).

ARGUMENT

Introduction.

This case, involving the death of a child, is charged with emotion. Any jury given the opportunity to make the parents "whole" at the expense of a corporation that, in hindsight, might have gone about the pressing business of tending to a potentially life-threatening emergency in a different manner will likely do so. The important issues of "duty" and legal or "proximate" cause have legal dimensions precisely because emotion is a poor substitute for rules of law that rationally

govern the complicated relationships among the many persons and entities that must live and work together in our society.

Power outages are a fact of life in our society. From time to time, they are precipitated by acts of nature. In this case, lightning downed one of two parallel power lines in a residential neighborhood, forcing FPL to disable the second line to protect workers and others who might be exposed to current during the repair. Lightning could as easily have disabled both lines at once. If that had happened, no one would suggest that a child's death would be unavoidable. Most would agree that the responsibility would lie with drivers using the intersection to provide the first line of defense.

A disruption in power may affect many people in serious ways — for example, by interrupting electricity that energizes equipment needed to protect safety or health or to illuminate staircases and to prevent myriad other hazards in our homes, offices, and neighborhoods. Accordingly, when such outages occur, those of us who are most directly affected are necessarily called upon to exercise care for our own protection and the protection of others. In the circumstances of this case, many other persons or entities might have prevented this tragedy.

In fact, the Florida Legislature foresaw the general circumstances of this case and provided that when traffic signals are rendered inoperable it is the duty of motorists traveling through the intersection to address the resulting risks by

treating the intersection as a four-way stop. See § 316.1235, Fla. Stat. (1997). In an emergency such as this, FPL's priority, by contrast, was to address the immediate threat of securing the area of the downed power line. Nobody contends that FPL did not properly discharge this duty. See In. Br. at 24.

In contrast, numerous drivers traveling north or south on Ludlum road — who failed to slow or stop their vehicles, as required by state law, to allow Ms. Sollie to cross the intersection safely — could have prevented this tragedy. Ms. Sollie, herself, could have avoided this accident. The jury was understandably reluctant to pass moral judgment on any of these persons. It certainly does not follow, however, that FPL had the legal duty to safeguard areas potentially affected by the power outage or that the actions of FPL's crew who tended to the downed power line should be deemed the legal or proximate cause of plaintiffs' loss.

In this case, the Third District, sitting en banc, correctly determined under well-established doctrines of tort law that FPL did not have a legal duty sufficient to support the imposition of liability for the plaintiffs' loss and separately determined that FPL's actions in repairing a downed power line in an adjacent residential neighborhood did not proximately cause that loss. In fact, no appellate court in Florida has imposed liability upon a power company for injuries resulting from the interruption of power to a traffic signal. This is fully consistent with other jurisdictions in this country that have had occasion to address the issue.

I. No Duty.

A. What Is, and Is Not, At Issue.

As a threshold matter, plaintiffs concede that they "did not contend [in the courts below] that FPL owed a duty to provide a continuous supply of electrical current to the traffic lights, and they did not contend that FPL was negligent in interrupting electrical power to the traffic lights." In. Br. at 10 (emphasis in original). In fact, plaintiffs concede that "[e]veryone agreed below that Mr. Woodard was required to pull the second fuse on the pole for the safety of persons repairing the downed wire in the Fishbeins' backyard." Id.

Plaintiffs assert on appeal that their actual claim at trial was that "Mr. Woodard's profession of ignorance was not credible — that he knew that he had disabled the traffic lights. Alternatively, the plaintiffs claimed that, even if Mr. Woodard's profession of ignorance was deemed to be credible, he . . . should have known that he had disabled the lights." Id. at 10-11 (emphasis in original). Based on this premise, plaintiffs contend that FPL was obligated to act upon its knowledge that it was disabling the traffic signal and thus to take precautions for the safety of the motorists using the intersection.

During the trial of this case, however, plaintiffs did not contend that Mr. Woodard knew that he was disabling the traffic light. To the contrary, at trial, plaintiffs denied that they were attempting to establish that FPL deliberately

terminated power to the traffic signal, and they successfully opposed jury instructions that would have advised the jury that this was an issue. (T. 409-10); (R2 205). Consistent with this position below, plaintiffs argued to the jury that FPL's man on the scene, Mr. Woodard, "just didn't look. He was negligent. Had he looked, he would have known . . . ." (T. 868).

Judge Cope pointed out in his separate opinion concurring in the original panel's decision that "[i]t is clear the plaintiff tried the case on the theory that FPL negligently shut off the power to the traffic signal." Goldberg, 856 So. 2d at 1029 n.1 (Cope, J., specially concurring). Thus, Judge Cope felt compelled to "clarify a sentence in the [original panel's] majority opinion (adopting a statement in the trial court's order) that 'this intersection collision occurred when the traffic signal was intentionally rendered inoperable to conduct non-emergency repairs.'" Id. Judge Cope explained that, although "FPL intentionally switched off the power at the pole[,] [t]here was no claim that FPL actually knew that it was switching off the power to the traffic signal." Id.

As Judge Cope correctly observed, plaintiffs' actual claim at trial was that Mr. Woodard should have known that he was thereby disabling the traffic light and thus should have taken steps to protect drivers using the intersection. In fact, the bulk of plaintiffs' statement of the case in their brief in this Court is devoted to this contention. It is more difficult for plaintiffs to argue, however, that FPL had a

legal duty to take steps to protect drivers from the dangers of an inoperable traffic signal when FPL did not actually know that it was disabling the traffic light in the first place. This is why plaintiffs now strain to assert before this Court what they did not want to have to prove at trial, namely, that FPL deliberately disabled the traffic signal.

To support their claim that, in dealing with a power line emergency, FPL had a duty to find out whether conditions might exist that might give rise to a further duty to protect motor vehicle drivers from those conditions, plaintiffs contend that it is enough that it was "foreseeable" that the chain of events resulting in the accident might occur. Plaintiffs argue, in essence, that although power companies have no duty to ensure a continuous supply of power to traffic signals (and perhaps other health or safety-related equipment), they nonetheless must be held accountable for the consequences of interruptions in the supply of power to traffic signals (and perhaps other health or safety-related equipment), so long as those consequences are foreseeable. The Third District appropriately rejected this far-reaching contention.

B. No Common Law Duty in Florida.

In holding that FPL had no legal duty to motor vehicle users in this case, the Third District's decision was faithful to well-settled cases in Florida and elsewhere

that hold that power companies have no duty to protect third parties from even the foreseeable consequences of interruptions in the supply of electrical power.

Thus, in Arenado v. Florida Power & Light, 523 So. 2d 628, 629 (Fla. 4th DCA 1987), the Fourth District (with then-Judge Anstead on the panel) held that the power company should not be held liable for an accident at an intersection with an inoperable light. In that case, a traffic signal was rendered inoperative because FPL's transmission line went down. See id. at 628. Arenado's vehicle and a vehicle approaching from a different direction entered the intersection at the same time and collided, resulting in Arenado's death. The plaintiff brought a wrongful death suit against FPL, alleging that FPL's negligence caused the interruption of electric service. The trial court held that FPL did not owe a legally cognizable duty to Arenado and dismissed the complaint. See id.

On appeal, the Fourth District affirmed. See id. at 629. The court rejected the plaintiff's argument that FPL's duty arose from contract and under the common law of torts. Specifically, the court observed that FPL "had not assumed the duty which is sought to be imposed upon it," and no such duty should be imposed under the general body of "tort law." Id.

Likewise, in Levy v. Florida Power & Light Co., 798 So. 2d 778 (Fla. 4th DCA 2001), the Fourth District recently affirmed summary judgment for FPL in a case much like this one. In Levy, a motorist struck a child at an intersection, where

the traffic signal was not operating. See id. at 779. There, like here, the county through its traffic control division "owned and operated" the traffic signal that FPL supplied with electricity. See id. The plaintiff contended that FPL had experienced power supply problems at this intersection before, had notice that the intersection was busy, but failed to protect motorists from harm. See id. at 780. The Fourth District rejected this claim, holding that the company had no duty sufficient to protect the injured party in that case, see id., and that the motorist's failure to stop at the intersection was an intervening cause, relieving the power company of liability. See id. at 781.

The court wrote: "a power company does not owe a duty to a noncustomer who was injured in an intersection collision because a traffic signal was rendered inoperative due to the negligence of the power company." Id. at 780. The court observed that Florida law "has declined to extend a utility's responsibility in cases like this one." Id. at 781. In part, this rule is policy driven because the alternative would make utilities the insurers of these types of traffic accidents. See id. at 781-82. Courts have not wanted to change this rule because "[j]udicial policy making is not a freewheeling exercise." Id.

Similarly, in Abravaya v. Florida Power & Light Co., 39 Fla. Supp. 153 (Fla. 11th Cir. Ct. 1973), the plaintiff brought a negligence action against FPL for injuries sustained in an intersection collision allegedly caused by inoperative traffic

signals. (A 1). Then-Circuit Judge Nesbitt, writing for the court, held that FPL "had no duty to regulate the flow of traffic for the city of Miami, and there is no factual allegation which would indicate that any such duty was assumed. . . . There being no duty, as a matter of law, there can be no breach of duty." Id. at 157-58.

Judge Nesbitt elaborated: "The plaintiffs in this case want a power company to bear risks for traffic accidents, in the event of signal failures. Their theory would impose a burden of liability for situations quite remote from the duties assumed in an ordinary contract situation." Id. at 158. Assessing the policy concerns of imposing liability on utilities in this situation, Judge Nesbitt observed:

> In making these determinations, the court is sensitive to the many repercussions which might result from such an extension of duties. Some courts have dismissed this in terms of foreseeability, others have referred to causation. But, the conclusion is best expressed in terms of duty. See W. Prosser, The Law of Torts, §43, at 251 (4th Ed. 1971).

Abravaya, 39 Fla. Supp. at 158.

Plaintiffs attempt to avoid such cases by contending that plaintiffs are not arguing that FPL negligently interrupted service to the traffic signal, but merely that FPL should have taken steps to protect motorists after it inadvertently disabled the signal. This is a distinction without a difference. In every case involving traffic-related injuries that occur due to inoperable traffic signals, it may be said that the power company failed to take sufficient steps to protect the injured person from the resulting harm. This is just an indirect way of stating the same claim.

In fact, a review of the record leaves no doubt that plaintiffs in this case sought to impose, and initially succeeded in imposing, liability on FPL precisely because FPL interrupted power to the traffic signal. In boiling the case down for the jury in closing argument, plaintiffs' counsel argued:

> I would urge you . . . to follow what their own expert said that if the light was on we have no accident. . . . I urge that the power company be found entirely liable. But for the light being off we wouldn't be here.

(T. 838) (emphasis added). Yet, the appellate courts in Florida have consistently and uniformly rejected such efforts to impose liability on power companies for injuries associated with inoperable traffic signals because it is untenable to make power companies the insurers of all those who enjoy the benefits of electric power.

C. Decisions Outside Florida.

The Third District's decision is supported not only by the consistent decisions of appellate courts in Florida but by well-reasoned decisions from other jurisdictions. For example, in Greene v. Georgia Power Co., 207 S.E.2d 594, 595-96 (Ga. Ct. App. 1974), the court upheld summary judgment for a power company that interrupted power to a traffic signal to make repairs necessary to restore current in a main line to other customers although the power company did not notify the municipal authorities in advance of the break in service.

In Gin v. Yachanin, 600 N.E.2d 836, 838 (Ohio Ct. App. 1991), the court affirmed summary judgment for a power company in like circumstances, stating:

> Courts have repeatedly held that a power and light company owes no duty to non-customers which would be breached by its failure to provide electricity to a customer. Specifically, the courts have held that when an electric company contracts with a city to provide electricity for street lights and traffic signals, the electric company assumes no duty to the general public to provide such service. . . . [I]n Galloway v. Ohio Power Co. [1985 WL 4181 (Ohio Ct. App. 1985)], an automobile collision occurred at a time when the traffic signal was not functioning. In granting Summary Judgment to the Defendant power company the court found that the utility did not owe a duty to the plaintiff and was not bound to notify the authorities of the power outage.

(Citations omitted) (emphasis added); see also White v. Southern California Edison Co., 30 Cal Rptr. 2d 431, 435-36 (Cal. Ct. App. 1994) (affirming summary judgment for power company, holding that a public utility owes no duty to a person injured as a result of an interruption of service or a failure to provide service); Strauss v. Belle Realty Co., 469 N.Y.S. 2d 948, 950-51 (N.Y. App. Div. 1983) (holding power company owed no duty to tenant injured in common area of building during electric service blackout); Shubitz v. Consolidated Edison Co., 301 N.Y.S. 2d 926, 929-30 (N.Y. Sup. Ct. 1969) (same); Milliken & Co. v. Consolidated Edison Co., 644 N.E.2d 268 (N.Y. 1994) (electric utility owed no duty to Garment District commercial tenant for losses sustained as a result of interruption of power for several days during a fashion event).

D. Plaintiffs' Mistaken Reliance on Other Cases

Plaintiffs insist, however, that this Court's decisions in Clay Electric Coop., Inc. v. Johnson, 28 Fla. L. Weekly S866 (Fla. Dec. 18 2003), and McCain v.

Florida Power Corp., 593 So. 2d 500 (Fla. 1992), dictate a different result. Plaintiffs are mistaken. These decisions stand for the proposition that a defendant may face liability when the defendant has actually undertaken to act to protect the plaintiff from injury but then makes matters worse by inducing the plaintiff to rely on the defendant or by exacerbating the risk that the plaintiff faced.

Thus, in Clay Electric, this Court held that a company that had expressly contracted to maintain street lights in good working order was liable to a pedestrian for failing to carry out that agreed-to responsibility with due care. The Court based the imposition of duty to a member of the public in that case upon the maintenance company's express undertaking to render street light maintenance services "necessary for the protection" of the public. 28 Fla. L. Weekly at S867.

Likewise, in McCain, this Court held that a power company was liable when its employee affirmatively undertook to demarcate "those areas where it would be safe to use the trencher." 593 So. 2d at 501. The plaintiff "was in an area marked 'safe' when he struck" a live underground electrical cable. Id. Because "the power company's agent marked those areas where McCain could safely dig," but "this marking was done negligently," the Court held the power company could be held liable. Id. at 505.

Here, by contrast, FPL undertook only to repair a downed power line and no more, and FPL's agents discharged this duty in a manner that indisputably

protected the persons for whom precautions were taken, namely, residents and workers exposed to the dangers of the downed power line. FPL did not undertake to render services for the benefit of operators of motor vehicles or their passengers, upon which those persons relied or enhancing the risks motorists would have faced had FPL never attempted to come to their aid. Indeed, plaintiffs' case is premised precisely on the argument that FPL's agents in fact took no steps, in connection with their very specific undertaking to fix the downed power line, to protect persons whom might be incidentally but unintentionally affected by power outages caused by the repairs.

Plaintiffs rely on other cases, like Clay Electric, where the defendant was held liable for injuries resulting from a breach of a duty that the defendant directly assumed. See, e.g., Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979) (county and state department of transportation, both directly responsible for maintaining traffic control, face exposure to claims by persons injured due to failure to maintain traffic control measures); Department of Transportation v. Neilson, 419 So. 2d 1071 (Fla. 1982) (same); Robinson v. State Department of Transportation, 465 So. 2d 1301 (Fla. 1st DCA 1985) (same); Palm Beach County Board of County Comm'rs v. State, 511 So. 2d 544 (Fla. 1987) (same); Bailey Drainage Dist. v. Stark, 526 So. 2d 678 (Fla. 1988) (same); Dolan v. Florida Power and Light Co., 29 Fla. L. Weekly D596 (Fla. 4th DCA Mar. 10,

2004) (following Clay Electric, power company may face liability for injury that allegedly occurred due to inoperable street light where public utility allegedly undertook to maintain street light); Felsen v. Florida Power & Light Co., 29 Fla. L. Weekly D699 (Fla. 3d DCA Mar. 24, 2004) (same). Plaintiffs' reliance on these cases is likewise misplaced. In each of these cases, the defendant was deemed to have assumed a duty to provide the very protection that was absent in the case, leading to the plaintiffs' injuries.

In this case, by contrast, plaintiffs have expressly conceded that they "do not contend that FPL owed a duty to provide a continuous supply of electrical current to the traffic lights, and they do not contend that FPL was negligent in interrupting electrical power to the traffic lights." In. Br. at 10 (emphasis in original). Indeed, any such argument would be resolutely foreclosed by an unbroken line of authority in this and other jurisdictions holding that power companies may not be held liable for even the negligent interruption in service to their customers, let alone for an interruption that plaintiffs concede was necessary and reasonable to effectuate emergency repairs. Yet, plaintiffs are attempting, in fact, to impose liability upon FPL precisely for injuries they contend resulted from the interruption of power to the traffic signal. As we have described, plaintiffs' counsel specifically argued to the jury in closing that "the power company be found entirely liable" because "[b]ut for the light being off we wouldn't be here." (T. 838) (emphasis added).

The fact remains, however, that plaintiffs have not shown, and cannot show, that FPL undertook any duty to ensure a continual, uninterrupted supply of electric power to Dade County for any purpose, much less for the protection of the motoring public, and it is solely FPL's utility/customer relationship with Dade County that governs the supply of power to the traffic signal.[3] Likewise, FPL undertook no duty to protect motorists or their passengers in the event of an interruption of power that might disable Dade County-owned traffic lights in the area. This is just the flipside of the same coin.

In contrast with Clay Electric and other cases like it, the duty plaintiffs ask the Court to impose in this case is once removed from the duty FPL actually undertook to perform (to restore the downed line in a manner that minimized dangers to persons in the vicinity of the line). As we have shown, courts have

[3] FPL's Tariff specifically relieves it from responsibility for any "complete or partial . . . interruption of service" to its customers – here Dade County. See General Rules & Regulations for Electric Services, Rule 2.5, "Continuity of Service," Sixth Revised Tariff Sheet No. 6.020 (this Tariff sheet was on file with the Florida Public Service Commission as of the date of this incident, effective April 16, 1996). See also Landrum v. Florida Power & Light, Co., 505 So. 2d 552, 554 n.1 (Fla. 3d DCA 1987) (holding that the Tariff has the force and effect of law); FPL's Motion for Rehearing, Rehearing En Banc or Certification, page 6, footnote 6, filed with the Third District in the Goldberg matter. As with any utility customer whose equipment or operation requires uninterrupted service, it is strictly the customer's decision (here, Dade County) whether or not to install and pay for a backup system (e.g., battery or generator power) to provide power to the customer's equipment (here, traffic signals) in the event of an outage. Dade County chose not to do so.

consistently declined to impose duties that are this attenuated from the activity directly undertaken by the defendant.

E. FPL's Discussions with the Village of Pinecrest Do Not Provide the Requisite Undertaking.

Plaintiffs contend, nonetheless, that FPL did undertake a duty to protect plaintiffs in this case by assuming an obligation to notify the Village of Pinecrest before commencing a planned outage. As Judge Cope recognized in his separate opinion to the panel decision, this argument has no merit, for several reasons.

As a threshold matter, as Judge Cope pointed out, "the reported discussion between the village and FPL was not a contract. It was at best a gratuitous undertaking by FPL, unsupported by any consideration." Goldberg, 856 So. 2d at 1032 (Cope, J., specially concurring) adopted by the Third District en banc, 856 So. 2d at 1034 (holding no contract between FPL and the Village for the reasons set forth in Judge Cope's specially concurring opinion).

This is significant because, as Judge Cope explained, "In order for the gratuitous undertaking doctrine to apply, the defendant must enter into performance and act negligently in carrying out the performance." Id. at 1033 (Cope, J., specially concurring). Here, "[t]here was no performance nor detrimental reliance on performance." Id.; see also Banfield v. Addington, 140 So. 893, 896 (Fla. 1932) (even where an undertaking is shown, a claim "will not lie for nonfeasance, where the undertaking was gratuitous merely"); Gunlock v. Gill

Hotels Co., Inc., 622 So. 2d 163, 164 (Fla. 4th DCA 1993) ("The law does not recognize a cause of action for breach of a gratuitous assumption of duty where performance of the assumed duty has not commenced.")

Plaintiffs respond to this point by contending that the Village representative believed an agreement had been reached. But even viewing this evidence in the light most favorable to the plaintiffs, it establishes at most, as Judge Cope concluded, that FPL had entered into a gratuitous undertaking, which may not support the imposition of a duty unless the defendant embarks upon performance and does so in a negligent manner. It is the very failure to undertake performance on which plaintiffs base their case against FPL.

Contrary to plaintiffs' contention, this case is different from Clay Electric, where the defendant had agreed for consideration to maintain the streetlights. The defendant there was bound to perform such a contract whether or not it had started to do so. Moreover, the duty that the defendant undertook to perform in Clay Electric was to maintain the street lights themselves, not a duty once removed to provide power to the entity that had actually undertaken to maintain the street lights (Dade County).

Further, any undertaking to notify the Village is highly attenuated from a duty to notify motorists, and, no matter how they are characterized, FPL's discussions with the Village could not have induced reliance on the part of the

Goldbergs or made them worse off than they would have been in the absence of any such undertaking.

More, as Judge Cope noted, the discussion between the Village and FPL "had to do with **planned** power outages. It made no reference to emergency service calls such as the one now before us." 856 So. 2d at 1032 (Cope, J., specially concurring) (emphasis in original). Judge Cope observed, "Within FPL parlance, the repair of a downed power wire is deemed to be an emergency from the time that FPL is notified until the time the repair is completed." Id.; (T. 198, 537).

Plaintiffs' response to this point is to rely upon a play of words, namely, testimony that FPL emergency work crews necessarily formulate a "plan" of attack for any emergency restoration they perform. (T. 90). Even viewing the evidence in the light most favorable to the plaintiffs, however, a work "plan," is not the same thing as a "planned" or "scheduled" outage. (T. 90, 539-540). By seeking to convert all outages into planned outages, plaintiffs' argument plainly contradicts the Village representative's own admission that he did not seek notification of all outages, let alone outages arising in emergency situations. (T. 148-50, 162-64).

Finally, when they set out to deenergize the second power line, FPL's work crew did not subjectively appreciate that they were going to disable the traffic signal. Even if they had they provided notice to the Village of Pinecrest that they

intended to disable a power line, that would have indicated nothing about the traffic signal. Neither FPL, nor the Village of Pinecrest, maintained records that would have enabled them to determine that any given outage would affect any given signal. (T. 518-19).

In fact, Dade County, not the Village of Pinecrest, was the entity that monitored and maintained this traffic signal. (T. 209, 226-27, 286-88). In this connection, Dade County received instantaneous notification of a possible outage at this traffic signal on the day of the accident. (T. 226-27, 287-88). For this reason, plaintiffs relied upon the County's records at trial to pinpoint the precise time and duration of the traffic signal's failure. (T. 226-27). Yet, there is no evidence that the County acted upon this notice when it was first received.

Therefore, the Third District, en banc, correctly rejected plaintiffs' argument that FPL voluntarily undertook the duty to prevent the accident in this case.

F. Foreseeability is Necessary But Not Sufficient.

This leaves plaintiffs with the argument that "foreseeability," without more, gives rise to a legal duty. This Court in Clay Electric and McCain, and other cases like them, discussed foreseeability as an important consideration in determining whether to impose a legal duty. Certainly, a defendant should not be held to have a duty to take precautions against risks that are not foreseeable. But this is a far cry from holding that foreseeability, alone, supports the imposition of a duty in all

circumstances. If that were the sole consideration, then any defendant whose actions in some sense contributed to the occurrence of an injury will, with the benefit of hindsight, always be held to have owed a duty to the injured plaintiff, unless the injury violated the laws of nature, which should never occur. This is true because every injury that flows naturally from a course of actions will appear foreseeable, with the benefit of hindsight, in some general sense.

Further, this Court has held that the question of whether an injury was a "freak" occurrence should be considered at a second stage of the analysis, in considering proximate cause. See McCain, 593 So. 2d at 503. Thus, even "freak" accidents would give rise to a legal duty, if general foreseeability were dispositive. This means that a standard based on general foreseeability alone is no standard at all because so long as a defendant's actions were a "but for" cause of the injury, even in the case of "freak" accidents, the defendant would be held to owe a legal duty to the plaintiff and would thus face the expense, disruption, and exposure of litigation. The threshold legal requirement of "duty" exists precisely to separate out those cases that belong in court from those that do not, rather than to relegate every case to civil litigation.

For these reasons, courts must consider all the circumstances of the case, in Florida or anywhere else. If foreseeability were the sole consideration in all cases, this Court would have had no occasion in its very recent decision in Clay Electric

to discuss and analyze so closely the existence of an actual "undertaking" to protect the public and the various conditions necessary to impose liability on the basis of such an undertaking. The Court had no difficulty determining that the injury in that case would be a foreseeable consequence of a breach of the specific responsibility that the maintenance company had undertaken, but the Court appropriately focused as a threshold matter on the existence of the undertaking, itself, as the basis for the duty.

Plaintiffs assert, nonetheless, that this Court has dictated in a steady stream of decisions that foreseeability is the sole criterion for duty, regardless of the relationship between the parties or other circumstances in the particular case. To the contrary, in each of the cases plaintiffs cite, this Court either relied upon a special relationship between the parties in determining that a duty existed, or held, as in Clay Electric, that the defendant had assumed the duty in question. See Nova Southeastern Univ., Inc. v. Gross, 758 So. 2d 86 (Fla. 2000) (school/student relationship and undertaking to control student's actions); Union Park Mem. Chapel v. Hutt, 670 So. 2d 64 (Fla. 1996) (undertaking to lead funeral procession); Markowitz v. Helen Homes, 826 So. 2d 256 (Fla. 2002) (premises liability); Owens v. Publix Supermarkets, Inc., 802 So. 2d 315 (Fla. 2001) (same); Whitt v. Silverman, 788 So. 2d 210 (Fla. 2001) (same); Florida Power & Light Co. v. Periera, 705 So. 2d 1359 (Fla. 1998) (same); Kitchen v. K-Mart Corp., 697 So. 2d

1200 (Fla. 1997) (negligent "entrustment" by seller of firearm); City of Pinellas Park v. Brown, 604 So. 2d 1222 (Fla. 1992) (police motorists owe duty to other motorists). These cases, as a group, support rather than negate the necessity of examining the circumstances of each case to determine whether a sufficient relationship or undertaking exists to support the imposition of a legal duty.

Plaintiffs also cite Section 321 of the Restatement (Second) Torts for the proposition that a duty to protect others might be imposed upon an actor who becomes aware of facts sufficient to cause that actor to realize that he has placed others at peril by his actions. The comments to that section give the following three examples: a golfer hits the ball into an open fairway and then sees a bystander walk into its path, a driver becomes aware that his car has skidded into the path of oncoming traffic, and after a man loans his car to another he is told by his chauffeur that the steering is broken.

Section 321 of the Restatement may not be understood to suggest a different result in this case for at least four reasons: (1) the courts in Florida have consistently declined to impose liability upon electric utilities for failing to protect third parties from the predictable consequences of interruptions in power, (2) in none of the examples given, is the actor engaged in an activity that itself serves important public policy objectives, (3) in each of the examples, it may be said that the actor undertook to use due care for the protection of the plaintiff in the very

activity at issue at its inception, and the duty recognized is merely a continuation of that original undertaking (e.g., hitting a golf ball safely, driving safely, and undertaking to provide an operable vehicle to a friend), and (4) in each of the examples, the actor had actual knowledge that the very peril at issue had in fact arisen. Thus, Section 321 does not support plaintiffs' contention.

In this case, FPL did not stand in a direct relationship with the many persons who benefit in some indirect way from the availability of electric power that FPL supplies to its customers, nor did FPL undertake to provide protection to all such persons at any point in its endeavors. Rather, FPL undertook no more nor less than to perform emergency restoration work in a manner to protect residents and the workers engaged in that repair (which is not at issue in this case).

In fact, plaintiffs complain that this is all FPL's line crew undertook to do, arguing that they should have taken the <u>further</u> steps of either immediately restoring power, using the cones in their truck to direct traffic, or notifying law enforcement authorities of the need to direct traffic. As the Third District appropriately held, however, plaintiffs cannot properly rely upon FPL's <u>omission</u> of any undertaking to protect vehicular traffic as the very basis to impose a legal duty to provide such protection. Therefore, no legally cognizable duty existed.

The Third District's decision in this case thus is not only consistent with a long line of well-reasoned authority and bedrock principles of tort law, but it

respects lines of public policy that may be crossed only at great peril, and at the risk of troubling, unintended consequences. If there is a need to make such public policy decisions in this area, the matter is best addressed — or revisited, as the case may be, in view of existing traffic laws — by the Legislature, which can gather the necessary facts and take into account the broad panoply of public interest considerations implicated by these issues. For its part, the Third District appropriately rejected plaintiffs' entreaties to open Pandora's Box by creating new duties in an area where public utilities have long operated with certainty.

G. The Rationale for Exercising Jurisdiction Does Not Exist.

In the plaintiffs' jurisdictional brief, plaintiffs asserted that this Court has jurisdiction because the Third District relied upon its prior decision in Martinez v. Florida Power & Light Co., 785 So. 2d 1251 (Fla. 3d DCA 2001), which was then pending before this Court, and which has since been vacated and remanded for reconsideration in the light of this Court's decision in Clay Electric. See Martinez v. Florida Power & Light Co., 863 So. 2d 1204 (Fla. 2003). Plaintiffs contended that the Third District's reliance on Martinez gave rise to jurisdiction under this Court's decision in Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981). See Pet. Jur. Br. at 5. Plaintiffs are mistaken.

This Court is well aware of the limited nature of its jurisdiction, which requires a finding that the decision under review "expressly and directly conflicts"

with another district court decision or a decision of this Court on the same question of law. See art. V, § 3(b)(3), Fla. Const. This Court's decision in Jollie does not expand that jurisdictional basis. It indicates only that this Court has prima facie conflict jurisdiction when a district court's decision relies upon a decision that has since been reversed. See 405 So. 2d at 420. There must still be a finding of express and direct conflict to establish jurisdiction. See art. V, § 3(b)(3), Fla. Const. When there is no conflict, this Court should discharge the review.

The en banc court's entire discussion of duty is:

> *No Duty*. Under Martinez, of which we entirely approve, the power company owed no common law duty and, for the reasons in part III of Judge Cope's specially concurring opinion, no "contractual" duty to the decedent to maintain current in the traffic light in question.

Goldberg, 856 So. 2d at 1034 (en banc).

Putting to one side for the moment the court's reference to Martinez, for all the reasons we have given, nothing in the remaining discussion can fairly be described as being in express and direct conflict with any of the decisions cited by plaintiffs in their jurisdictional brief. So we must consider the significance of the court's citation to Martinez.

This Court's decision in Martinez did nothing more than vacate and remand the Third District's decision in that case for reconsideration in the light of Clay Electric. See Martinez, 863 So. 2d at 1205. In both Clay Electric and Martinez the

defendants had undertaken a duty to maintain the street lights that the plaintiffs contended had been neglected. By contrast, in the case under review, FPL did not undertake to maintain the traffic signal at issue. This is evident from the four corners of the en banc decision. See Goldberg, 856 So. 2d at 1034. The en banc decision rejects on its face plaintiffs' contention that FPL had undertaken such a duty in this case.

This significant distinction demonstrates that the case under review is factually and legally different from Clay Electric and Martinez. Thus, there can be no conflict with, or misapplication of, Clay Electric or Martinez. See, e.g., art. V, § 3(b)(3), Fla. Const., and Kaylor v. Kaylor, 500 So. 2d 530, 531 (Fla. 1987) (review dismissed after oral argument because alleged conflict cases were factually distinguishable).

To be sure, if this Court were to grant rehearing in Clay Electric and recede from its ruling in that case, a fortiori FPL should prevail in this review. That is because this case presents a much more compelling case for the defendant than Clay Electric. But, by the same token, due to the critical differences we have described, this Court's adherence to Clay Electric would do nothing to cast doubt on the Third District's decision in this case. Moreover, for the same reason that this case presents a more compelling case for the defendant than in Clay Electric or

Martinez, the en banc court's a fortiori use of Martinez here does not suffice to create a genuine conflict.

While this Court's decision in Jollie superficially would appear to suggest that there might be jurisdiction, i.e., prima facie conflict jurisdiction, FPL has overcome the prima facie expression of jurisdiction by demonstrating conclusively that there is no express and direct conflict with any of the cited decisions, including Clay Electric and Martinez. This case simply does not present a situation where the defendant undertook a duty to maintain streetlights — rather it involves a situation once removed from the situation in those cases.

A finding of no conflict in this case would be bolstered by the policy underlying this Court's limited jurisdiction. After the creation of the district courts, this Court assumed the role "as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice[.]" Jenkins v. State, 385 So. 2d 1356, 1357-58 (Fla. 1980) (quotation omitted). This role continued after the 1980 amendment to this Court's jurisdiction. See id. at 1358. Where, as here, there is no conflict, there is no need to preserve "uniformity of principle and practice" as such uniformity already exists. Thus, the rationale underlying this Court's jurisdiction counsels against deciding this case, as the law is already stable.

This Court's exercise of jurisdiction in this case would be unnecessary for the further reason that there is no conflict with the Third District's separate and independent holding of no proximate cause. As there is no need for this Court to address the proximate cause issue, the plaintiffs effectively are requesting this Court to render an advisory opinion on the duty question. Accordingly, this Court should exercise its discretion and dismiss this review.

II. No Proximate Cause.

As an independent and sufficient second ground for its disposition of this case, the Third District, en banc, correctly concluded that "no negligence with respect to the operation of the traffic light could have been a legal or proximate cause of the accident because it was causally superseded by the actions of the drivers actually involved in the collision." Goldberg, 856 So. 2d at 1034 (en banc). In this respect, too, the Third District's decision is grounded in an unbroken line of appellate authority in Florida, holding that the acts or omissions of a power company, as a matter of law, may not be deemed the legal or proximate cause of intersection accidents that may somehow be tied to inoperable traffic signals.

Indeed, as there is not one Florida district court decision to the contrary, this Court would necessarily have to depart from well-settled and uniform law to hold otherwise. Without express and direct conflict and with no misapplication conflict, there is no need for this Court to review this case to settle the law — it is already

settled. The plaintiffs concede as much when they repeatedly label this uniform line of cases as "stubborn." See In. Br. at 37, 47.

It is fundamental that, even when a defendant has a legal duty to protect the plaintiff from harm, and has breached that duty, the plaintiff must demonstrate that the defendant's negligent act or omission was the legal or "proximate" cause of the plaintiff's injury. See, e.g., McCain, 593 So. 2d at 503. The plaintiff must show that the defendant's act or omission provided more than "the occasion for the negligence" of another person. Department of Transportation v. Anglin, 502 So. 2d 896, 898 (Fla. 1987); see Banat v. Armando, 430 So. 2d 503, 505 (Fla. 3d DCA 1983); Derrer v. Georgia Electric Co., 537 So. 2d 593 (Fla. 3d DCA 1989); Stahl v. Metropolitan Dade County, 438 So. 2d 14, 19 (Fla. 3d DCA 1983).

Thus, in Anglin, this Court held that, while the Department of Transportation's negligence in allowing water to pool on a roadway was a cause-in-fact of an automobile accident, this negligence "simply provided the occasion for the negligence of" the driver who collided with the vehicle that stalled because of the water. Based on this conclusion, this Court held that the Department of Transportation should not be held liable for the plaintiff's injury.

In reaching this result, this Court relied, inter alia, upon the Third District's decision in Metropolitan Dade County v. Colina, 456 So. 2d 1233 (Fla. 3d DCA 1984), one of the several cases in which the Third District has "stubbornly," as

plaintiffs put it, yet conscientiously, applied well-settled principles of legal or proximate cause. In Colina, the Third District determined that a county was not liable for failing to police or restore an inoperative traffic signal, where a passenger was killed in an intersection collision. See id. at 1235. Stormy weather had rendered the traffic signal inoperable, and a police officer reported to the county that the signal was out. More than four hours later, Colina approached the intersection, realized that the signal was inoperable, and stopped his van as required by Florida law. Colina saw two cars approaching the intersection, and, though realizing the cars might not stop, nonetheless decided to cross the intersection. Colina's van struck the car driven by Masferer, who had failed to stop at the intersection at all. Colina's wife died as a result of the collision.

Colina brought a wrongful death action, alleging that Masferer negligently failed to stop at the intersection and that the county negligently failed to deploy traffic control signs or send a repair crew out to the scene. The jury found negligence on the part of both defendants but none on Colina's part.

On appeal, the court agreed with the county that its conduct "was not the proximate cause of Marta Colina's death," and that the trial court accordingly erred in refusing to direct a verdict in its favor. The court held:

> Application of the traditional "but for" test results in a conclusion that the county's omission was a cause in fact of Mrs. Colina's death. The case, however, turns on whether Masferer's and Colina's actions constituted superseding, intervening causes relieving the county of liability. We hold

> that their actions were such intervening causes. . . . Any negligence on Dade County's part simply provided the occasion for the actions of Masferer and Colina, which together were the proximate cause of Mrs. Colina's death.

Id. at 1234-35.

Likewise, in Derrer, the court upheld a judgment notwithstanding the verdict in favor of a power company that negligently caused a traffic signal to become inoperable. 537 So. 2d at 594. The court agreed with the plaintiff that the power company's conduct may have been a cause-in-fact of the collision, but nonetheless concluded that causing the traffic signal to become inoperable was not the proximate cause of the plaintiff's injuries as a matter of law because the plaintiff's "oblivious behavior in not realizing she was entering an intersection was not a reasonably foreseeable consequence" of the power company's alleged wrongdoing. Id. (emphasis added). The court held, "[s]urely, inoperable intersectional traffic lights do not, in the range of ordinary human experience, cause automobile drivers to miss seeing the entire intersection where the light is located; such a bizarre occurrence is, in our view, beyond the scope of any fair assessment of the danger created by the inoperable traffic light." Id. (emphasis added).

In this case, too, FPL's failure to act was overtaken by the conduct of the drivers and other intervening circumstances at Ludlum Road and 120th Street. To begin with, none of the drivers traveling north or south stopped at the intersection, as they were required to do by Florida law. Had any of these drivers stopped or

slowed their vehicles to allow Mrs. Sollie to cross the intersection, this accident would not have occurred.

Plaintiffs explained Mrs. Goldberg's failure to stop by pointing to something not FPL's fault or within FPL's control. Specifically, plaintiffs adduced evidence that the field of view of persons traveling northbound on Ludlum Road was obstructed by a tree limb that extended out into the road 100 feet south of the traffic signal. But FPL did not maintain the conditions of the road or the traffic signal. This was the responsibility of Dade County. (T. 209, 226-27, 286-87).

Plaintiffs went so far as to prove that, whether or not the signal was working, Mrs. Goldberg would not have had time to stop once the signal came into view. As plaintiffs' counsel phrased it in his question to an expert witness (which elicited an affirmative response), "even if she came out and saw it, assuming it was lighted or unlighted, she would have been there and the accident would have happened anyway." (T. 683) (emphasis supplied). This does not prove that FPL's actions were the proximate cause of what Mrs. Goldberg did that day. It proves exactly the opposite: Mrs. Goldberg did not stop to let Ms. Sollie cross because the tree limb blocked her view of the traffic light.

As for Ms. Sollie's actions, she saw that the light was out and stopped at the corner. (T. 736). She conducted herself, therefore, just as she might if a temporary stop sign were there. But her actions thereafter were problematic.

Several eye witnesses testified that the traffic on Ludlum Road was unrelenting. (T. 260-61, 452). Even though Mr. Stoker was waiting at the intersection to cross one lane of traffic to turn left onto Ludlum Road at the time that Ms. Sollie arrived at the intersection, (T. 261), Ms. Sollie took the chance of crossing both lanes of traffic, hitting the rear of Mrs. Goldberg's car, which had nearly passed through the intersection by the time Ms. Sollie reached her. (T. 328, 642). Contrary to the testimony of other eyewitnesses, including Mr. Stoker, whose car was idling right next to Ms. Sollie's, she testified that she saw no cars coming either north or south. (T. 736).

Whether true or not, these unusual circumstances must be deemed to supercede whatever more attenuated role FPL played in actions taken by the drivers on that fateful day. At most, FPL's acts and omissions provided merely the "occasion" for the concurrence of other improbable events. See Anglin, 502 So. 2d at 898; Banat, 430 So. 2d at 505; see also Greene, 207 S.E.2d at 596 (notwithstanding drivers' conflicting impressions of conditions at an intersection, the power company's alleged negligence leading to the termination of power to a traffic signal was not the proximate cause of the collision, as a matter of law).

The Fourth District's decision in Levy, discussed at pp. 18-19, supra, provides further support for this conclusion. In that case, a driver struck and killed a bicyclist at an intersection where the traffic signal was not working as a result of

FPL's alleged negligence. 798 So. 2d at 779-80. The Fourth District held that FPL should be free from liability where the driver's view of the decedent was blocked by another car, and the driver did not notice that the traffic light was malfunctioning. See id. at 781-82. The Fourth District also held that the driver's "failure to stop at the intersection was a superseding intervening cause relieving FP&L of any liability." Id. at 781; see also Metropolitan Dade County v. Tribble, 616 So. 2d 59, 60 (Fla. 3d DCA 1993) (alleged negligence of county for failing to maintain traffic signal not the proximate cause of accident occurring at intersection with inoperable traffic signal); Adoptie v. Southern Bell Telephone and Telegraph Co., 426 So. 2d 1162, 1163 (Fla. 3d DCA 1983) (alleged negligence of utility for cutting power to intersection could not be the legal cause of plaintiff's damages sustained in accident at intersection with inoperative traffic light).

Not only have the Florida courts been consistent in their holding on this issue, but other states have as well. Those jurisdictions confronted with the precise issue before this court — an accident occurring at an intersection with an inoperative traffic signal — hold as a matter of law that the actions of the drivers in negotiating the intersection constitute an intervening cause. Thus, the cessation of power cannot be the proximate cause of an accident occurring at that intersection.

In Logan v. Phillips, 896 SW.2d 38, 39 (Mo. Ct. App. 1995), like here, a young girl was killed in an accident at an intersection with an inoperative traffic

signal where the utility had supplied power to the signal. There, like here, the girl's parents brought a wrongful death claim, suing the utility as well as the other driver, a police officer who had failed to stop at the intersection. The plaintiffs' theory was that the utility negligently supplied power because the utility permitted the power outage to occur.

In affirming the trial court's motion to dismiss, the court extensively examined the proximate cause issue. See id. at 41-42. The court concluded as a matter of law that "[t]he power failure provided only the condition or occasion of the injury" and therefore any negligence on the utility's part was "too remote to be the proximate cause" of the accident. Id. at 42. In reaching this decision, the court relied on Adoptie and Greene, see id., which we discussed above.

The same result occurred in Quirke v. City of Harvey, 639 N.E.2d 1355 (Ill. App. Ct. Div. 4 1994). There, the police chief ordered the utility to discontinue power to an electric line that a person was threatening to throw himself on in order to commit suicide. That power outage rendered multiple traffic lights inoperable. Thereafter, a traffic accident occurred in the darkness of the night at one of the intersections where there was no power. The trial court granted the city and utility summary judgment. The appellate court affirmed, rejecting the view that a traffic accident is foreseeable, even where one of the drivers indicated that she could not see the intersection. In concluding that the cessation of power to the traffic light

was not the proximate cause of the accident, the court held as a matter of law that city and utility

> cannot be held legally responsible for the remote risk that someone, when encountering a major intersection that has been rendered dark due to an emergency power shutdown, will disregard the rules of the road and proceed through the intersection without stopping.

Id. at 1360.

Another Illinois court reached the same result in Quintana v. City of Chicago, 596 N.E.2d 128 (Ill. App. Ct. Div. 1 1992). There, traffic lights maintained by the city were inoperative. See id. at 129. An accident occurred in the intersection, and the plaintiff (a pedestrian) sued the city, among others, for failing to maintain the traffic signal. See id. Both drivers involved in the initial car crash testified they had stopped at the intersection on account of the inoperative signal. In affirming the trial court's grant of summary judgment to the city on proximate cause grounds, the court observed:

> [T]he inoperative traffic lights were at worst, a condition that the city permitted. The failure of one of the drivers to comply with the statutory requirements was the proximate cause of plaintiff's injuries. Although the parties admitted to complying with the statute by stopping at the intersection, if the statute had been complied with then the accident would not have happened in the manner it did.

Id. at 131 (emphasis added).

In Terrill v. ICT Insurance Co., 93 So. 2d 292, 295 (La. Ct. App. 1957), another inoperative traffic signal case, the appellate court affirmed the trial court's

dismissal of the city and utility from the suit on proximate cause grounds. The court held that the failure of the light was not the proximate cause of the accident because the drivers were required to exercise caution when proceeding through the intersection. See id. The court wrote: "The proximate cause of the accident was obviously the failure of one or both of the drivers to exercise precaution, and the failure of the traffic light at most was a remote cause of the accident." Id. Once a driver recognizes that a traffic signal is inoperative, it is incumbent on that driver to go through the intersection using necessary caution. See id.[4]

These decisions from outside of Florida reinforce the uniform rule that has developed over time in Florida that the drivers' actions at an intersection with an inoperative traffic signal are the proximate cause of accidents occurring in the intersection, and, as a matter of law, constitute an intervening cause to any alleged

[4] In our attempt to identify and discuss all reported decisions with factually similar circumstances, we have found that courts have uniformly held that power outages to traffic signals are not the proximate cause of intersection collisions. The only case to the contrary is factually distinguishable. See Rust International Corp. v. Greystone Power Corp., 133 F.3d 1378 (11th Cir. 1998) (applying Georgia law). There, the utility had undertaken to repair a connector that powered a traffic signal and did so negligently. "Accordingly, [the utility's] negligence occured at the moment that its technician misdiagnosed the problem with the connector and therefore failed to exercise reasonable care in making the repair." Id. at 1381. Although this decision appears to conflict with the Greene case, 207 S.E.2d at 596, it is in any event, limited to its unique facts: "[W]e hold that under Georgia law, Greystone assumed a duty of care towards [the plaintiffs] to restore power to the intersection." Rust International, 133 F.3d at 1381. The court held that it was the utility's breach of this specifically assumed duty that was a proximate cause of the resulting injuries. See id. at 1381 n.5.

negligence by the utility. Indeed, plaintiffs have not brought forth one decision that holds otherwise.

Plaintiffs rely upon decisions declining in other contexts to determine the issue of proximate or intervening cause as a matter of law. None of these cases, however, involve the liability of a power company for injuries once removed from the risks that the power company specifically undertook to ameliorate (in this case, injury from a downed power line). In each of the cases upon which plaintiffs rely, the defendant had acted to protect the plaintiff from the very injury that the plaintiff incurred but did so in a manner that led to the plaintiff's harm. See, e.g., Helman v. Seaboard Coast Line RR Co., 349 So. 2d 1187 (Fla. 1977) (train hit a car at a railroad crossing); Welfare v. Seaboard Coast Line RR Co., 373 So. 2d 886 (Fla. 1979) (train caused injury while traveling at arguably excessive speed); Clark v. Polk County, 753 So. 2d 138 (Fla. 2d DCA 2000) (distinguishing Derrer; county's negligence in failing to ensure safety of roads was a jury question); Polk County v. Sofka, 803 So. 2d 751 (Fla. 2d DCA 2001) (same); Gibbs v. Hernandez, 810 So. 2d 1034 (Fla. 4th DCA 2002) (contractor left concrete blocks in construction zone in intersection in such a manner as to block the view of motorists); Grier v. Bankers Land Co., 539 So. 2d 552 (Fla. 4th DCA 1989) (landowner maintained dangerous conditions on its own property); Cahill v. City of Daytona Beach, 577 So. 2d 715 (Fla. 5th DCA 1991) (city failed to maintain

safe streets); Armas v. Metropolitan Dade County, 429 So. 2d 59 (Fla. 3d DCA 1983) (county failed to maintain safety of public rights of way); Dykes v. City of Apalachicola, 645 So. 2d 50 (Fla. 1st DCA 1994) (city failed to maintain public right of way). Thus, in each of these cases, it might be fairly said that the defendant's actions were truly "proximately" related to the injury that occurred. As the courts have consistently held, the same is not true in cases such as this.

In sum, the Third District, en banc, correctly concluded that FPL's acts or omissions, as a matter of law, may not be deemed the legal or proximate cause of plaintiffs' losses. The Third District's decision in this case was consistent with well-established principles of proximate cause in cases such as this and thus should be affirmed. No Florida appellate decision holds to the contrary.

CONCLUSION

For the foregoing reasons, due to the absence of any bona fide inter-district conflict and no misapplication conflict, on either the issue of legal duty or the issue of proximate cause, this Court should decline to assert jurisdiction in this case. Should the Court exercise jurisdiction, the decision of the Third District, sitting en banc, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondent Florida Power & Light Company as well as the Appendix thereto has been furnished by **Federal Express** to

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CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY, this ___th day of May, 2004, that the type size and style used throughout Respondent's Answer Brief is Times New Roman 14-Point Font.

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