IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1942

WALTER GOLDBERG and ROSALIE GOLDBERG, as Co-Personal Representatives of the Estate of JILL HEATHER GOLDBERG, deceased,

Petitioners,

vs.

FLORIDA POWER & LIGHT CO.,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' BRIEF ON THE MERITS

GROSSMAN & ROTH, P.A.
925 South Federal Highway, Suite 775
Boca Raton, Florida 33432
-and-
PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800 / Fax (305) 358-2382

By: JOEL D. EATON

Fla. Bar No. 203513

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I.
STATEMENT OF THE CASE

The petitioners, Walter Goldberg and Rosalie Goldberg, in their capacity as co-personal representatives of the Estate of Jill Heather Goldberg, were plaintiffs below in a wrongful death action against Florida Power & Light Co. (FPL), seeking redress for the death of their 12-year old daughter. Jill was killed in an intersection collision which occurred during rush hour, at a dangerous intersection and under exceptionally dangerous environmental conditions, after FPL purposefully disabled the traffic lights controlling the intersection and then failed to take any precautions for the safety of motorists approaching the uncontrolled intersection.

The case was tried to a jury before the Honorable Juan Ramirez, Jr., in March, 1999. In its verdict, the jury found that FPL was a negligent cause of Jill's death, and that the drivers involved in the collision had exercised reasonable care under the confusing and deceptive circumstances confronting them -- and it awarded Mr. and Mrs. Goldberg past and future damages totaling $37,350,000.00 (R. 229). FPL's post-trial motions were denied; judgment was entered in the full amount of the jury's verdict; and FPL appealed to the District Court of Appeal, Third District (R. 242, 282, 295, 298, 537, 654, 656).

Judge Ramirez provided a thorough and thoughtful explanation for his denial of FPL's post-trial motions (R. 656). Relying upon *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992), he rejected FPL's contention that it owed no duty of care to Jill, concluding instead that it had a duty to protect or warn motorists of the

dangerous condition it had created when it deliberately disabled the traffic lights. Relying upon *McCain* once again, he further concluded that, given the adverse conditions confronting the motorists, the accident was "entirely foreseeable," rather than a "bizarre occurrence," and that the evidence was therefore sufficient to support the jury's finding of fact on the issue of proximate causation.

The panel that initially heard FPL's appeal (Judges Cope, Goderich, and Shevin) agreed with Judge Ramirez on these issues, and quoted his lengthy post-trial order in full. *Florida Power & Light Co. v. Goldberg*, 856 So.2d 1011, 1012-26 (Fla. 3d DCA 2003). Relying upon *McCain*, the panel added: " . . . [T]he FPL employee's conduct, in disabling the light, created a foreseeable zone of risk to the driving public. . . . FPL had a duty to exercise reasonable care to protect the motorists it placed at risk by this conduct." 856 So.2d at 1027. And relying upon both *McCain* and *Palm Beach Cty. Bd. of Cty. Comm'rs v. Salas*, 511 So.2d 544 (Fla. 1987), it also agreed that, given the adverse conditions, the accident was foreseeable, rather than "utterly unpredictable," and that the evidence was therefore sufficient to support the jury's finding of causation. *Id.*

The panel also noted that the jury was properly instructed, in the language of Fla. Std. Jury Instr. (Civ.) 4.11, that the drivers' failure to treat the uncontrolled intersection as a four-way stop was merely evidence of negligence, not negligence as a matter of law, and that it need not find either driver negligent simply because the pertinent traffic regulations may have been violated. And it concluded that, because the intersection was "exceptionally dangerous," and because the drivers were

confronted with a "confusing, unusual and deceiving situation," Judge Ramirez did not abuse his discretion in ruling that the jury's exoneration of the drivers was not against the manifest weight of the evidence. 856 So.2d at 1028. The panel therefore affirmed the judgment to the extent that it established FPL's liability for Jill's wrongful death. However, it accepted FPL's position that the damage awards were excessive, and it ordered a remittitur of the damage awards to $10,000,000.00, or in the alternative (at the Goldbergs' election), a new trial on damages.

Five members of an abbreviated en banc court (Judges Schwartz, Levy, Gersten, Greene, and Fletcher) -- with the initial panel dissenting -- disagreed with their brethren on the liability issues and concluded in a very cursory opinion (per J. Schwartz) that FPL was entitled to judgment in its favor *as a matter of law*.[1/] 856 So.2d at 1033-34. First, it held:

> *No Duty*. Under *Martinez [v. Florida Power & Light Co.*, 785 So.2d 1251 (Fla. 3d DCA 2001), *quashed*, 863 So.2d 1204 (Fla. 2003)], 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.

856 So.2d 1034. Whether Judge Ramirez and the panel erred in their conclusion on the real issue in the case -- whether FPL owed the quite different duty to protect or

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[1/] As a practical matter, the vote was 5-4. Although Judge Ramirez was recused because he was the trial judge, his post-trial order was quoted in full in the panel's opinion. And less than the full court participated in the decision. Judge Jorgenson heard oral argument, but passed away in the interim. And Judge Wells, who was a member of the court at the time the decision was rendered, was apparently not invited to participate.

warn motorists of the dangerous condition it created when it disabled the traffic lights -- was simply not addressed.

The majority also followed a trilogy of Third District decisions holding that intersection collisions that occur when traffic lights are inoperative are unforeseeable as a matter of law and the actions of the drivers were therefore an efficient intervening cause, and it held 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." 856 So.2d at 1034. The majority concluded by reversing the Goldbergs' judgment "with directions to enter one for the defendant instead." *Id.*

In our jurisdictional brief, we demonstrated that *both* of the majority's holdings were in express and direct conflict with numerous decisions of both this Court and the other district courts of appeal. This Court thereafter granted discretionary review of the decision.

II.
STATEMENT OF THE FACTS

According to *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992), both of the issues decided adversely to the Goldbergs by the en banc court -- the duty issue and the causation issue -- turn upon the foreseeability of the intersection collision that took Jill's life. The facts proven to the jury's satisfaction below are therefore of critical importance here. And because the Goldbergs received a favorable verdict below, we are entitled to have the evidence viewed in every light most favorable to the

verdict, with all conflicts resolved and all reasonable inferences drawn in their favor. *See Irven v. Dept. of Health & Rehabilitative Services*, 790 So.2d 403, 406 n. 2 (Fla. 2001). We will state the facts in that appropriate light. Because there is a great deal at stake here, we will also be thorough. And because we will have to argue the sufficiency of the evidence to support the verdict at some point in the brief, we will be somewhat argumentative as we proceed.

Friday, September 12, 1997, was a dreary, overcast day, characterized by continuous rain and drizzle and punctuated with thunderstorms (T. 77, 103, 196, 263-64, 402, 407, 450-51, 472, 487, 639-40, 643, 657, 669, 675, 734). Anticipating power outages from the weather, FPL had extra repair crews on duty (T. 183). Around 2:00 p.m., a thunderstorm belted the residential intersection of S.W. 67th Avenue and S.W. 120th Street in Pinecrest, and a lightning strike dropped a power line into the backyard of the Fishbein residence, the second residence in the southwest quadrant of the intersection (T. 70-78, 103-04, 187, 196, 674; PX. 2, PX. 9). The wire caused no significant damage; it merely burned a small area of grass, an inch and a half wide and ten feet long (T. 174). The downed line, which affected only the Fishbein residence and which did not affect the traffic signal lights at the intersection, was reported to FPL at 2:06 p.m. (T. 77-78, 103-04, 283, 546-48; PX. 2). FPL assigned Raymond Woodard, a line specialist with 30 years experience, to respond to the call (T. 70, 77-78). A Pinecrest police officer was the first to arrive at the scene (T. 78-80). Mr. Woodard arrived 39 minutes after the call, at 2:45 p.m. (T. 78, 88). He had worked

the South Dade area for 30 years, and had been to the Fishbein residence 2½ weeks earlier, so he was familiar with the area (T. 70-76, 79, 92; PX. 1).

Mr. Woodard observed that the downed wire was dead, that the fuse for the line had blown, and that the line therefore presented no hazard (T. 82, 175-76). The police officer asked Mr. Woodard if he was needed; and although Mr. Woodard knew that he would have to leave the premises at some point to "open the jack" for the blown fuse (and perhaps a second fuse) as a safety precaution, he told the officer he was not needed, and the officer left (T. 79-83, 188). Dr. Fishbein told Mr. Woodard that he had to leave and did not want to leave the gate open, so Mr. Woodard radioed for assistance and remained in the backyard until others arrived (T. 83-85, 110). Although the repair would require only three people, six additional FPL employees arrived in five additional trucks (T. 83, 88-89, 177-78, 194-95, 551). There were therefore seven men on the scene -- and six large FPL trucks, which were equipped with two-way radios, flashers, hazard lights, and traffic cones (T. 71-72, 88-89, 172, 176-79, 581). The men also had portable, hand-held radios, and each of them had been trained in directing traffic when the circumstances required (T. 72, 100-01, 572-77).

In roughly the same time frame, the plaintiffs' 12-year old daughter, Jill, telephoned her mother, reported that her school track practice had been rained out, and asked that she be picked up (T. 450). Mrs. Goldberg obliged, and the two of them drove to Marshalls to buy Jill some accessories for a bar mitzvah she was attending the next day (T. 450). After additional assistance arrived at the Fishbein residence, Mr. Woodard walked to the pole containing the fuse for the downed line --

a route that took him out the front gate of the residence, east briefly on 122nd Drive, and then north for half a short, two-lot block on a bike path on the west side of 67th Avenue, directly toward the operable stop lights controlling the intersection of 120th Street and 67th Avenue (T. 85-86, 105-06; *see* PX. 9). The pole was located on the lot line between the residence on the southwest corner of the intersection and the Fishbein residence, a mere 100 feet or so from the stop lights (T. 208, 233; *see* PX. 9). Mr. Woodard used an "extendo stick" to "open the jack" of the blown fuse and returned to the Fishbeins' backyard (T. 82, 106). Although the lights remained operative and the view of the lights from the bike path and the pole was unobstructed, Mr. Woodard claimed not to have seen them (T. 87, 90-92, 112-13, 229; PX. 9).

According to one of the seven FPL employees on the scene, on a scale of one to ten, from relatively routine to critical emergency, the repair rated only a three (T. 180-81). The seven men conferred at some length and ultimately arrived at a "plan" to effect the repair of the downed line (T. 90, 181-82, 197). The "plan" involved opening a second fuse on the same pole, to prevent the possibility of a "backfeed" from a second line attached to the pole while re-rigging the downed line -- an action that everyone knew would cause an additional power outage for everything receiving electricity from the second line (T. 86-87, 90, 94-95, 182, 188, 537, 562-63). Although FPL had agreed to notify Pinecrest's Village Manager any time a planned outage would occur in the Village so police officers could be dispatched to direct traffic at intersections where traffic lights would be de-energized (an agreement upon which we

will elaborate in our argument), not one of the seven men who formulated the "plan" notified anyone of their intentions (T. 147-67, 304-06, 553-54).

There were a sufficient number of police officers available that afternoon so that an officer could and would have been dispatched to direct traffic at the intersection if the lights needed to be de-energized (T. 146, 156, 273, 293, 304-06, 310-11). The Village also had portable four-way stop signs that could have been placed at the intersection to control traffic if the lights were out (T. 146, 229, 293). As noted previously, FPL's employees were also trained in directing traffic when the circumstances required (T. 572-77). And warning flares or traffic cones could have been placed in the roadway to alert motorists of the danger (T. 229). In fact, the National Electrical Safety Code required these types of precautions if a traffic signal were to be de-energized (T. 228-29). And the intersection was *badly* in need of some type of warning or traffic control if the lights were to be de-energized, because it was one of the most dangerous intersections in Pinecrest (T. 145, 271-72, 788).

The intersection was exceptionally dangerous for a number of reasons. Both 120th Street and 67th Avenue were major arteries that cut through the heart of Pinecrest, and with the exception of the Village's intersections at U.S. 1, the intersection was the most heavily traveled intersection in the Village (T. 143-45, 271-72, 292-93; PX. 3). And unlike the intersections at U.S. 1, which were obviously intersections, the intersection of 120th Street and 67th Avenue -- but for the high-intensity traffic lights -- did not suggest to approaching motorists that it was a major intersection at all.

Both roads were two-lane roads, a single lane in each direction, located in a purely residential area; and there were homes, trees, and bushes on both sides of the road and on all four corners of the intersection (T. 159, 292; *see* PX. 9). And because of a homeowner's wall, two poles, and a large signal box on the southwest corner, there was virtually no line of sight available across that corner, and eastbound and northbound motorists were essentially blind to each other upon approach (T. 343-55, 771-73, 788; PX. 22, 23, 24). The Village had done an extensive survey of its roads and had concluded that the intersection would have been prone to numerous accidents if controlled by only a four-way stop -- and it is undisputed on the record that, because of the dangerous nature of the intersection, high-intensity traffic lights were "absolutely mandatory" to prevent accidents, notwithstanding their $100,000 to $150,000 cost (T. 145, 204-05, 271-72, 292-93, 788).

To carry out the "plan" arrived at by the seven FPL employees, Mr. Woodard made a second trip to the pole; he drove his "bucket truck" along the same route he had previously walked, directly toward the operable stop lights controlling the intersection (T. 85-86, 108-09, 112). He was aware that 67th Avenue was a busy street and that the intersection was busy at that time (T. 98).[2/] Mr. Woodard stopped his truck at the pole, a mere 100 feet or so from the traffic signal; he raised himself in the bucket; and he opened the jack to the second fuse at the pole, knowing that it would

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[2/] Inexplicably, although all seven employees involved in formulating the "plan" knew that it would cause a power outage in the neighborhood, six of them simply stood around in the Fishbeins' backyard; not one of them thought to accompany Mr. Woodard to assist him in determining what safety precautions might reasonably be required by the planned outage.

cause a power outage (T. 86-87, 90, 108-09, 208, 233). In the process, he de-energized the traffic lights at the intersection (T. 91-95).

The lights were shut off at 4:42 p.m. -- more than 2½ hours after FPL was notified of the downed wire, and nearly two hours after Mr. Woodard's 2:45 p.m. arrival at the scene (T. 77-78, 88, 226-27, 251; PX. 8). Mr. Woodard spent three to four minutes at the pole, with an unobstructed view of the traffic lights; he then maneuvered his truck back onto 67th Avenue (during which he had to look directly toward the inoperable traffic lights to clear traffic approaching from the north), and returned to the Fishbeins' backyard (T. 87, 98, 109, 229). He claimed to have been unaware of the existence of the lights or of the fact that he had de-energized them (T. 87, 92, 112-13).[3/]

Indeed, that was FPL's principal line of defense. Its consistent position at trial (as explained to the jury in opening statement) was that "Roy Woodard did not know, could not have known and FPL did not know and could not have known that by de-energizing this particular power line . . . that that would de-energize the traffic control signals . . . " (T. 57-58). For their part, the plaintiffs did *not* contend that FPL owed a duty to provide a continuous supply of electrical current to the traffic lights, and they

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[3/] A neighboring homeowner also lost power when the fuse was pulled (T. 126). Because she knew that the traffic lights went out when her power went out; because there had been prior accidents in those conditions and she knew the intersection to be a "a very dangerous corner"; and because she heard the screeching of tires and feared that another accident would happen, she telephoned FPL three times to report the inoperative signals (T. 126-35). All she got was an answering machine; no person answered her calls (*id.*).

did *not* contend that FPL was negligent in interrupting electrical power to the traffic lights. Their theory of liability was quite different and far simpler. Everyone 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. That Mr. Woodard deliberately pulled the fuse was also not in dispute. There was also no dispute that pulling the second fuse disabled the traffic lights at the intersection.

The plaintiffs' claim 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 was nevertheless negligent in not ascertaining that his action in pulling the second fuse would disable the traffic lights, and that he therefore should have known that he had disabled the lights.[4/] And on either version of the facts, the plaintiffs claimed that FPL was negligent when, after seven FPL employees planned the repair for nearly two hours, and after Mr. Woodard knew or should have known that the plan required disabling the traffic lights, FPL failed to take even the simplest precautions for the safety of motorists approaching the dangerous intersection during rush hour, under exceptionally dangerous environmental conditions. Judge Ramirez

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[4/] In the law of torts, proof of "constructive notice" is every bit as acceptable as proof of "actual notice." Indeed, the phrase "knew or should have known" is a staple of tort law. *See, e. g., Springer v. Morris*, 74 So.2d 781, 785 (Fla. 1954) ("'the prime foundation of liability in negligence cases is knowledge -- *or what is deemed to be in law the same thing, opportunity by the exercise of reasonable diligence to acquire knowledge of the peril which subsequently results in injury*'"; emphasis in original), *quoting Lindsay v. Thomas*, 128 Fla. 293, 174 So. 418, 420 (1937); *Feldstein v. City of Key West*, 512 So.2d 217, 291 n. 5 (Fla. 3d DCA 1987) (same).

concluded that, viewed in a light most favorable to the plaintiffs, the evidence was sufficient to support the plaintiffs' claims (T. 809-12) -- and we believe the evidence fully supported that conclusion.

To begin with, Mr. Woodard made two trips to the pole, one while walking at a leisurely pace and one while driving his truck (presumably alert to conditions of the roadway ahead of him). He was facing the traffic lights on both occasions, and he had an unobstructed view of them from the time he turned onto the bike path and onto 67th Avenue until the time he stopped 100 feet or so short of them. And the high-intensity traffic lights were *fully operational* on both occasions. In our judgment, he could hardly have missed their presence, and at the least, these facts permitted the jury to draw a perfectly reasonable inference that he did not.[5/]

Whether Mr. Woodard was aware, or should have been aware, that pulling the second fuse would (and did) disable the traffic signal presents a separate question. On that subject, there was also abundant evidence supporting a reasonable inference that he knew, or should have known, exactly what he was doing -- notwithstanding his self-serving denials at trial. According to Sheldon Pivnick, who had been Chief of the Traffic Signals and Signs Division of Dade County for 25 years, the pole was typical

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[5/] We also think FPL is in no position to contend otherwise. Having argued long and hard below that motorists approaching a traffic signal should detect its presence, even when it is *inoperable*, it simply cannot contend with a straight face here that the evidence did not support a reasonable inference that Mr. Woodard was aware, or should have been aware, of the existence of the *operable* traffic lights a short distance from the pole on which he opened the fuses on two separate occasions. On the favorable view of the evidence to which we are entitled here, we think that inference is rock solid.

of 2,000 or so poles that fed traffic signals in the county, all of which were configured in the same standard way (T. 201, 214, 217, 223-25). It was identified as the power source for a traffic signal by a 25 square-foot concrete pad at its base, five feet on a side, containing a steel plate (or "pull box" cover) in its center, nearly two feet long and 14 inches wide, with the words "TRAFFIC SIGNAL" prominently embossed upon it -- the obvious purpose of which was to alert anyone working on the pole that it powered a traffic signal (T. 215-17, 225, 797; PX. 7, 10).

There were several other items identifying the pole as a service point for a traffic signal to any FPL employee working on it, especially one with 30 years' experience in the field (T. 224-25). There was a gray conduit running up the side of the pole, from the concrete pad to a disconnect switch box located eight to nine feet above the pad, and the handle to the switch was painted red (T. 217-18, 225; PX. 7). There was an additional gray conduit running up the side of the pole from the switch box to a point just short of the top of the pole, from which the traffic signal's power cables emerged and connected to FPL's service lines (T. 217-18, 225, 238-41). Because FPL keeps its power lines clear of foliage, this connection would be visible even if the other identifying features of the pole were obscured (T. 240-41).

According to Mr. Pivnick (who was qualified as an expert on the subject without objection), anyone working on a pole should inspect it thoroughly before opening a fuse, whether the pole is obscured by foliage or not, to determine what problems would be caused by the disconnect, so that appropriate safety precautions could be taken (T. 200-03, 223-24, 230, 253). And Mr. Pivnick was of the opinion

that, given the multiple ways in which the pole plainly announced itself as the power source for a traffic signal -- particularly the connection from the top of the upper conduit to the service lines -- it was "hard to believe" that Mr. Woodard did not know that he was disabling a traffic signal when he pulled the fuse (T. 223-26, 240-41).

Mr. Pivnick also opined that, given the obligation to inspect the pole carefully before opening the fuse, and given the multiple identifying features at the base of the pole and on the pole itself, Mr. Woodard at least "should have known" that pulling the fuse would de-energize the traffic signal (T. 230). And he was of the additional opinion (which would seem to be a matter of common sense as well) that, even if Mr. Woodard had inadvertently disabled the traffic signal, from the position he was in it "certainly would have been clear to him" that the lights at the intersection a mere 100 feet away had gone dark (T. 231).

In his defense, Mr. Woodard pleaded ignorance at trial, claiming that he was unaware of the existence of the traffic signal; that he did not inspect the pole; that he did not know and could not have known that he had de-energized the traffic lights because the concrete pad, the steel plate, the pole, the conduit, and the connection to the service lines were obscured by foliage; and that he did not observe and "had no reason" to observe that the lights were out after he pulled the fuse (T. 87, 92, 95-96, 107, 112-15, 118). In our judgment, the evidence set out above was more than sufficient to support reasonable inferences to the contrary. But there was more --

perhaps less direct, but equally probative of Mr. Woodard's utter lack of credibility on the point.[6/]

To begin with, another FPL employee, J. J. Van Riel, was at the pole at some point during the repair process and would therefore have been aware of its condition, yet FPL did not call him as a witness to corroborate Mr. Woodard's description of the foliage (T. 88-89, 101). The jury was free to draw an adverse inference from this omission and conclude that, had Mr. Van Riel been called, he would have testified adversely to FPL on this point. FPL was also aware immediately after the accident that it had disabled the traffic signal; it had five additional employees on the scene who were aware of the accident; and not one of them was called to corroborate Mr. Woodard's description of the pole (T. 426-28, 631). Adverse inferences were available from these omissions as well.

[6/] The jury was *not* required to believe Mr. Woodard's self-serving "foliage" story simply because there was no direct evidence contradicting it. As the late Judge Zehmer educated undersigned counsel with characteristic acumen in *Roach v. CSX Transportation, Inc.*, 598 So.2d 246 (Fla. 1st DCA 1992), a jury can permissibly reject the undisputed testimony of a sole eyewitness to a particular fact where his credibility is drawn into question by other evidence in the case. *Accord Hanono v. Murphy*, 723 So.2d 892 (Fla. 3d DCA 1998). *See The Florida Bar v. Clement*, 662 So.2d 690, 696 (Fla. 1995) (finder-of-fact can reject unrebutted testimony, as long as rejection is not wholly arbitrary), *cert. denied*, 517 U.S. 1210 (1996).

In any event, even if Mr. Woodard's "foliage" story were the gospel truth, the fact remains that Mr. Pivnick testified that anyone working on a pole should inspect it thoroughly before opening a fuse, whether it is obscured by foliage or not; and the jury could therefore have found that Mr. Woodard should have inspected the pole behind the foliage, and if he had done so, he would have discovered one or more of the multiple devices announcing it as the power source for the traffic signal. In short, the jury could have found that, whether Mr. Woodard had actual knowledge or not, he certainly should have known he was disabling the signal.

FPL also had investigators on the scene the very next day (T. 596-97, 631). Photographs were taken, but despite the fact that the investigators knew that the fuse to the signal had been pulled, no photograph of the condition of the pole at the time of the accident ever surfaced during the litigation (T. 594-97, 631-32). And Mr. Woodard was interviewed by a claims agent in FPL's law department shortly after the accident; he reported simply that he had not seen anything on the pole to alert him to the traffic signal -- and he said nothing about foliage obscuring the pole (T. 592-93, 630). It was not until well after suit was filed, when he was shown photographs of the pole during his deposition, that Mr. Woodard relied upon "foliage" to explain his professed ignorance (T. 95-96, 114, 631). Adverse inferences were available from these inexplicable omissions as well.

It was also readily inferable from several (we think somewhat arrogant) portions of Mr. Woodard's testimony that, despite (or perhaps because of) his 30 years of experience with FPL, whether pulling the fuse would disable the traffic lights was simply an irrelevant question to him. For example, when asked if he would have called a policeman had he known he was disabling the traffic signal, Mr. Woodard parroted FPL's "party line" at trial (T. 91-92; see T. 584):

> A. It depends on the situation. Hindsight, looking at what happened now, sure, but we have to de-energize lines to do our work. We have to make things safe. It's a daily thing. Any time there's thunderstorms, first thing we have to do sometimes when we get there is shut down the power to make something safe and a lot of times it takes out traffic lights. We expect the people to obey the law and treat it as a four-way stop.
>
> Q. You expect the people to obey the law if it's storming out and it's rush hour, things of that nature?

A. We have no control over that.

And when asked if it was appropriate to intentionally disconnect the power to a traffic signal on a busy street, Mr. Woodard responded (T. 97):

> A. Well, to answer that, we have to do that almost every day when there's storms. We drop -- sometimes we drop feeders.
>
> Q. Would you want to do it without taking safety precautions such as calling the police or putting out any safety warnings?
>
> A. We can't do that. I mean we might take out 20 traffic lights and we have to do it on a moment's notice.
>
> Q. Are you suggesting that this downed line in the backyard of the Fishbein's [sic] was of that magnitude?
>
> A. This was not, no, but it's just -- I didn't know how many --

This was tantamount to saying that I took no precautions with respect to the one set of traffic lights I knew I was shutting down because I figured I was probably shutting down a whole string of them -- or at least a jury could so find.

Mr. Woodard also asserted (we think somewhat incredibly) that "[w]e don't inspect every pole we work on . . . when we open switches and close switches," and he insisted that he "had no reason" even to look at the pole before opening the switch that killed the traffic lights 100 feet away (T. 113, 118). The jury could reasonably infer from all this testimony that Mr. Woodard knew he was disabling the lights and simply did not care -- that he relied entirely on motorists approaching the intersection to protect themselves from the consequences of his actions. And finally, there is the matter of Mr. Woodard's admission of both scienter and guilt to Paul Kirsch, a co-employee on the scene, immediately after the accident: "Well, Ray said, you know, he

kind of thought it was his fault" -- to which Mr. Kirsch more or less agreed when he responded, "Don't take it personal" (T. 425-28).

In any event, the traffic lights were disabled at 4:42 p.m., while Mrs. Goldberg and Jill were finishing their shopping. The Village of Pinecrest was not notified; no police officer was called (or, more accurately, *re*called); and despite the fact that there were seven men trained in directing traffic and six trucks equipped with hazard lights, flashers, and traffic cones in the Fishbeins' backyard, no traffic control or warning was provided at the intersection a mere one house away. Motorists approaching the intersection were simply left to fend for themselves. Mrs. Goldberg and her daughter began their drive home in a 3,550-pound, 14-year old Mercedes that Mrs. Goldberg had recently purchased in used condition because she wanted a heavy car that would sustain an accident while driving her children (T. 447-48). They turned onto 67th Avenue at 124th Street, the first major intersection to the south, and headed north toward the disabled traffic lights (T. 450-51).

It was rush hour and the traffic was very heavy in both directions (T. 260-61, 266, 452). It was dusk, heavily overcast, dark, stormy, and rainy, and Mrs. Goldberg was driving with both her lights and her windshield wipers on (T. 451, 487, 643). She was driving under the speed limit of 35 m.p.h., following a line of cars and carefully watching the cars ahead of her (T. 327, 452, 472-73, 479, 661, 668). Both she and Jill were wearing their seatbelts (T. 329). As they approached the intersection of 67th Avenue and 120th Street, the light pole and a portion of the cross-arm on which the inoperable traffic lights were located, including the easternmost of the two sets of light

lenses located on the arm, were completely hidden from view behind the overhanging branch of a tree (T. 650-52, 676-81). As an examination of PX. 9 and DX. F will show, given the location of the hidden signal on the cross-arm, the very most that Mrs. Goldberg could have seen during her approach was roughly one-third of the cross-arm and a single inoperable signal -- and to compound the problematical nature of the visual cues available to her, the traffic signal was located well beyond the intersection, on the *north* side of it, rather than in the vicinity of the stop bar controlling entry of northbound traffic into the intersection.

There was a steady flow of traffic in both directions on 67th Avenue (T. 261-62, 266, 452). James Stoker was stopped at the stop bar in the left-turn lane of 120th Street, heading east, waiting to turn north (T. 259-60). He had been stuck there for seven to eight minutes because the southbound Friday rush hour traffic, which he described as "pretty horrendous" and "going across every few seconds," was not stopping at the inoperable traffic signal (T. 260-61). The northbound traffic was not stopping either: " . . . nobody was stopping, no people northbound or southbound. They were just going through and not stopping at all, not the first car" (T. 261-62).

A large Ford Expedition was stopped next to Mr. Stoker in the through lane to his right, waiting to cross 67th Avenue from west to east (T. 261-62). This vehicle was operated by Cynthia Sollie, who was en route to Gulliver Academy to watch a swim meet (T. 730-36). Because of the obstructions to the line of sight on the southwest corner of the intersection, Mrs. Sollie and Mrs. Goldberg were essentially blind to each other (T. 343-49, 788). Mrs. Sollie was stopped at the stop bar, as

required by the combination of §§316.1235 and 316.123(2)(a), Fla. Stat.; she had her windshield wipers on; and she could see no further than 50 feet or so down 67th Avenue to the south, and then only "through a crack" (T. 370-74, 771-72, 779). This distance provided only one to 1½ second's notice of a vehicle proceeding northbound within the speed limit, which was an insufficient amount of time to permit safe passage across the intersection (T. 373-74, 772-74, 792).

As Mrs. Goldberg approached the intersection in the rain, she was in a line of moving traffic, carefully watching the car in front of her; she did not see the inoperable traffic signal and she did not see Mrs. Sollie's Expedition (T. 451-52, 472-79, 486-87). Mrs. Sollie was also unaware of Mrs. Goldberg's approach; detecting a break in the traffic, and from her position behind the stop bar, she started across the intersection (T. 264-65, 370-72, 736, 742). At that point, the collision was unavoidable (T. 679-82, 772-74, 792). Mrs. Sollie's Expedition "tapped" Mrs. Goldberg's Mercedes in the left rear fender area; the "tap" was a light one, causing only $60 worth of damage to the Expedition's bumper (T. 328-29, 452-53, 738-40; DX. H, I, J). However, the "tap" caused the Mercedes to yaw out of control on the slick, wet pavement -- and it slid sideways into the southbound lane of 67th Avenue, where it was broadsided by an oncoming 6,000 pound Chevrolet Suburban (T. 264-65, 328-30, 452-53, 641-42, 657-59, 662-63, 738-40, 764). Although both vehicles were proceeding within the speed limit, the impact resulted in 100,000 to 200,000 pounds of peak force, and the passenger side of the Goldbergs' vehicle was crushed (T. 330-34; PX. 14, 17, 18, 19). Jill died that night (T. 507, 671-72; PX. 32).

The accident occurred at 5:11 p.m., 29 minutes after Mr. Woodard had shut down the high-intensity lights that were erected there, at considerable cost, to prevent precisely what occurred (T. 354-55, 357, 788). The first police officer to arrive on the scene after the accident had difficulty detecting the metal structure of the light during his approach from the west, and after checking the visibility of the inoperable traffic lights from the south, he determined that they could not be seen under the conditions (T. 367, 380-81, 387-90). There is *no* evidence in the record that *anyone* detected the inoperable traffic lights while northbound (or southbound) on 67th Avenue -- and from Mr. Stoker's description of the traffic on 67th Avenue at the time, it is inferable that few, if any, did (T. 368).

The plaintiffs' accident reconstruction expert was of the opinion (reduced to its essentials) that the deceptive and confusing conditions at the intersection essentially trapped Mrs. Goldberg and Mrs. Sollie, and that the inoperable traffic lights were the sole cause of the tragic collision (T. 340-68). He was also of the opinion (elicited by FPL) that Mrs. Goldberg's technical violation of §316.1235 played no part in the accident, because the environmental conditions prevented her from detecting the inoperable signal (T. 360-62). Even FPL's accident reconstruction expert conceded the obvious, that the inoperable traffic signal was a causal factor in the accident, and that the accident probably would not have occurred if the lights had been operable, or if someone had been directing traffic (T. 785-88). He also conceded that, if FPL knew the lights had been disabled, someone should have been directing traffic (T. 790-91). FPL's own "senior safety specialist" also conceded at trial that, if a lineman knew he

was about to disable a traffic signal, he should notify the police or arrange for another employee to direct traffic (T. 557, 566-67, 571-73, 586). And even if these things had not been conceded by FPL below, we submit that they are undeniable.

Notwithstanding the concessions of its own experts, FPL attempted to convince the district court that the tragic accident was entirely unforeseeable *as a matter of law* -- and five members of the en banc court agreed. Whatever the law may be (a point we will address in due course), it is a certainty that, from the evidence the jury heard, the accident was plainly foreseeable *as a matter of fact* -- and FPL did not even bother to insult the jury in closing argument by attempting to persuade it otherwise (T. 843-64). All that it argued was that FPL did not know and could not know that pulling the second fuse would disable the traffic lights, and that Mrs. Goldberg and Mrs. Sollie were solely to blame for Jill's death (*id.*). Omission of any argument on foreseeability was well advised, because the foreseeability of the accident was spread all over the record.

We remind the Court of several things previously mentioned. The intersection was undeniably a dangerous one, susceptible to accidents even by careful drivers and under the best of conditions -- so dangerous that the Village determined that four-way stop signs would be wholly inadequate to control it -- which is why high-intensity traffic lights were considered "absolutely mandatory" and placed there in the first place. That inoperative traffic lights result in intersection collisions was also one of the motivations for the Village Manager's request that he be notified in advance of planned outages, and FPL's agreement to do so. That intersection collisions "typically"

happen when traffic lights are inoperable was also the reason that the Village had portable four-way stop signs available, as well as a policy of dispatching police officers to intersections to direct traffic until those signs could be put in place (T. 274-75, 293). And that motorists often fail to detect inoperable traffic lights or treat them as four-way stops was proven by the testimony of Pinecrest's Chief of Police (T. 273-74), as well as by Mr. Stoker's observation of the traffic on 67th Avenue in the seven to eight minutes that he waited for someone to stop, and no one did.

There is more. The plaintiffs' expert accident reconstructionist spent several years on a "crash team" funded by the federal government, gathering on-scene data as to the causes of automobile accidents (T. 317-20). He testified that, in his experience, motorists rarely treat inoperable traffic lights as four-way stops -- a point that was reinforced "a lot during the post-effects of Hurricane Andrew" (T. 359). And Detective Buchanan, who was qualified as an expert by FPL itself, offered this rather compelling observation on the subject (T. 684-86):

> Although the law states the intersection becomes a four-way, I'm sure you've driven down the road, and I do every day, that when there's a light out, the flow of traffic that's going when the light is out continues to go as long as the cars are consistent. If the oncoming section gets a break in traffic, or one of the drivers, you know, decides that he's going to break the chain, he nudges up until they gain possession of the lane and then they go until the other side gets a break. That's the way it is here. It's been like that for sixteen years. The law was written many years ago. The intersections today -- I mean it's just not practical. If we shut down the light at 104th Street or anywhere along South Dixie, four lanes in each directions, you're not going to have at rush hour especially, 5 o'clock when this hap-

> pened, four cars stop, four cars go. It's just not going to happen. It's going to be chaotic. That's why police officers are put in intersections because there's no control. You've been there. I've been there. It happened to me in the past. I don't make any confessions, but the light was out in front of the station a week or two ago, and I was following the flow of traffic. The light was out. Cars were behind me, in front of me, if you stop too soon, you'll get rear-ended, so I followed the flow of traffic myself. That's just what happened.

All of which, we submit, is why FPL essentially conceded that the accident was foreseeable as a matter of fact by electing to avoid mention of the subject altogether in closing argument. We will address the district court's conclusion that the law is exactly contrary to the undeniable facts proven without dispute below -- its conclusion that the accident was so freakish and improbable in the range of human experience that it was unforeseeable *as a matter of law* -- in the argument which follows.

III.
ISSUES PRESENTED FOR REVIEW

> A. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT FPL OWED NO DUTY OF CARE TO JILL GOLDBERG AS A MATTER OF LAW.
>
> B. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT, EVEN IF FPL BREACHED A DUTY OF CARE, ITS NEGLIGENCE WAS NOT A LEGAL CAUSE OF JILL GOLDBERG'S DEATH AS A MATTER OF LAW.

IV.
SUMMARY OF THE ARGUMENT

Because the importance of the several issues presented here has necessitated a fairly lengthy brief, our arguments cannot readily be summarized in two or three pages. For the same reason, we believe we should avoid repeating ourselves at the Court's expense. Respectfully requesting the Court's indulgence, we turn directly to the merits.

V.
ARGUMENT

A. THE DISTRICT COURT ERRED IN HOLDING THAT FPL OWED NO DUTY OF CARE TO JILL GOLDBERG AS A MATTER OF LAW.

(Standard of review: *de novo*)

1. The Common Law Duty.

As we noted in our statement of the facts, the plaintiffs did *not* contend below that FPL owed a duty to maintain a continuous supply of electrical current to the traffic lights. Everyone agreed that Mr. Woodard was required to pull the second fuse on the pole for his own safety and the safety of others repairing the downed wire in the Fishbeins' backyard. The plaintiffs' contention was that, once FPL knew or should have known that pulling the second fuse disabled the traffic lights, it owed a duty to exercise reasonable care to protect or warn motorists of the dangerous condition it had created by disabling the traffic lights. Judge Ramirez and the panel that initially heard FPL's appeal understood the point and agreed that such a duty existed.

The majority of the en banc court failed to see the distinction. It chose instead to rely exclusively upon its earlier decision in *Martinez v. Florida Power & Light Co.*,

785 So.2d 1251 (Fla. 3d DCA 2001), *quashed*, 863 So.2d 1204 (Fla. 2003), and concluded that FPL was entitled to judgment in its favor as a matter of law because it "owed no common law duty . . . to the decedent to maintain current in the traffic light in question." 856 So.2d at 1034. Although we think the majority rather badly missed the point, the fact remains that it held that FPL owed no common law duty of care on the facts in this case. Most respectfully, that conclusion was legally indefensible, for multiple reasons.

First, to the extent that the conclusion was bottomed upon the district court's earlier decision in *Martinez*, it is undeniably indefensible. Two and one-half months after the district court ordered entry of a judgment in FPL's favor on the authority of its earlier decision in *Martinez*, that decision was quashed by this Court on the authority of its companion decision in *Clay Electric Cooperative, Inc. v. Johnson*, Case No. SC01-1955 (Fla. Dec. 18, 2003). *Martinez v. Florida Power & Light Co.*, 863 So.2d 1204 (Fla. 2003). The district court's holding of "no duty" in this case was thereby deprived of the sole authority upon which it was rested, and we respectfully submit that a quashal of the district court's decision must follow as a matter of course.

As this Court explained in *Clay Electric* (slip opinion, p. 6):

> Whenever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide this service -- i. e., the "undertaker" -- thereby assumes a duty to act carefully and to not put others at an undue risk of harm. This maxim, termed the "undertaker's doctrine" applies to both governmental and nongovernmental entities. The doctrine further applies not just to parties in privity with one another -- i. e.,

> the parties directly involved in an agreement or undertaking -- but also to third parties. . . .

In the instant case, of course, FPL was not supplying electricity to the traffic lights for free; it contracted with the county to sell it electricity for a substantial price, so that the county could fulfill its own operational level duty to maintain its traffic lights in operable condition for the safety of the motoring public. *See Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979). Having done so, it assumed a duty to act carefully in maintaining a supply of electricity to the traffic lights and not put the motoring public at an undue risk of harm. If the issue in this case was whether FPL owed a duty of reasonable care to maintain electrical current in the traffic lights, as the majority of the district court perceived, *Clay Electric* plainly answers that question in the affirmative -- and there can really be no debate about that.

That, however, was not the issue as perceived by Judge Ramirez and the panel that initially heard FPL's appeal. The real issue in the case was whether, after FPL knew or should have known that it had disabled the traffic lights for the safety of its own personnel, it had a duty to exercise reasonable care to protect or warn motorists placed at risk by the dangerous condition it had created for the motoring public. The answer to that question, we submit, can be found in both this Court's general jurisprudence on the subject of "duty," and in its more specific jurisprudence applying the general rule to cases with similar facts.[7/]

[7/] In this connection, the Court's observation in *Clay Electric* is pertinent: "The answer to the issue posed in the present cases lies not in the judicial obstruction of the plaintiffs' claims, but in the sedulous, even-handed application of established prin-

First, the general rule:

> . . . The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others. . . .
>
> . . . Foreseeability clearly is crucial in defining the scope of the general duty placed on every person to avoid negligent acts or omissions. Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others. As we have stated:
>
> > Where a defendant's conduct creates a *foreseeable zone of risk*, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are take to protect others from the harm that the risk poses.
>
> . . . Thus, as the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken. . . .
>
> The statute books and case law, in other words, are not required to catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care. Rather, each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. This requirement of reasonable, general fore-

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ciples of tort law. Reasonable care is not a standard that is beyond Clay Electric's reach" (slip opinion, p. 17). Justice Pariente's concurring observation in *Clay Electric* is also pertinent: " . . . by our opinion in this case we are <u>not expanding</u> principles of common law tort liability but <u>merely applying</u> traditional principles of negligence to the specific facts in the record before us" (slip opinion, p. 24). The same can be said of our argument on the "duty" issue in this case.

> sight is the core of the duty element. For these same reasons, duty exists as a matter of law and is not a factual question for the jury to decide. Duty is the standard of conduct given to the jury for gauging the defendant's factual conduct. As a corollary, *the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant*.

McCain v. Florida Power Corp., 593 So.2d 500, 503 (Fla. 1992) (emphasis supplied), *quoting Kaisner v. Kolb*, 543 So.2d 732, 735 (Fla. 1989).

This language has been repeated in various forms and on numerous occasions by this Court.[8/] And if there were ever any question concerning the sweeping nature of that directive, that question was recently put to rest in *Whitt v. Silverman*, 788 So.2d 210 (Fla. 2001), in which this Court quashed a decision of the Third District that had declined to apply a *McCain* foreseeability analysis to the duty question before it -- and in which this Court explicitly mandated that a *McCain* analysis be applied to *all* duty questions arising in negligence cases in the courts of this state. The issue presented here is therefore whether FPL's conduct in disabling the traffic signal more likely than not created a foreseeable zone of risk to the motoring public. If it did, FPL owed a duty of reasonable care to Jill Goldberg. After *McCain* and *Whitt*, the question is just that simple.

[8/] *See, e. g., Markowitz v. Helen Homes of Kendall* Corp., 826 So.2d 256 (Fla. 2002); *Owens v. Publix Supermarkets, Inc.*, 802 So.2d 315 (Fla. 2001); *Whitt v. Silverman*, 788 So.2d 210 (Fla. 2001); *Nova Southeastern University, Inc. v. Gross*, 758 So.2d 86 (Fla. 2000); *Henderson v. Bowden*, 737 So.2d 532 (Fla. 1999); *Florida Power & Light Co. v. Periera*, 705 So.2d 1359 (Fla. 1998); *Kitchen v. K-Mart Corp.*, 697 So.2d 1200 (Fla. 1997); *Union Park Memorial Chapel v. Hutt*, 670 So.2d 64 (Fla. 1996); *City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992).

As noted previously, the foreseeability of the accident which took Jill's life is spread all over the record in this case, and FPL did not even bother to argue the point to the jury. To the extent that FPL may choose to argue the contrary to the Court, the argument will be foreclosed by *Commerical Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979). In that case, a majority of the Third District had held that Dade County owed a duty to maintain its traffic lights in operable condition; that it could be liable to a motorist injured in an intersection collision if "the County knew or should have known of the malfunction in sufficient time to correct it and failed to do so"; but that §768.28 had not waived the County's sovereign immunity. *Cheney v. Dade County*, 353 So.2d 623, 624 (Fla. 3d DCA 1977), *quashed*, 371 So.2d 1010 (Fla. 1979).

Judge Hubbart dissented from the majority's holding on the sovereign immunity issue, and on the point in issue here, whether inoperable traffic lights create a foreseeable zone of risk to the motoring public, he penned the following characteristically sensible paragraphs:

> Sound policy reasons exist for recognizing that the county has a duty to persons using the streets to properly maintain the county's traffic control signals at street intersections. Such devices control the flow of busy automobile and pedestrian traffic which in turn protect people's life and limb. Improper maintenance of such devices by the appropriate governmental authority can lead to very serious accidents causing untold injuries, suffering and even death. Motorists and pedestrians alike quite rightly rely on such authorities . . . to properly maintain these devices for their own safety. . . .

> It is [sic] long been the established law of this state that a municipality has a duty to persons using its streets to keep those streets in a reasonably safe condition and to warn persons using the streets of known dangerous conditions. . . . The same policy reasons prompting recognition of such a duty apply with equal force to imposing a similar duty on the county to properly maintain its traffic control signals in the streets. There is no basis in reason or experience for making a distinction between the two duties. The observance of both duties is essential for the protection of any person who uses the streets against serious bodily harm or death. . . .

Cheney, supra, 353 So.2d at 628-29.

In *Commercial Carrier*, this Court approved Judge Hubbart's analysis and held that a county has an operational level duty to maintain its traffic lights in operable condition for the protection of the motoring public. Most respectfully, if a county owes a duty of care to maintain its traffic lights in operable condition because the negligent failure to do so creates a foreseeable zone of risk to the motoring public, it plainly follows that FPL owes a duty of care in supplying electricity to those traffic lights -- and it most certainly owes a duty of care to the motoring public when it purposefully disables a traffic light at a busy, essentially blind intersection 100 feet away, at rush hour and in the rain. Because FPL's conduct in disabling the traffic signal undeniably created a foreseeable zone of risk at the intersection, it had a duty to exercise reasonable care for the safety of motorists placed at potentially fatal risk

by its conduct -- and, in our judgment, there can be no doubt about that after *McCain* and *Whitt*.[9/]

That FPL owed a duty of reasonable care to Jill Goldberg is also established by decisions of this Court applying the general rule to cases with similar facts. Perhaps the best example is this Court's decision in *Palm Beach Cty. Bd. of Cty. Comm'rs v. Salas*, 511 So.2d 544 (Fla. 1987), upon which the initial panel of the district court relied. In that case, a county survey crew knowingly deactivated a traffic signal, creating a confusing situation at an intersection. This Court held that, having done so, the crew owed a duty "to take reasonably necessary steps . . . to protect the safety of passing motorists" -- "and to warn the motoring public of any known hazards that the presence of the survey crew and the accompanying deactivation and blocking of the turn lane created." 511 So.2d at 545, 547. Most respectfully, the decision below cannot be squared with that decision in any way.

For similar conflicting cases, *see Bailey Drainage District v. Stark*, 526 So.2d 678 (Fla. 1988) (where intersection is not controlled with traffic lights and is dangerous because visibility of traffic on intersecting streets is obstructed, governmental entity owes a duty of reasonable care to warn motorists of danger); *Dept. of Transportation v. Neilson*, 419 So.2d 1071, 1078 (Fla. 1982) ("[T]he failure to properly maintain existing traffic control devices" and "[t]he failure to . . . warn of a known danger"

[9/] This point is reinforced by the Court's recent decision in *Clay Electric*. Surely, if the failure to maintain a streetlight creates a foreseeable zone of risk to pedestrians walking alongside a dark roadway, as the Court concluded, disabling a traffic light at a dangerous intersection during rush hour and in the rain creates a foreseeable zone of risk to motorists.

constitutes actionable negligence); *Robinson v. State, Dept. of Transportation*, 465 So.2d 1301 (Fla. 1st DCA) (where DOT deactivated traffic light's left-turn signal by rendering left turn lane inaccessible, creating confusing situation, it owed a duty of reasonable care to protect and warn motorists of danger), *review denied*, 476 So.2d 673 (Fla. 1985).

The duty of care recognized by these decisions is hardly novel; indeed, it appears to be *universally* recognized. *See Restatement (Second) of Torts*, §321("If an actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect"); *Restatement (Third) of Torts*, §38 (Preliminary Draft No. 4) (same). Most respectfully, the district court's conclusion that FPL owed no duty of care whatsoever to Jill Goldberg -- that it could deliberately disable a traffic signal at an extremely dangerous, essentially blind intersection during rush hour and in the rain, with absolute impunity, with utter disregard for the perfectly foreseeable and potentially fatal consequences of its actions, and with no accountability whatsoever for the deaths it may cause in the process, is legally indefensible -- and we respectfully urge the Court to quash that aspect of the district court's decision.

2. The Assumed Duty.

It remains for us to address the en banc court's disagreement with the panel's conclusion that FPL also "assumed a duty" of care on the facts in this case. Because we are confident that FPL's duty exists quite independently of this doctrine, we will

be brief. The en banc court overruled the panel on this point "for the reasons [stated] in Part III of Judge Cope's specially concurring opinion." 856 So.2d at 1034. Reduced to their essentials, those "reasons" were (1) there was no "contract" between Pinecrest's Village Manager and FPL that FPL would notify the Village of all planned outages; (2) Mr. Woodard's action in disabling the traffic lights was not a "planned outage" requiring notification under the purported agreement; (3) the doctrine does not apply because FPL never commenced performance of the purported agreement; (4) no "assumed duty" could be recognized in the absence of privity between FPL and the motoring public; and (5) no "assumed duty" could be recognized in the absence of reliance upon the purported agreement by the motoring public. In our judgment, the first "reason" is bottomed upon both an incorrect view of the law and a "wrong light" view of the evidence; the second "reason" is bottomed upon a "wrong light" view of the evidence; and the remaining "reasons" are an incorrect view of the law.

Although it was unnecessary for the plaintiffs to prove the existence of a "contract" (as we will explain in a moment), the existence of an agreement was nevertheless proven. Pinecrest's Village Manager testified that he had two conversations with Greg Cope, his contact at FPL, in which he asked that he be notified of any power outages that were "planned outages" -- that is, any time FPL knew in advance that it would be disabling power so that he could respond to his citizens' calls and notify his police department; that Mr. Cope "indicated to me that he would pass that on to the appropriate department heads so that we would get notified"; and that there was no doubt in his mind that he and Mr. Cope "had reached an agreement" --

"[a]bsolutely none" (T. 147-53, 161-68). Because of the jury's favorable verdict, we are entitled to that favorable view of the evidence here, notwithstanding Mr. Cope's denials at trial (which, incidentally, were thoroughly impeached by the contrary admissions made in his pre-trial deposition) (T. 613-18). Most respectfully, there was both a promise and an agreement.

As to the second "reason," we refer the Court to the evidence collected at page 7 of this brief. Given the fact that FPL's employees conceded at trial that they conferred at *considerable* length and reached a "plan" to pull a second fuse that they knew in advance would cause a power outage in the neighborhood, and that they notified no one of the planned outage, on the favorable view of the evidence to which we are entitled here -- not FPL's self-serving characterization of the facts as an "emergency repair" -- the agreement was plainly breached.

Liability for that breach flows from the duty of care established by §324A of the *Restatement (Second) of Torts*, which has been adopted by this Court:

> . . . The Restatement (Second) of Torts explains this well accepted rule of law 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
> >
> > (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.
>
> Restatement (Second) of Torts, §324A (1965).
>
> Voluntarily undertaking to do an act that if not accomplished with due care might increase the risk of harm to others or might result in harm to others due to their reliance upon the undertaking confers a duty of reasonable care, because it thereby "creates a foreseeable zone of risk."

Union Park Memorial Chapel v. Hutt, 670 So.2d 64, 67 (Fla. 1996). That this is the law in Florida is heavily underscored by this Court's more recent decisions in *Clay Electric Cooperative, Inc. v. Johnson*, Case No. SC01-1955 (Fla. Dec. 18, 2003), and *Martinez v. Florida Power & Light Co.*, 863 So.2d 1204 (Fla. 2003).

There is no requirement for proof of a "contract" in §324A; a gratuitous undertaking will do. The Court's decision in *Clay Electric* also explicitly rejects any requirement for "privity" between the undertaker and the plaintiff. It also makes it clear that a duty can arise under any one of the three disjunctive clauses that follow the word "if" in §324A. "Reliance" is not required under clause (a); all that is required is that a breach of the undertaker's agreement "increase the risk of harm" to third persons. *See Dolan v. Florida Power & Light Co.*, 29 Fla. L. Weekly D596 (Fla. 4th DCA Mar. 10, 2004) (following *Clay Electric* on this point). And FPL's failure to notify the Village that it had planned to disable the traffic lights at the intersection most certainly increased the risk of harm to the motoring public, because a simple notification would

have resulted in the dispatch of a police officer to direct traffic at the intersection and the placement of portable four-way stop signs to control that traffic. At least three of the legal "reasons" given in Judge Cope's concurring opinion for rejecting application of §324A to the facts in this case are therefore squarely rejected by both the plain language of §324A and this Court's decision in *Clay Electric* -- and from a recent, post-*Clay Electric* decision, it would appear that even the Third District no longer accepts those "reasons" as valid. *See Felsen v. Florida Power & Light Co.*, Case No. 3D03-1753 (Fla. 3d DCA Mar. 24, 2004).

Only one of Judge Cope's "reasons" remains -- his conclusion that FPL gets "one free bite" at the duty -- that as long as it never once honors the promise it made, it can breach the promise without breaching the duty. As Comment *f* to §324A explains (in 1965), this "ancient distinction between 'misfeasance' and 'nonfeasance' has persisted where the harm results to third persons . . .". However, the Comment goes on to state that "there is no essential reason why the breach of a promise, relied upon by the promisee or by a third person, with resulting physical harm to the latter, should not result in liability in tort," and then leaves the question open "in the absence of sufficient decisions."

Although the Court did not explicitly address this aspect of §324A in *Clay Electric*, it implicitly endorsed this Comment in the decision when it concluded that Clay Electric owed a duty of care to the plaintiff's decedent, notwithstanding that it "had not instituted even the most rudimentary maintenance procedures" (slip opinion, p. 9). If *Clay Electric* was not entitled to "one free bite" in the duty it assumed, then

FPL was not entitled to "one free bite" for breaching the promise it made in this case -- and perhaps the more modern view endorsed by the *Restatement* can be made explicit in the Court's decision in this case.

Most respectfully, for all of these reasons, the district court's conclusion that FPL owed no duty of care whatsoever to Jill Goldberg -- that it could deliberately disable the traffic lights at an extremely dangerous, essentially blind intersection during rush hour and in the rain, without notifying the Village of the planned outage as it had promised to do, with absolute impunity, with utter disregard for the perfectly foreseeable and potentially fatal consequences of its actions, and with no accountability whatsoever for the deaths it may cause in the process -- is legally indefensible. FPL plainly owed a duty to exercise reasonable care for the safety of the motoring public it placed at risk by its actions, and we respectfully urge the Court to quash that aspect of the district court's decision.

B. THE DISTRICT COURT ERRED IN HOLDING THAT, EVEN IF FPL BREACHED A DUTY OF CARE, ITS NEGLIGENCE WAS NOT A LEGAL CAUSE OF JILL GOLDBERG'S DEATH AS A MATTER OF LAW.

(Standard of review: *de novo*)

Not content merely to overrule their brethren on the "duty" issue, a majority of the en banc court also overruled the panel's conclusion that the evidence was sufficient to support the jury's finding on the issue of proximate causation:

> *No Legal Cause*. Even if the contrary were true, under *Tribble, Colina*, and *Derrer*, 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.

856 So.2d at 1034. The reference to "*Tribble, Colina,* and *Derrer*" is a reference to a line of cases in which the Third District has stubbornly adhered to its view that intersection collisions that occur when traffic lights are inoperative -- no matter the environmental conditions, no matter the visual cues available to motorists, and no matter the obstructions to sight lines across corners -- are *always* deemed unforeseeable *as a matter of law*.[10/] Most respectfully, while these decisions may be arguably defensible where a traffic signal has failed on a blue-sky day, where the existence of the intersection is obvious, and where the motorists know that the lights are out, on the facts in the instant case the majority's conclusion is legally indefensible.

"Foreseeability" is the touchstone for determination of this issue, of course. "If an intervening cause is foreseeable the original negligent actor may still be held liable. The question of whether an intervening cause is foreseeable is for the trier of fact." *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So.2d 520, 522 (Fla. 1980). *Accord Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983); *Springtree Properties, Inc. v.*

[10/] It was not always so in the Third District. In 1983, Judge Schwartz wrote, "[W]e reject the claim that, as a matter of law, an inoperative or invisible traffic control device cannot be a legal cause of a resulting intersection collision." *Armas v. Metropolitan Dade County*, 429 So.2d 59, 60 (Fla. 3d DCA 1983) (issue of proximate causation for jury where foliage obscured view of stop sign at intersection). The Third District's more recent line of cases represented by "*Tribble, Colina* and *Derrer*" has been the subject of thoughtful scholarly criticism. *See* Perwin, "Liability for Negligently Disabling or Failing to Repair a Traffic Signal: Absolute Immunity in the Third District?," Vol. 73, no. 7, *Florida Bar Journal*, p. 71 (July/Aug. 1999).

Hammond, 692 So.2d 164 (Fla. 1997); *Whitt v. Silverman*, 788 So.2d 210 (Fla. 2001). And the line of cases supporting this thoroughly settled proposition is *far* longer than the line of cases represented by "*Tribble*, *Colina* and *Derrer*."

More generally:

> On the question of proximate causation, the legal concept of foreseeability also is crucial, but in a different way. In this context, foreseeability is concerned with the specific, narrow factual details of the case, not with the broader zone of risk the defendant created.
>
> In the past, we have said that harm is "proximate" in a legal sense if prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission in question. In other words, human experience teaches that the same harm can be expected to recur if the same act or omission is repeated in a similar context. . . . However, as the *Restatement (Second) of Torts* has noted, it is immaterial that the defendant could not foresee the *precise* manner in which the injury occurred or its *exact* extent. . . . In such instances, the true extent of the liability would remain questions for the jury to decide.
>
> On the other hand, an injury caused by a freakish and improbable chain of events would not be "proximate" precisely because it is unquestionably unforeseeable, even where the injury may have arisen from a zone of risk. The law does not impose liability for freak injuries that were utterly unpredictable in light of common human experience. . . .
>
> Unlike in the "duty" context, the question of foreseeability as it relates to proximate causation generally must be left to the fact-finder to resolve. Thus, where reasonable persons could differ as to whether the facts establish proximate causation -- i. e., whether the *specific* injury was generally

> foreseeable or merely an improbable freak -- then the resolution of the issue must be left to the fact-finder. . . .

McCain v. Florida Power Corp., 593 So.2d 500, 503-04 (Fla. 1992). The additional decisions stating these settled principles are so numerous that they need no mention.

Turning from the general to the specific, this Court has explicitly recognized the foreseeability of the type of accident that occurred in this case. In *Palm Beach Cty. Bd. of Cty. Comm'rs v. Salas*, 511 So.2d 544 (Fla. 1987), this Court squarely held that a jury question was presented on the issue of proximate causation in an action against a governmental entity that had disabled a traffic signal, where a motorist who was fully aware of the inoperable traffic light failed to yield the right-of-way to oncoming traffic and caused a collision in the intersection:

> . . . It is clear that the county was a factual cause of the Salases' injuries; "but for" the creation of this dangerous situation, the accident would not have occurred. We are of the view, and we so hold, that the county could have easily foreseen that blocking off the turn lane, and deactivating the turn signal and thus leaving motorists with no guidance on if or when they could turn left, personal injury to someone was not a remote possibility. Blount's actions were not so unforeseeable that the county should be relieved, as a matter of law and policy, of all liability. . . . Blount's confusion at this busy and now more dangerous intersection was not some remote possibility, it was easily foreseeable. The fact that Blount was negligent when she turned left does not render her actions so bizarre, unusual or outside the realm of the reasonably foreseeable that the county's actions did not also proximately cause the Salases' injuries. The county created this danger and confusion and failed to warn the motoring public . . . . Under these facts, a directed verdict in favor of the county is a judicial usurpation of the jury's role.

511 So.2d at 547-48. The same, we think, can be said of the en banc court's decision in the instant case.[11/]

As we have taken some pains to demonstrate, the fact that the intersection collision which took Jill's life was foreseeable *as a matter of fact* is spread all over the record in this case, and FPL thought so little of its position on this point below that it did not even attempt to persuade the jury otherwise. And the fact that one or both of the drivers involved in the initial collision may have violated a pertinent traffic regulation gave the district court no license to declare the accident unforeseeable *as a matter of law*, for two very good reasons. First, as this Court made clear in *Salas*, negligent conduct by a driver confused by an inoperative traffic light may itself be foreseeable. Indeed, where the concept of foreseeability is involved, the law draws no distinction whatsoever between foreseeable negligent conduct and foreseeable non-negligent conduct.

Just as importantly, the jury exonerated both Mrs. Goldberg and Mrs. Sollie of negligence in this case, despite their technical violation of pertinent traffic regulations. We concede that, when an intersection collision occurs, Florida courts usually conclude that someone should be found at fault -- but that requirement was fully met by the jury in this case when it found FPL to be the negligent cause of the collision. The jury was not required to find either of the two drivers at fault simply because each

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[11/] It is worth noting that there was a dissent in *Salas*, which relied upon *Metropolitan Dade Cty. v. Colina*, 456 So.2d 1233 (Fla. 3d DCA 1984), *review denied*, 464 So.2d 554 (Fla. 1985). A majority of this Court obviously rejected reliance on that case in *Salas*. In the instant case, however, the majority of the district court ignored *Salas* and bottomed its conclusion of "no legal cause" on *Colina* and its progeny.

may have violated a traffic regulation, however -- and it was properly instructed below to precisely that effect.

In Florida, the violation of *some* statutes that establish a standard of care is negligence *per se*, or negligence as a matter of law. *See generally deJesus v. Seaboard Coastline R. Co.*, 281 So.2d 198 (Fla. 1973); Fla. Std. Jury Instr. (Civ.) 4.9. However, the violation of a traffic regulation is *not* negligence as a matter of law -- and this Court has consistently refused to give the violation of a traffic regulation that effect:

> The plaintiff in error has cited a number of cases from other jurisdictions which support his contention that . . . an act violating the motor vehicle law constitutes per se negligence, but we have not and do not now agree with that view. The violation of traffic law is prima facie evidence of negligence, but that prima facie evidence may be overcome by proof of surrounding circumstances and conditions which will eliminate the character of negligence from the transaction. Therefore, when it is shown that the traffic law has been violated, it is a question for the jury to determine from all the facts and circumstances whether or not the prima facie [evidence] of negligence is overcome by other evidence of existing facts and circumstances. . . .

Allen v. Hooper, 126 Fla. 458, 171 So. 513, 516 (1937). *Accord Palm Beach Cty. Bd. of Cty. Comm'rs v. Salas*, 511 So.2d 544 (Fla. 1987); *Seaboard Coastline R. Co. v. Addison*, 502 So.2d 1241 (Fla. 1987); *Chimerakis v. Evans*, 221 So.2d 735 (Fla. 1969); *Clark v. Sumner*, 72 So.2d 375 (Fla. 1954); *Baggett v. Davis*, 124 Fla. 701, 169 So. 372 (1936).

It was because of this *long* line of authority, of course, that the jury was instructed below in the language of Fla. Std. Jury Instr. (Civ.) 4.11 (T. 877-78):

> Violation of the following traffic statutes is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that a person alleged to have been negligent violated such a traffic regulation, you may consider that fact, together with the other facts and circumstances, in determining whether such person was negligent.

In other words, the jury was instructed that it need not find either driver negligent simply because the pertinent traffic regulations may have been violated -- and the jury took the trial court at its word.

The district court's implicit conclusion that both drivers were negligent because each violated a pertinent traffic regulation flies squarely in the face of *Allen v. Hooper* and its extensive progeny, and it is exactly contrary to the instruction which the trial court gave to the jury on the point. And if the instruction was correct, as it plainly was, then the district court's conclusion is necessarily wrong, because it would make no sense at all to conclude that it was proper to instruct the jury that it need not necessarily find the drivers negligent, and then declare its verdict insupportable after trial because the drivers had not been found negligent.

Most respectfully, the jury was probably required to find at least one of the three actors at fault on the facts in this case -- and it did; but it was not required to find the drivers at fault as well. Instead, it was properly charged to evaluate the drivers' conduct in light of *all* the "facts and circumstances"; and if the jury fairly concluded that the drivers were reasonably careful given the "circumstances and conditions" they

faced, notwithstanding that traffic regulations may have been violated in the process, then its determination of the facts in that regard could not properly be disregarded.

To briefly reiterate, the "circumstances and conditions" facing Mrs. Sollie and Mrs. Goldberg were deceptive and confusing. The intersection was located in a residential area, and views of its approaches were badly obscured by walls and bushes placed very close to the roadways. But for the existence of the traffic signal itself, it would not be apparent to approaching drivers that an intersection existed at all until *very* close to it. The accident occurred at dusk, in dreary conditions; the sky was overcast with dark clouds and it was raining. It was rush hour and the volume of traffic was very high. The intersection was undeniably a dangerous one, susceptible to accidents even by careful drivers and under the best of conditions -- which is why high-intensity traffic lights were placed there in the first place.

Mrs. Goldberg was in a line of traffic, following the vehicles ahead of her at a safe distance. They did not stop, so they gave her no indication of anything out of the ordinary at the intersection. Because of an overhanging tree, only a single, inoperable traffic signal (and one-third of its cross-arm) were within her field of view; and under the adverse lighting conditions she faced, she simply failed to detect it. The first police officer on the scene verified that the inoperable signal could not be seen under the conditions. The purpose of placing powerful, high-wattage *lights* in the devices is to increase their visibility, of course; without the lights, the devices have the same level of illumination as everything else in the surrounding scene -- and very little illumination at all in the rain. Reasonably careful persons can certainly fail to detect an

inoperative traffic signal under such conditions, and there was abundant testimony that it happens all the time. Absent detection of the inoperable signal, Mrs. Goldberg's violation of a pertinent traffic regulation was plainly excusable, and the jury was entitled to so find.

Unlike Mrs. Goldberg, Mrs. Sollie did detect the inoperative traffic signal and she stopped precisely where the statutes required her to stop -- at the stop bar painted on the pavement. But she was faced with deceptive and confusing conditions as well. Her sight line to the south was blocked by a homeowner's wall and other things, and she could not see far enough ("through a crack") down the street from where she was legally stopped to avoid a collision if she attempted to cross the intersection through an apparent gap in the crossing traffic. From the very limited sight line she had, she obviously misjudged the sufficiency of the time available to her to cross the intersection through the gap she perceived, but her misjudgment caused no more than a mere "tap" of Mrs. Goldberg's vehicle, which would not have resulted in any injury at all if the pavement had not been slick because of the rain. This minor misjudgment was simply a mistake that even a reasonably careful person could make under the deceptive and confusing circumstances, or at least a jury could so find. Without traffic lights, this was a very dangerous intersection into which even reasonably careful persons could stumble and collide in the rain, which is why the traffic lights (rather than four-way stop signs) were placed there in the first place -- and it was well within the jury's province as finder-of-fact to conclude that that is precisely what happened on the facts proven to it in this case.

In our judgment, the same facts that support the jury's exoneration of Mrs. Goldberg and Mrs. Sollie prove the foreseeability of the accident that occurred beyond any legitimate debate. The foreseeability of the accident would also appear to have been settled by this Court's decision in *Commercial Carrier Corp. v. Indian River Cty.*, 371 So.2d 1010 (Fla. 1979), because it would make no sense to recognize the existence of a duty to maintain traffic signals in operable condition if a breach of that duty could never be a proximate cause of a resulting intersection collision. And given the sheer number of decisions on the subject, surely the Third District must recognize at some point what common experience tells all the rest of us -- that intersection collisions are perfectly predictable when traffic lights are out at dangerous intersections, especially at dusk and in the rain, where sight lines are badly obstructed. After all, the sole reason for the county's determination to spend $100,000 to $150,000 to erect traffic lights at this dangerous intersection was to prevent the collisions which would *inevitably* occur without them.

Most respectfully, the accident in suit was not an "improbable freak," and it was not "utterly unpredictable in light of common human experience." Under the deceptive and confusing circumstances and conditions faced by both drivers, the accident was plainly foreseeable -- and because reasonable persons can at least disagree on that proposition, the district court plainly erred in usurping the jury's role as finder-of-fact by resolving the issue of proximate causation as a matter of law.[12/]

[12/] In this connection, it worth reminding the Court of its decision in *Welfare v. Seaboard Coastline R. Co.*, 373 So.2d 886, 888-89 (Fla. 1979), in which it reiterated as "our directions to the appellate courts of this state" the "three incontrovertible

Although it is clear that the Court accepted review because of the now undeniable conflict created by its quashal of *Martinez v. Florida Power & Light Co.*, 785 So.2d 1251 (Fla. 3d DCA 2001), *quashed*, 863 So.2d 1204 (Fla. 2003), we urge the Court to quash this second aspect of the district court's decision as well.[13/] Indeed, we believe a quashal of the district court's resolution of the "duty" issue *necessarily* requires quashal of its resolution of the causation issue, because both issues turn squarely upon the single concept of "foreseeability" -- and a determination that FPL owed a duty of care because its actions created a "foreseeable zone of risk" is necessarily a determination that a jury could properly find that the accident itself was reasonably foreseeable. The two issues are therefore essentially one and the same, and

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premises" of *Helman v. Seaboard Coastline R. Co.*, 349 So.2d 1187 (Fla. 1977) -- including the following: "[T]he question of whether defendant's negligence was the proximate cause of the injury is generally one for the jury unless reasonable men could not differ in their determination of that question. . . . Because there was some competent evidence to support the jury verdict that respondents were negligent . . . , the jury was concomitantly imbued with the function of deciding whether such negligence was a proximate cause of the injury."

Most respectfully, if a jury could properly find that a train's exceeding its own speed limit by a mere five m.p.h. was a proximate cause of a crossing accident, as the Court held in *Helman*, then surely a jury could properly find that FPL's failure to protect or warn motorists that it had disabled the traffic lights at this essentially blind intersection, during rush hour and in the rain, was a proximate cause of Jill's tragic death.

[13/] The Court may also have granted review to resolve the conflicts identified in our jurisdictional brief on this second aspect of the district court's decision. If so, the entreaty that follows was probably unnecessary. If not, the entreaty that follows is bottomed upon both this Court's fundamental obligation to dispense justice to its supplicants and "the well-settled principle that 'once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case.'" *Sullivan v. Sapp*, case no. SC02-2490 (Fla. Jan. 15, 2004) (slip opinion, p. 13).

one cannot be decided without necessarily deciding the other. In addition, of course, both of the district court's holdings are squarely in conflict with a single decision of this Court -- *Palm Beach County Cty. Bd. of Cty. Comm'rs v. Salas, supra* -- and we do not see how the Court could legitimately conclude that that decision controls one issue in this case but not the other.

Moreover, the stubborn line of cases represented by "*Tribble, Colina* and *Derrer*" (and now this one) deserves to be disapproved, because every other district court that has confronted the issue in factual circumstances similar to those presented in this case has resolved it consistently with this Court's resolution of the causation issue in *Salas*: *Robinson v. State, Dept. of Transportation*, 465 So.2d 1301 (Fla. 1st DCA) (deactivated traffic signal), *review denied*, 476 So.2d 673 (Fla. 1985); *Polk Cty. v. Sofka*, 803 So.2d 751 (Fla. 2d DCA 2001) (uncontrolled intersection; obstructed line of sight), *review denied*, 821 So.2d 300 (Fla. 2002); *Clark v. Polk Cty.*, 753 So.2d 138 (Fla. 2d DCA) (missing traffic control device; obstructed line of sight), *review denied*, 776 So.2d 276 (Fla. 2000); *Gibbs v. Hernandez*, 810 So.2d 1034 (Fla. 4th DCA 2002) (obstructed line of sight); *Grier v. Bankers Land Co.*, 539 So.2d 552 (Fla. 4th DCA) (obstructed line of sight), *review denied*, 548 So.2d 662 (Fla. 1989); *Cahill v. City of Daytona Beach*, 577 So.2d 715 (Fla. 5th DCA 1991) (obstructed view of traffic control device).[14/]

[14/] *See also Dykes v. City of Apalachicola*, 645 So.2d 50 (Fla. 1st DCA 1994) (where bushes obscured motorist's vision of right-of-way, pedestrian's act of stepping in front of car from behind bushes was foreseeable and therefore not an efficient intervening cause as a matter of law; following *Salas*; jury question presented on issue of proximate causation), *dismissed*, 651 So.2d 1193 (Fla. 1995).

Most respectfully, in dishonoring the jury's fully-supported finding of fact on the proximate causation issue in this case and arrogating to itself the right to resolve this quintessentially factual issue *as a matter of law*, the district court undeniably brought itself into conflict with the settled jurisprudence of this state, established by numerous decisions of this Court and every other appellate court in this state -- and we respectfully urge the Court to quash *both* aspects of the district court's decision.

VI.
CONCLUSION

It is respectfully submitted that the *en banc* decision of the district court should be quashed and the cause remanded with directions to reinstate the panel's initial decision.

Respectfully submitted,

GROSSMAN & ROTH, P.A.
925 South Federal Highway, Suite 775
Boca Raton, Florida 33432
-and-
PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800 / Fax (305) 358-2382

By: _____
JOEL D. EATON
Fla. Bar No. 203513

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 5th day of April, 2004, to: Hicks, Anderson & Kneale, P.A., 799 Brickell Plaza, 9th Floor, Miami, FL 33131; Aimee Fried, Esq., FPL Law Department, P.O. Box 029100, Miami, FL 33102-9100; and to Hunter W. Carroll, Esq., Carlton Fields, P.A., Post Office Box 2861, St. Petersburg, FL 33731-2861.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

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JOEL D. EATON