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.

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE AND FACTS

Petitioners' Statement of the Case and Facts improperly relies upon facts outside of the four corners of the Third District en banc majority's opinion, which provides no background facts. (App. pp. 17-18)). Despite the fact that Petitioners seek review of the en banc decision, they submit an extensive rendition of alleged facts taken solely from the panel decision that was vacated by the en banc panel expressly and as a matter of law. (App. p. 17, n.1); *see Jaris v. Tucker*, 414 So. 2d 1164, 1165 n.1 (Fla. 3rd DCA 1982) (noting that "[u]pon the grant of rehearing en banc, the panel opinion was vacated").

Because "[t]he only facts relevant to [this Court's] decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict," the facts set forth by Petitioners should be disregarded or stricken as irrelevant to this Court's conflict jurisdiction. *Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986) (emphasis added). *See also Hardee v. State*, 534 So. 2d 706, 708 n.* (Fla. 1988) (holding that the only facts relevant to conflict jurisdiction are those appearing on the face of the opinion, and not those in the record).

Petitioners not only improperly provide facts not appearing in the en banc decision, but reargue the alleged merits of their case. Many of the facts submitted by Petitioners on pages 1 and 2 of their brief, cited by the vacated panel, pertain to new trial issues that were unrelated to the legal issues addressed by the en banc panel. Other "facts" presented, while not pertinent to the lack of conflict jurisdiction, warrant clarification. Although Petitioners state (p. 3) that the original panel "agreed with [the trial judge] and quoted his post-trial order in full," Judge Cope did not take part in the original majority's opinion, but submitted a special concurrence wherein he disagreed with portions of the majority's holding. Furthermore, the only judges that dissented in the Third District's en banc opinion were the three original panel members; the remaining judges

unanimously agreed that the original panel's decision was wrong. (App. p. 17).

The dissenters' view of the evidence may not be considered in determining whether conflict jurisdiction exists. 485 So. 2d at 830. Rather, "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." *Id.* Because the facts presented in Petitioners' brief are nothing more than the dissenters' view of the evidence as presented in a vacated decision, they cannot be considered in regard to conflict jurisdiction.

SUMMARY OF THE ARGUMENT

Notwithstanding the twenty cases Petitioners cite in an attempt to establish a conflict, there is not a single opinion from this Court or any of the district courts that is in conflict with the en banc panel's holding that there was no duty or proximate cause under these facts.

ARGUMENT

I. No Jurisdiction Based on *Martinez*

In their brief Petitioners cited *Martinez v. Florida Power & Light Co.*, 785 So. 2d 1251 (Fla. 3rd DCA 2001), a case that the en banc panel cited below and which was pending in this Court. Since the filing of Petitioners' jurisdictional brief, this Court has issued decisions in *Martinez v. Florida Power & Light Co.*, Case Number SC01-1505, and its companion case, *Clay Electric Cooperative, Inc. v. Johnson*, Case Number SC01-1955, holdings which address the duty a power company owes to the general public when it "undertakes" to maintain a streetlight. Petitioners have filed both opinions with this Court as supplemental authorities.

No conflict jurisdiction exists, however, based on *Martinez*. The case upon which Petitioners rely for this proposition, *Jollie v. State*, 405 So.2d 418 (Fla. 1981), has no application

to the Third District's en banc decision, as it holds that this Court could exercise its conflict jurisdiction over "a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by [the Supreme] Court." *Id.* at 420 (emphasis added).

Critically, the Third District below did not cite *Martinez* as "controlling authority" because the en banc panel expressly held that the result of its ruling would be the same even if *Martinez* was reversed. Although Petitioners contend that the en banc court relied upon *Martinez* in support of its holding that the defendant owed no duty of care to the decedent in this case, they fail to mention that the Third District's en banc decision was based "on two separate grounds each of which is independently sufficient to require the result, that [the Goldbergs'] case fails as a matter of law." (App. p. 17) (emphasis added). The Third District alternatively held, without reliance on *Martinez*, that there was no causation as a matter of law, stating:

> *No Legal Cause*. Even if the contrary were true [that *Martinez* was wrongly decided], under *Tribble*, *Colina*, and *Derrer*,[1] 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 superceded by the actions of the drivers actually involved in the collision.

(App. p. 17).

Because the Third District alternatively based its decision on the pivotal fact that the "indispensable element[]" of causation was not present, *id.*, *Martinez* was not a "controlling authority" below, as required under *Jollie*. This Court's decisions in *Martinez* and *Clay Electric* do not address the issue of causation and have no application to cases like this involving drivers

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[1] *Metropolitan Dade County v. Tribble*, 616 So. 2d 59 (Fla. 3d DCA 1993); *Metropolitan Dade County v. Colina*, 456 So. 2d 1233 (Fla. 3d DCA 1984); and *Derrer v. Georgia Elec. Co.*, 537 So. 2d 593 (Fla. 3d DCA 1988).

who failed to obey traffic laws. Thus, *Martinez* and *Clay Electric* do not change the outcome of the decision below because the Third District's decisions in *Tribble*, *Colina* and *Derrer* -- holding that no legal or proximate causation exists where a drivers' failure to obey traffic laws was a superceding and intervening cause of the accident -- are still good law, are not in conflict with any other decisions, and are not pending review in this Court.

Accordingly, review of the Third District's opinion would be a needless exercise. Review is not necessary to resolve any interdistrict conflict, because this Court has resolved any previously existing conflicts with its decisions in *Martinez* and *Clay Electric*. Furthermore, this Court's holding in *Martinez* does not have any impact on the outcome of the case below because the Third District en banc panel expressly recognized the pending *Martinez* decision and held that its holding would remain the same on alternative grounds even if this Court overruled *Martinez*.

II. No Conflict Jurisdiction

Nor is there otherwise any express or direct conflict on the face of the Third District's opinion. FLA. CONST. art. V, § 3(b)(3). *See Hardee*, 534 So. 2d 706. The only decisions cited in the Third District's en banc opinion are other decisions from the Third District. Thus, even if the en banc decision could be said to conflict with one of the Third District's prior opinions (and it clearly does not), conflict between a district court decision and a previous decision of the same court cannot create a basis for conflict jurisdiction in this Court. *See Gilliam v. State*, 267 So. 2d 658, 659 (Fla. 2nd DCA 1972).

No conflict exists even based on the facts provided in the vacated panel's decision. The issue in this case was whether FPL could be held liable for an automobile accident that occurred after FPL temporarily shut off the flow of electricity to a power grid that also covered an intersectional traffic light while conducting repairs to a high-voltage power line that had been

downed in a thunderstorm. There is not a single decision in Florida that has addressed the issues in this case and held against the utility. Every one of the cases cited by Petitioners contains facts and points of law completely distinguishable from those in this case, thus providing no basis for conflict jurisdiction. *See Department of Revenue v. Johnston*, 442 So. 2d 950 (Fla. 1983) (discharging jurisdiction where cause was before Court based on apparent conflict between district court opinions that were factually distinguishable); *Kyle v. Kyle*, 139 So. 2d 885, 887 (Fla. 1962) ("If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise.").

Every Florida court that has addressed the duty a serving utility owes to the motoring public has held that a utility does not owe a duty to motorists involved in intersectional accidents when the electrical current that feeds a traffic signal has been interrupted. For instance, the Fourth District held that an electric utility did not owe a duty to a driver who was killed in an intersectional accident when the flow of electricity to a traffic light was interrupted. *Arenado v. Florida Power & Light Co.*, 523 So. 2d 628 (Fla. 4th DCA 1988). This Court dismissed review of *Arenado* based on its finding that there was no conflict. 541 So. 2d 612 (Fla. 1989). Similarly, in *Abravaya v. Florida Power & Light Co.*, 39 Fla. Supp. 153 (Fla. Cir. Ct. 1973), cited with approval in *Arenado*, the circuit court held that the defendant utility did not owe a duty to a driver who was injured as a result of the loss of electrical power to a traffic signal. *Id.* at 153-54.

A. Duty: Petitioners fail to show how the Third District's holding that there was no duty under the facts conflicts with a decision of another court. This Court has now held in *Clay Electric* and *Martinez* that when an accident occurs due to an inoperable streetlight, a power company cannot be held liable to injured parties unless it "assumed a specific, legally recognized duty to the plaintiffs" to maintain the streetlight. (p. 8). In *Clay Electric*, the defendant

streetlight maintenance company was held to have assumed a duty to the general public by contracting with the Jacksonville Electric Authority to maintain the streetlights along the street where the decedent was killed.

In contrast to *Clay Electric*, this is not a case where the Respondent, FPL, owned, operated or maintained the subject traffic signal. Thus, it had assumed no duty. The interruption in power to the traffic signal was merely incidental to FPL's shutting off of electricity to a larger grid in order to repair a downed high-voltage power line. Consequently, unlike the defendant in *Clay Electric*, which through a contract with the JEA had expressly undertaken to maintain the subject streetlight, the Petitioner here never undertook a duty to maintain the signal.[2]

The cases relied upon by Petitioners in their attempt to establish a conflict regarding duty are of no avail to them. To the contrary, the *Clay Electric* Court relied upon the line of cases cited by Petitioners in support of its "narrow[]"[3] ruling that a duty to the general public arises only upon the assumption of a "specific" duty -- a ruling that has no application here. *See Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979) (cited in *Clay*

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[2]Even to the extent the Court were to consider the vacated panel majority's decision below, which refers to an alleged agreement by FPL to notify the Village of Pinecrest of any planned power outages, there is still no conflict with *Clay Electric* because the alleged agreement was unrelated to the maintenance of any traffic lights. Rather, it was <u>at most</u> a gratuitous oral agreement to notify the city in advance of any planned outages (which this was not) so that the city could respond to resident telephone inquiries regarding outages, and had nothing to do with safety or the dispatching of police to outage areas. In his special concurrence, Judge Cope correctly rejected any relationship between such agreement (to the extent one existed) and the accident, and additionally observed: "Clearly the . . . discussion between the village and FPL was not a contract." (App. p. 16). In any event, Petitioners have abandoned any "undertaking" argument by not raising it in their jurisdictional brief (or on appeal).

[3]*Martinez*, Case No. SC01-1505 at 2.

Elec.); *Department of Transp. v. Neilson*, 419 So. 2d 1071 (Fla. 1982) (cited in *Clay Elec.*); *Robinson v. Department of Transp.*, 465 So. 2d 1301 (Fla. 1st DCA 1985); *Bailey Drainage Dist. v. Stark*, 526 So. 2d 678 (Fla. 1988); *Palm Beach County Board of County Commissioners v. Salas*, 511 So. 2d 544 (Fla. 1987). The "duty" cases cited by Petitioners involve duties owed by governmental entities to the motoring public to maintain traffic signals and intersections that the entities own and maintain.

As stated, FPL did not own, control, or maintain the subject traffic signal. The plaintiff in this case alleged that FPL was negligent due to its failure to provide electrical current to an area that included a traffic signal. There was never any allegation of a failure to properly maintain the Dade County-owned and maintained traffic signal and/or intersection. In fact, in an analysis approved by the *Clay Electric* concurrence (p. 18), the intermediate appellate court in *Clay Electric* expressly distinguished "electrical current" cases such as this from the cases cited by Petitioners, holding that there is a "crucial distinction" between a governmental entity's duty to maintain traffic lights and signals that it undertakes to provide, and a utility's provision of electricity to a governmental improvement. *See Johnson v. Lance, Inc.*, 790 So. 2d 1144, 1146 (Fla. 1st DCA 2001).

The Third District's decision also does not conflict with this Court's decisions in *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), and *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001), as Petitioners contend. In *McCain*, an employee of Florida Power Corporation ("FPC") went to a construction site and undertook the task of marking the areas where it would be safe to use a mechanical trencher. Later that day, the plaintiff was injured by an electrical shock when the blade of the trencher he was operating struck an underground FPC cable carrying 7,200 volts of electricity. The plaintiff was in an area marked "safe" when the

accident occurred, and he "relied upon those markings in conducting his digging in the area." *Id.* at 1271-72. In quashing the Second District's holding that the plaintiff's injury was not foreseeable, this Court reasoned: "The extensive precautionary measures taken by [FPC] show that it understood the extent of the risk involved. The very fact that [FPC] marked the property for McCain itself recognizes that McCain would be within a zone of risk while operating the trencher." *Id.* at 504.

This case is nothing like *McCain*. *McCain* involved negligent safety advice given directly to an injured party relying on the "superior" knowledge of a power company, express recognition by the power company of the risks of injury, and an injury resulting from direct contact with electrical equipment owned and maintained by the utility. Because of the dramatic and legally significant differences between *McCain* and the present automobile accident/power interruption case, there is no express and direct conflict between *McCain* and the panel's decision.

In fact, the concurrence in this Court's *Clay Electric* decision noted that *McCain* applied there "[b]ecause Clay Electric agreed to maintain the streetlights adjacent to the roadway," thus creating a foreseeable zone of risk. (p. 19). The instant case did not involve a *McCain* zone-of-danger duty because FPL never undertook a duty to operate or maintain the traffic signal that was located in the area in which the electrical current was interrupted during repairs to a downed line.

The decision below also does not conflict with *Whitt*, which involved the unrelated issue of liability of landowners for injuries arising from natural conditions on their land. The *Whitt* case involved neither electricity, electrical current, or inoperable traffic signals, and thus has absolutely no application to the decision below.

B. Proximate Cause: Petitioners also fail to identify a decisional conflict arising out of the Third District's holding below that there was no proximate causation as a matter of law. The en banc panel relied solely upon three Third District cases holding that a failure to maintain a traffic light cannot be a proximate cause of a motorist's superceding and intervening negligence: *Metropolitan Dade County v. Tribble*, 616 So. 2d 59 (Fla. 3rd DCA 1993), *rev. denied*, 626 So. 2d 210 (Fla. 1993); *Metropolitan Dade County v. Colina*, 456 So. 2d 1233 (Fla. 3d DCA 1984), *pet. for rev. denied*, 464 So. 2d 554 (Fla. 1985); and *Derrer v. Georgia Elec. Co.*, 537 So. 2d 593 (Fla. 3d DCA 1988), *rev. denied*, 545 So. 2d 1366 (Fla. 1989).

Significantly, this Court denied review in every one of these three cases, all three of which found a lack of proximate causation, even after this Court's 1987 decision in *Salas* and its 1992 decision in *McCain*. Thus, although Petitioners assert in their "causation" argument that the cases relied upon by the Third District conflict with *Salas* and *McCain*, this Court has already rejected that argument. *See, e.g., Tribble*, 616 So. 2d 59, *rev. denied*, 626 So. 2d 210 (Fla. 1993).

Further, as explained above, *Salas* and *McCain* do not create a conflict, as they do not address the issue at hand. Since *McCain* and *Salas* (and prior to them as well), every single District Court of Appeal panel that has addressed the issue herein has held that a motorist's failure to stop at an intersection is a superceding, intervening cause of an automobile accident occurring due to the absence of a functioning traffic light. *Tribble*, 616 So. 2d at 60 (negligence of driver who collided with car after failing to stop at intersection with malfunctioning traffic light was "a superceding and intervening cause of the accident"); *Levy v. Florida Power & Light Co.*, 798 So. 2d 778, 781 (Fla. 4th DCA 2001) (negligence of driver who struck and killed minor bicyclist after failing to stop at intersection with malfunctioning traffic light was "a superceding and

intervening cause relieving FP&L of any liability").

In fact, the *McCain* Court expressly held in regard to causation that "foreseeability is concerned with the specific, narrow factual details of the case . . . ." 593 So. at 503. The facts of *McCain* are vastly different from the ones in this case, and thus no conflict can arise from the Third District's finding of no causation under these facts. *See Department of Revenue*, 442 So. 2d 950. This Court's opinion in *Salas* also does not conflict with the en banc panel's decision holding that an interruption in power to a traffic light was not the legal cause of a resulting automobile accident. *Salas* did not involve the interruption of electricity to a traffic signal, wherein drivers are required by law to treat the signal as a four-way stop sign. Rather, *Salas* involved a survey crew that had completely blocked a left-hand turn lane at a major intersection without giving drivers any guidance as to how to proceed through the intersection, a factual scenario that has absolutely no application to an interruption of electricity to a traffic signal.[4]

Much of Petitioners' remaining argument on proximate causation improperly relies upon facts outside the four corners of the en banc panel's decision, and thus cannot establish a basis for conflict jurisdiction. For instance, although Petitioners argue in regard to what "common experience" tells us about certain driving conditions (pp. 8-9), the panel's opinion does not provide that the case involved a traffic light that was out at a "dangerous intersection," or that "sight lines [were] badly obscured."

The remaining "causation" cases cited by Petitioners are not in conflict with the Third District's decision below, as not one of them involved inoperable traffic lights or the liability

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[4]The article criticizing the Third District's holdings on causation, recommended to this Court by Petitioners (note 7), was authored by a member of the firm representing Petitioners.

of electric utilities.[5]

CONCLUSION

The Respondent respectfully submits that this Court deny review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 29th day of December, 2003 to: Joel D. Eaton, Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, FL 33130; and Stuart Grossman, Grossman & Roth, P.A.

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[5] *See Robinson*, 465 So. 2d 1301; *Polk County v. Sofka*, 803 So. 2d 751 (Fla. 2nd DCA 2001); *Clark v. Polk County*, 753 So. 2d 138 (Fla. 2nd DCA 2000); *Gibbs v. Hernandez*, 810 So. 2d 1034 (Fla. 4th DCA 2002); *Grier v. Bankers Land Co.*, 539 So. 2d 552 (Fla. 4th DCA 1989); *Cahill v. City of Daytona Beach*, 577 So. 2d 715 (Fla. 5th DCA 1991).

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