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' REPLY BRIEF ON THE MERITS

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I. STATEMENT OF THE CASE AND FACTS

FPL does not quarrel with our statement of the case. Neither does it quarrel with the accuracy of a single word in our statement of the facts. Rather, with a rhetorical shrug of its shoulders, it simply dismisses "most of" those facts as irrelevant to the issues before the Court. It then goes on to present a highly sanitized and heavily slanted version of the facts which all but ignores its admitted obligation to state the facts in a light most favorable to the verdict. And it emphasizes the facts upon which Mrs. Goldberg and Mrs. Sollie might have been found negligent, notwithstanding that the jury completely exonerated both of them in its verdict -- after being instructed that violation of a traffic regulation is not necessarily negligence, and that *all* the facts and circumstances should be considered in assessing blame. FPL also concludes its recitation by pointing an accusing finger at Miami-Dade County, notwithstanding that it neither pled nor asserted below that the county had any role whatsoever in causing the accident that took Jill Goldberg's life. As the Court might expect, we have a number of problems with FPL's restatement of the facts.

To begin with, FPL may not have liked the incriminating detail in the many facts we collected in support of the jury's verdict, but it has no legitimate claim that those facts are irrelevant to the issues before the Court. With respect to the duty issue, this Court recently observed that "[t]he principle of 'duty' is linked to the concept of foreseeability and may arise from four general sources," including "judicial precedent; and . . . a duty arising from the general facts of the case." *Clay Electric Coop., Inc. v. Johnson*, 28 Fla. L. Weekly S866, S866 (Fla. Dec. 18, 2003). And, of course, the

issues of foreseeability and causation undeniably present quintessentially factual questions in the settled jurisprudence of this state. *See McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992). It was our duty to present this Court with *all* the facts underlying both issues in a light most favorable to the verdict. We did that -- and we leave it to the Court to determine whether we wasted its time in any way.

We are also constrained to take issue with the defensive spin that FPL has placed on the facts in an effort to deny the nose on its face. For example, at page 9 of its brief, FPL asserts that it "does not 'have any way of knowing how a particular traffic control signal anywhere in Dade County is fed.'" This assertion is preposterous. The evidence was undisputed that the pole feeding the traffic signal that Mr. Woodard disabled was typical of 2,000 or so poles that fed traffic signals in the county, all of which were configured in the same standard way, and that it was identified as the power source for a traffic signal by a 25 square-foot concrete pad at its base containing a steel plate 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 provide FPL with an *unmistakable* "way of knowing how a particular traffic control signal anywhere in Dade County is fed."

FPL's restatement of the facts underlying the "assumed duty" issue suffers from the same "wrong light" view of the evidence. It is certainly true that FPL attempted to convince the jury that its seven-man crew's restoration of power to the Fishbeins' residence was an "emergency restoration," rather than a "planned outage." But it is also true that one of the men on the scene rated the repair on a scale of one

to ten, from relatively routine to critical emergency, as only a three -- and that the crew took nearly two hours to plan the manner in which it would repair the downed wire. Given this conflict in the evidence, it was for the jury to decide -- not for FPL to decide by its own self-serving characterization -- whether this was a "planned outage" of which FPL could reasonably have given notice, or an "emergency restoration" so dire that it could justifiably remain mute. There are other examples of FPL's inability to face the facts that deserve mention, but space is at a premium, so we simply refer the Court to our initial statement of the facts -- and we stand by both the propriety and accuracy of that uncontested statement.

An additional word is in order concerning FPL's assertion that the plaintiffs did not claim at trial that Mr. Woodard actually knew he was disabling the traffic light. The assertion is irrelevant to the issues, of course, since "constructive notice" -- i. e., what one "should have known" in the exercise of reasonable care -- is the functional equivalent of actual notice in a negligence action, and FPL concedes that the evidence was more than sufficient to prove that, at the least, Mr. Woodard most certainly should have known he was disabling the light. But more importantly, the assertion, which FPL bottoms upon a single snippet of argument plucked from its context in plaintiffs' counsel's rebuttal argument, is simply untrue.[1/]

[1/] FPL's attempt to reinforce its insupportable assertion with the plaintiffs' objection to one of its proposed jury instructions is, to put the point charitably, a *non sequitur*. This was a simple negligence action, and both sides proposed standard negligence instructions. FPL proposed two "special" instructions, however, one of which stated that "[t]he issues for your determination . . . are whether [FPL] *knowingly and intentionally* interrupted the power supply to the traffic signal . . . [etc.]" (R2 205;

If it were not the plaintiffs' position that Mr. Woodard knew exactly what he was doing, as FPL claims, one might reasonably ask why the plaintiffs bothered to adduce the abundant evidence of that fact collected at pages 10-17 of our initial brief. One might also reasonably ask why, in denying FPL's motion for directed verdict, Judge Ramirez stated on the record that the evidence was sufficient for the jury to find that Mr. Woodard knew what he was doing (T. 809-12). And before such an assertion could have been made in good faith, one might reasonably ask whether the point was argued to the jury elsewhere in closing arguments. It was.

In his initial closing argument, plaintiffs' counsel argued at considerable length that Mr. Woodard's "foliage" story was not believable; that it was reasonably inferable from the fact that FPL produced photographs of everything but the pole and that none of the other employees on the scene corroborated Mr. Woodard's story, that there was no "foliage" obscuring the pole; and that Mr. Woodard knew precisely what he was doing and was "guilty as sin" as a result (T. 824-30). Plaintiffs' counsel repeated these points in his rebuttal argument, asserting once again that the truth was that the pole was not covered by foliage (T. 866-68). And for good measure, he argued that

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emphasis supplied). The plaintiffs opposed this instruction because it stated the issue in terms of FPL's "no notice" defense (and worse, that it required a finding of "actual notice"), and because the issue was *not* whether Mr. Woodard had engaged in *intentional misconduct* in pulling the fuse (T. 408-15, 717-24). The issue was whether FPL was negligent in failing to take precautions for the safety of motorists when it knew or should have known that it had interrupted the power supply to the traffic signals, and Judge Ramirez therefore properly rejected FPL's proposed instruction in favor of standard negligence instructions.

Mr. Woodard at least should have known that he was disabling the traffic lights because he had an obligation to look at the pole and was negligent if he did not do so (T. 868). This "alternative" argument (that FPL has taken badly out of context) was not a concession that Mr. Woodard had no actual knowledge that he was disabling the lights. It was simply a protective argument, advanced in the face of the possibility that the jury might believe Mr. Woodard's "foliage" story. And with those things off our chest, we turn to the merits of FPL's response, such as they are.

II. ARGUMENT

A. THE DUTY ISSUE.

As we emphasized in our initial brief, the issue presented here is not, as a majority of the district court perceived, whether FPL owes a duty to maintain a continuous supply of electricity to traffic signals. The issue presented here is whether, once 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. FPL insists, and at great length, that it owed neither duty as a matter of settled law. FPL is wrong, of course, as we demonstrated in our initial brief, and we intend to demonstrate that the several arguments it has thrown up in an effort to finesse this Court's settled jurisprudence on the subject are legally indefensible. But before we undertake that task, we cannot help but observe at the outset that there is considerable irony lurking in the position that FPL has taken in this Court.

Although FPL's appellate *attorneys* earnestly insist that FPL owed no duty to protect or warn motorists of the dangerous condition it created, FPL *itself* conceded at trial that it was duty bound to do precisely what Mr. Woodard and his crew did not -- protect or warn motorists of the danger they had created. The concession came from FPL's "senior safety specialist," Frederick Hughes, Jr., a 32-year employee who administered FPL's safety program, safety rules, and work practices, and whom FPL produced as the most knowledgeable person in its employ concerning "safety issues when turning off power at an intersection" (T. 557-59, 565).

On cross-examination, Mr. Hughes conceded that, with respect to planned outages at least, FPL's policy was to make arrangements to have a police officer direct traffic, and that this was simply a matter of "common sense" (T. 566-67). Mr. Hughes was then asked about FPL's policy in an "unplanned situation":

> Q. Let me ask you a very simple question. If you know that you're going to kill the light to the intersection, you'd agree you have an obligation to protect the public?
>
> A. I have to agree with you.
>
> Q. That would mean if you know, you call the police, and if you can't get the police, you on behalf of FPL do something more to protect the public?
>
> A. If you have the personnel or whatever it takes to do the --
>
> Q. Absolutely, and your personnel, FPL linemen trouble men, loan [sic] journeymen, foremen are trained in maintenance of traffic, aren't they?
>
> A. Yes, sir, they are.
>
> . . . .
>
> Q. You are of the opinion that in the event that you can't get a police officer and in the event you know you're going to turn off the power to the intersection and you have the manpower that

> you should put somebody from FPL out there to direct traffic, flagmen to warn the public. Correct?
> A. It would be in the best interest.

(T. 571-73). Given that FPL itself has recognized its "obligation" to protect or warn motorists placed at risk by the deactivation of traffic signals, not to mention mere "common sense," its appellate counsels' effort to convince this Court that recognition of such a duty would be terrible public policy ought to ring *very* hollow here.[2/]

FPL's principal argument relies upon *Arenado v. Florida Power & Light Co.*, 523 So.2d 628 (Fla. 4th DCA 1988), and its limited progeny -- progeny that included the decision quashed by this Court in *Martinez v. Florida Power & Light Co.*, 863 So.2d 1204 (Fla. 2003). Reduced to their essentials, these cases rely upon the 75-year old decision in *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928), to hold, as a majority of the district court held below, that FPL has no duty to provide a continuous supply of electricity to traffic lights. That, as we have taken some pains to make clear, is not the issue presented here, however, so FPL's principal argument addresses a non-issue in the case.

It is also highly doubtful that *Arenado* and its progeny survive this Court's recent decision in *Clay Electric*, because the Court declared *H.R. Moch Co.* an anachronism in that case, and because no legitimate distinction can be drawn between

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[2/] In this connection, the evidence was undisputed that the National Electrical Safety Code required that measures be taken for the safety of the motoring public in circumstances like those confronting Mr. Woodard (T. 228-29). And for good measure, FPL's trial counsel conceded below that, if FPL knew it had de-energized the traffic signal, a jury question was presented on the issue of its negligence (T. 812).

traffic lights and street lights -- except, perhaps, that the negligent failure to provide electricity to traffic lights presents far more danger than permitting a street light to go dark, a point that ought to make extension of *Clay Electric* to traffic lights an imperative. Surely, given the reasoning of *Clay Electric*, when FPL contracted with the county to sell it electricity 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, FPL assumed the duty to act carefully in maintaining a supply of electricity to the traffic lights and not putting the motoring public at undue risk of harm. If the issue in this case were whether FPL owed a duty of reasonable care to maintain electrical current in the traffic lights, *Clay Electric* plainly answers that question in the affirmative -- and in our judgment, there can really be no debate about that.[3/]

[3/] To FPL's contention that *Arenado* is the law everywhere where traffic lights are concerned, we point out that it has collected a mere six cases from other jurisdictions, only one of which is from a state's highest court, and none of which provide much support for *Arenado*. In *Greene v. Georgia Power Co.*, 132 Ga. App. 53, 207 S.E.2d 594, 596 (1974), the court noted that "[a]n electric company may be liable for injury resulting from an unreasonable delay in restoration of power," but held that the power company was not *negligent* where power to a traffic light was restored within seven minutes of its loss. In *Gin v. Yachanin*, 75 Ohio App.3d 802, 600 N.E.2d 836 (1991), the court held simply that the power company had no duty to repair a downed wire owned by the city. *White v. Southern California Edison Co.*, 25 Cal. App.4th 442, 30 Cal. Rptr.2d 431 (1994), is a street light case, not a traffic light case, and it contains a paragraph recognizing the existence of a duty of care on facts like those in the instant case. The three New York decisions upon which FPL relies are well wide of the mark for a different reason. Each of them circumscribes the liability of an electric power company for personal injuries and economic losses resulting from city-wide blackouts affecting millions of people. *See Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985). We are unpersuaded by any of these decisions that *Arenado* and its progeny should survive this Court's decision in *Clay Electric.*

When it finally turns to the point in issue here, FPL is forced to extemporize. It argues that it owed no duty to protect or warn motorists of the dangerous condition it had created because its "undertaking" was limited to repairing the downed wire, and it did not "undertake" to protect or warn the motoring public. It is certainly true that FPL did not "undertake" to protect or warn the motoring public of the danger it had created, but that is why it was found *negligent* in this case -- not the reason why it owed no duty of care to Jill Goldberg. Following the logic of the extemporization, FPL could dig a deep trench across a street to lay a power cable and leave it open and unguarded overnight without incurring any duty to protect or warn motorists of the hidden danger it had created. That is not the law, of course. And there are two very good reasons why that is not the law on the facts in the instant case.

To begin with, as we demonstrated in our initial brief, a duty of reasonable care arises in Florida whenever a defendant's "undertaking" creates a "foreseeable zone of risk," and that duty extends to all persons within that "foreseeable zone of risk." When FPL deactivated the traffic signals for the safety of its own personnel, the "zone of risk" it created was not limited to personnel involved in the repair (or the Fishbeins, who were not even at home); the "zone of risk" it created undeniably extended to all persons who were foreseeably placed at risk by this act, like the motoring public -- and the duty of reasonable care created by the "undertaking" therefore extended to the motoring public. That point, incidentally, is made perfectly clear by this Court's decision in *Palm Beach Cty. Bd. of Cty. Comm'rs v. Salas*, 511 So.2d 544 (Fla. 1987) -- a decision that was featured in our initial brief, and a decision that FPL all but

ignores by burying it within a string cite (and misspelling it to boot) in the single swoop of a paragraph (at pp. 24-25) in which it ineffectively attempts to distinguish *all* of the "duty to protect or warn" decisions upon which we relied.

In any event, and second, to the extent that FPL bases its extemporization on this Court's recent decision in *Clay Electric*, we think the decision has been badly misread. *Clay Electric* does not purport to displace *McCain* and its extensive progeny. It does not hold that a duty of care arises *only* when one "undertakes" to act and *never* when it *omits* to act. And it does not hold that a duty of care created by an "undertaking" extends no further than the immediate confines of the "undertaking" itself. Rather, as we noted at the outset of this brief, the decision rather explicitly announces that "[t]he principle of 'duty' is linked to the concept of foreseeability and may arise from four general sources," including "judicial precedent; and . . . a duty arising from the general facts of the case."

In *Clay Electric*, this Court found §324A of the *Restatement (Second) of Torts* to be persuasive authority for recognition of a duty of care on the facts in that case. In the instant case, the duty of care that FPL owed to Jill Goldberg is just as firmly established by §321 of the *Restatement (Second) of Torts*: "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." The duty to protect or warn of a known danger created by a defendant is also firmly established in the jurisprudence of this Court. And if *Salas* and the additional representative decisions that we cited in our initial brief

were not enough to make the point, the additional representative cases footnoted below should nail the point home.[4/] Most respectfully, the fact that FPL did not "undertake" to protect or warn motorists of the dangerous condition it created when it deactivated the traffic signals is the reason why it was found *negligent* in this case; it is not a reason why it should be immune from the common sense "obligation" to exercise reasonable care that its own "senior safety specialist" conceded below.

Perhaps sensing that its extemporizations might prove to be unpersuasive, and that the "bedrock principles of tort law" upon which it purports to rely might actually be found in the decisions cited in our initial brief, FPL invokes "public policy" as its last resort. It claims that the district court's decision "respects lines of public policy that may be crossed only at great peril, and at the risk of troubling, unintended consequences," and it cautions the Court against opening a "Pandora's Box." Counsel's prose style is impressive, if somewhat hyperbolic, but we believe the public policy in cases where a defendant's conduct has created a "foreseeable zone of risk" is already firmly established in this state. Nevertheless, if the Court wishes to reconsider its policy in this area, we invite it to choose *any* analytical tool it might deem appropriate -- cost/benefit, risk/utility, or even the length of a chancellor's foot. However the competing considerations might be balanced, there can be but one

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[4/] *Florida Dept. of Natural Resources v. Garcia*, 753 So.2d 72, 77 n. 4 (Fla. 2000) ("[I]f a government entity *creates* a hazardous condition that would not be readily apparent to the public and has knowledge of the presence of people likely to be injured by the dangerous condition, the government has a duty to either correct the condition or warn the public"); *Ralph v. City of Daytona Beach*, 471 So.2d 1 (Fla. 1983) (same); *City of St. Petersburg v. Collom*, 419 So.2d 1082 (Fla. 1982) (same).

legitimate conclusion. The benefit to be obtained by recognition of the duty is the preservation of human life; the cost to FPL to comply with the duty -- ironically, an "obligation" it has already established as its own corporate policy as a matter of "common sense" -- is nominal at best.

A simple radio call to the dispatcher to obtain a police officer to direct traffic would fully discharge the duty. And if a police officer were unavailable, the placement of a few traffic cones or flares in the zone of danger, or perhaps a truck or two with flashing lights, might be sufficient. Or a lineman could direct traffic, just as he was trained to do to meet the very exigency that took Jill Goldberg's life. After all, there were seven linemen standing around in the Fishbeins' yard with not much else to do for the two hours in which they planned the repair, and it would have cost FPL little more than the expenditure of a few calories to comply with the socially responsible duty that this Court highlighted in *Salas*. *See Whitt v. Silverman*, 788 So.2d 210, 222 (Fla. 2001) (rejecting "agrarian rule" in favor of a *McCain* analysis where "it does not appear that it would have been unduly burdensome" for the landowners to have exercised reasonable care for the safety of others).

Most respectfully, the question presented here is *not* a close one. FPL does *not* deserve an immunity from negligence actions that no other entity in this state -- not even the state itself -- enjoys. And we conclude as the Court did in *Clay Electric*: "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

principles of tort law. Reasonable care is not a standard that is beyond [FPL's] reach." 28 Fla. L. Weekly at S868.[5/]

B. THE CAUSATION ISSUE.

Given this Court's decisions in *McCain* and its extensive progeny, the proximate causation issue turns upon the answer to a single question: whether the intersection collision that occurred after FPL disabled the traffic lights at the dangerous intersection -- at dusk, during rush hour, and in the rain -- and then failed to protect or warn the motoring public of the highly increased danger it had created, "was genuinely foreseeable or merely an improbable freak." *Whitt, supra* at 217, *quoting McCain, supra* at 504. Since FPL did not even bother to contest the undeniable foreseeability of the accident at trial, one would have thought the answer to this question was perfectly straightforward. And, of course, if the accident was foreseeable, as FPL all but conceded at trial, "then the resolution of the issue must be left to the fact-finder." *Id.*

If it were not clear enough to the district court from this general principle that it could not properly decide the proximate causation issue as a matter of law, the point should certainly have been brought home to it by this Court's decision in *Palm Beach Cty. Bd. of Cty. Comm'rs v. Salas*, 511 So.2d 544 (Fla. 1987), the pertinent portion

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[5/] In responding to our alternative argument on the issue of "assumed duty," FPL simply parrots Judge Cope's analysis of the issue below, on a wrong light view of the evidence. Since our initial argument demonstrates the error of that analysis in light of this Court's decision in *Clay Electric*, there is no need for us to plow that ground again. For our reply on this issue, the Court is referred to our initial brief.

of which is quoted at length at pages 39-40 of our initial brief. Curiously, like an ostrich that buries its head in the sand at the first sign of danger, FPL simply ignores *Salas* in its brief. Ignoring it will not make it go away, however.

Rather than confront *Salas*, FPL attempts to convince the Court (at p. 39) that there is an "unbroken line of appellate authority in Florida" supporting its position on this issue. It cites no decision from this Court, however. As authority for its proposition, it relies upon *Metropolitan Dade Cty. v. Colina*, 456 So.2d 1233 (Fla. 3d DCA 1984), and its incestuous progeny, notwithstanding that *Colina* was a centerpiece of the *dissenting* opinion in *Salas* and was therefore obviously rejected by the majority as authoritative in that case. FPL even goes so far as to assert (at p. 50) that "[n]o Florida appellate decision holds to the contrary." Although it does not say so, it apparently justifies its silent dismissal of *Salas* on the ground that the traffic signal in that case was deactivated by a county work crew, rather than a power company -- but that is plainly a distinction without a difference where the issue of proximate causation, which turns on foreseeability rather than the status of the defendant, is concerned.

FPL also insists (at p. 48) that, "[i]n our attempt to identify and discuss all reported decisions with factually similar circumstances, we have found that courts have uniformly held that power outages to traffic signals are not the proximate cause of intersection collisions." And it identifies *Rust Int'l Corp. v. Greystone Power Corp.*, 133 F.3d 1378 (11th Cir. 1998), as the "only case to the contrary." With all

due respect to FPL's capable counsel, the "attempt" was far from thorough.[6/] Undersigned counsel's own superficial 20-minute search on Westlaw turned up a number of cases from other jurisdictions which, like *Salas*, conclude that malfunctioning/inoperable traffic lights *can* be found to be a proximate cause of an intersection accident. *See, e. g., District of Columbia v. Carlson*, 793 A.2d 1285 (D.C. App. 2002); *Williams v. Mo. Hwy. & Transpn. Comm.*, 16 S.W.3d 605 (Mo. App. 2000); *Nunez v. Commercial Union Ins. Co.*, 774 So.2d 208 (La. App. 2000), *rev'd in part on another ground*, 780 So.2d 348 (La. 2001); *Maddox v. City of Oakdale*, 746 So.2d 764 (La. App. 1999); *Prager v. Motor Vehicle Accident Indemn. Corp.*, 53 N.Y.2d 854, 422 N.E.2d 824 (1981); *Wood v. State of New York*, 112 A.D.2d 612, 492 N.Y.S.2d 481 (1985); *Ferroggiaro v. Bowline*, 153 Cal.App.2d 759, 315 P.2d 446, 64 A.L.R.2d 1355 (1957). The Court will find dozens more in Annotation, *Traffic Light Failure--Liability*, 34 A.L.R.3d 1008 (1970) (and 2003 Supplement thereto).[7/]

[6/] Counsel also misstates the facts when asserting that a tree limb blocked Mrs. Goldberg's view of the traffic lights, so the accident would have happened even if the lights had been working. The evidence was undisputed that the tree limb blocked the view of only the right signal on the crossarm, not the left, and the discussion with the expert quoted in FPL's brief was limited to the right signal alone (T. 677-83).

[7/] The two recent decisions from the Louisiana appellate courts, *Nunez* and *Maddox*, plainly reflect a change in approach to the issue from the 1957 Louisiana decision relied upon by FPL. A recent decision of an Illinois appellate court also rejects the proximate causation analysis of *Quintana v. City of Chicago*, 230 Ill.App.3d 1032, 596 N.E.2d 128 (1992), in favor of a *foreseeability* test consistent with Florida law. *See Indlecoffer v. Village of Wadsworth*, 282 Ill.App.3d 933, 671 N.E.2d 1127 (1996).

In the final analysis, of course, because the issue is highly fact-sensitive, there is little to be gained by trading cases from other jurisdictions. The law in Florida is clear enough. *Colina* and its progeny 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. But those decisions simply cannot be allowed to deprive litigants of their constitutional right to have a jury decide what is quintessentially a question of fact, no matter the environmental conditions, no matter the visual cues available to motorists, and no matter the obstructions to sight lines across corners. The district court's decision plainly conflicts with *McCain*, *Salas*, and *Clay Electric*, and we respectfully submit once again that both aspects of the district court's decision should be quashed.

III. CONCLUSION

The *en banc* court resolved the two issues on which it granted an *en banc* rehearing; it did not disagree with the panel's resolution of the remaining issues in the case; and the *en banc* decision of the district court should therefore be quashed and the cause remanded with directions to reinstate the panel's initial decision.

By: _____
JOEL D. EATON

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 1st day of June, 2004, to: Aimee Fried, Esq., FPL Law Department, P.O. Box 029100, Miami, FL 33102-9100; and to Gary L. Sasso, Esq. and 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.

_____

JOEL D. EATON