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Committee on Judiciary

Senator Daniel Webster, Chair

DUTY TO MAINTAIN STREETLIGHTS

SUMMARY

Under *Clay Electric Cooperative, Inc., v. Johnson*, 873 So. 2d 1182 (Fla. 2003), utilities may be sued for damages as a result of accidents caused by inoperative streetlights. In order to avoid liability, streetlights must be maintained with reasonable care. The Florida Supreme Court, however, did not provide any standards to determine what level of maintenance is reasonable. As a result of the opinion, utilities fear that they will be subject to unlimited tort liability. Utilities also warn that utility rates may increase. On the other hand, the opinion may create an incentive for utilities to find and repair inoperative streetlights quickly.

The Legislature likely has the authority to pursue a range of options in response to the *Clay Electric* decision. These courses of action range from no action, to requiring compliance with a standard of care, to providing complete immunity.

BACKGROUND

On September 4, 1997, a 14-year-old boy was struck and killed by a delivery truck in the early morning darkness as he walked to his school bus stop. The accident occurred in the vicinity of an inoperative streetlight. In a lawsuit following the accident, the Supreme Court of Florida ruled that Clay Electric Cooperative, Inc., owed a duty to pedestrians to maintain the inoperative street light with reasonable care.¹ As a result, utilities² may be liable in negligence actions for damages caused by inoperative streetlights.

¹ *Clay Electric Cooperative, Inc., v. Johnson*, 873 So. 2d 1182 (Fla. 2003).

² For simplicity, this report refers to the duty of a utility to maintain streetlights. However, others including municipalities who perform streetlight maintenance likely have the duty to maintain streetlights with reasonable care as well.

Legislation passed the House of Representatives during the 2004 Regular Session which would have provided utilities with complete immunity from negligence actions for failure to maintain streetlights with reasonable care.³ Similar legislation in the Senate died in committee.⁴

The Accident

On the morning of the accident, the decedent walked near the edge of the roadway with his back toward traffic. The shoulder on that side of the road was wide, flat, and grassy. The shoulder on the other side of the road dropped off quickly into a ditch, leaving little room to walk between the road and the ditch. The light nearest the accident had not been illuminated for "some time."⁵

The streetlights along the road were located on telephone poles 20 to 30 feet from the edge of the road.⁶ The streetlights were a style of light that provides less illumination than the cobra-style lighting that is more prevalent today. The lights were spaced at wide intervals, less frequently than every other telephone pole.

Clay Electric Cooperative, Inc., was contractually obligated to maintain the streetlight nearest the accident.⁷ However, a copy of its streetlight maintenance contract has not been located.⁸ As a result,

³ See House Bill 1573, 1st Engrossed (2004).

⁴ See Senate Bill 2226 (2004).

⁵ *Clay Electric*, 873 So. 2d at 1184.

⁶ The defendant, Clay Electric Cooperative, Inc., has maintained that the lights are not streetlights, but security lights. The trial court, however, found that the lights were typical of lights located along streets and highways throughout the Jacksonville area. *Johnson v. Lance, Inc.*, 790 So. 2d 1144, 1145 (Fla. 1st DCA 2001).

⁷ *Clay Electric*, 873 So. 2d at 1187.

⁸ William T. Stone and Thomas F. Slater, "When Streetlights Go Dark: Legal Liability Now and a Preview of What's to Come," Presentation at Florida Municipal

the methods by which Clay Electric was contractually obligated to maintain the streetlights are unknown. Nevertheless, the Court found that:

at the time of the accident, Clay Electric had not instituted even the most rudimentary maintenance procedures.⁹

Lawsuit for Negligent Streetlight Maintenance

The lawsuit was instituted against the driver of the truck and the corporate owner of the truck. The truck driver, however, claimed that he would have seen the decedent if the streetlight nearest the accident had been working. The driver further claimed that Clay Electric's failure to maintain the streetlight was the cause of the accident. Because the truck driver blamed Clay Electric for the accident, the jury may have been permitted to attribute fault to Clay Electric even though it was not a party to the case.¹⁰ The plaintiffs, therefore, amended their complaint to name Clay Electric as a defendant to ensure that damages could be collected for fault attributed to Clay Electric.¹¹

Duty to Maintain Streetlights

Clay Electric moved for summary judgment on the basis that it had no legal duty to maintain streetlights.¹² The Supreme Court, however, found that Clay Electric:

should have foreseen that proper maintenance [of the streetlight] was necessary for the protection of the plaintiffs.¹³

The Court also held that, under the undertaker's doctrine, Clay Electric assumed a duty to act carefully and not to put others at an undue risk of harm.¹⁴ The undertaker's doctrine provides that:

Electric Association-Florida Municipal Power Association 2004 Annual Conference (July 29, 2004).

⁹ *Clay Electric*, 873 So. 2d at 1187.

¹⁰ See *Bellsouth Human Resources Administration, Inc., v. Colatarci*, 641 So. 2d 427 (Fla. 4th DCA 1994) (holding that defendant's proffer that non-parties were negligent was sufficient to include non-party tortfeasors on the verdict form).

¹¹ *Stone*, *supra* note 8.

¹² *Clay Electric*, 873 So. 2d at 1184.

¹³ *Id.* at 1187.

¹⁴ The undertaker's doctrine in Restatement (Second) of Torts s. 324A (1965) states:

One who undertakes, gratuitously or for consideration, to render services to another

Whenever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service--i.e., the "undertaker"--thereby assumes a duty to act carefully and to not put others at an undue risk of harm.¹⁵

The *Clay Electric* Court supported its finding of the existence of a duty to maintain streetlights for the benefit of pedestrians through the use of the undertaker's doctrine by citing to *Union Park Memorial Chapel v. Hutt*, 670 So. 2d 64 (Fla. 1996).¹⁶ In *Union Park*, a woman was injured while traveling in her vehicle in a funeral procession through an intersection with a red light.¹⁷ The injured woman sued the funeral home for negligent operation and supervision of the funeral procession. Under s. 316.1974, F.S. (1991), participants in funeral processions were permitted to travel through red lights. The statute also required other vehicles to yield the right-of-way to funeral processions.¹⁸ The trial court held that a funeral director owed no duty to participants in funeral processions. The Supreme Court of Florida, however, held that:

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.

¹⁵ *Clay Electric*, 873 So. 2d at 1186.

¹⁶ *Id.*

¹⁷ *Union Park*, 670 So. 2d at 65.

¹⁸ Section 316.1974(2), F.S. (1991), states:

Pedestrians and the operators of all vehicles, except emergency vehicles, shall yield the right-of-way to each vehicle which is a part of a funeral procession. Whenever the lead vehicle in a funeral procession lawfully enters an intersection, the remainder of the vehicles in such procession may continue to follow the lead vehicle through the intersection, notwithstanding any traffic control device or right-of-way provisions prescribed by statute or local ordinance, provided the operator of each vehicle exercises due care to avoid colliding with any other vehicle or pedestrian upon the roadway.

once a [funeral] director voluntarily undertakes to [lead a funeral procession], the director assumes at least a minimal duty to exercise good judgment, and ensure that procession members proceed to the cemetery in a safe manner.¹⁹

About a year after the *Union Park* opinion, the Legislature passed ch. 97-300, L.O.F. This law amended s. 316.1974, F.S., to create a presumption that funeral directors act with reasonable care if certain procedures are followed and equipment used.²⁰ Lead vehicles in a funeral procession, for example, must enter intersections lawfully and use a flashing light. No case law exists that explains whether the presumption of reasonable care in the conduct of a funeral procession can be overcome.

Defense and Dissent Legal Arguments

Clay Electric argued that the undertaker's doctrine was inapplicable because the inoperative streetlight did not increase the risk to the decedent. The decedent "was no worse off with an inoperative streetlight than he would have been with no light at all."²¹

¹⁹ *Union Park*, 670 So. 2d at 67.

²⁰ Section 316.1974(5), F.S. (1997), states:

316.1974 Funeral procession right-of-way and liability.—

(5) LIABILITY.—

(a) Liability for any death, personal injury, or property damage suffered on or after October 1, 1997, by any person in a funeral procession shall not be imposed upon the funeral director or funeral establishment or their employees or agents unless such death, personal injury, or property damage is proximately caused by the negligent or intentional act of an employee or agent of the funeral director or funeral establishment.

(b) A funeral director, funeral establishment, funeral escort, or other participant that leads, organizes, or participates in a funeral procession in accordance with this section shall be presumed to have acted with reasonable care.

(c) Except for a grossly negligent or intentional act by a funeral director or funeral establishment, there shall be no liability on the part of a funeral director or funeral establishment for failing, on or after October 1, 1997, to use reasonable care in the planning or selection of the route to be followed by the funeral procession.

²¹ *Clay Electric*, 873 So. 2d at 1187.

Further Clay Electric and the dissenting opinion argued that the test for determining whether utility conduct imposes a duty to the public was described in *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928).²² The following test was articulated in that case:

If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward. . . . The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good.²³

Accordingly, the dissent argued that the failure to repair a streetlight was the withholding of a benefit rather than the launching of an instrument of harm and therefore no duty existed.²⁴

Policy Arguments

Clay Electric and the dissent argued that the existence of a duty to maintain streetlights would have the following negative impacts:

- the floodgates would be opened to similar lawsuits against utilities;
- utilities' maintenance costs and liability insurance premiums would increase sharply;
- consumer rates for electricity, water, and other basic services would rise; and
- streets would not become safer because utilities and municipalities may decline to increase their liability by installing additional streetlights.²⁵

Clay Electric further argued that the adverse impact of consumer rate hikes outweighs the benefits of lawsuits for failure to maintain streetlights. Lastly, Clay Electric argued that losses resulting from accidents in the vicinity of inoperative streetlights are covered by automobile insurance.

²² *Id.* at 1188 and 1196-1197.

²³ *Id.* at 1197 (emphasis in original).

²⁴ *Id.* at 1198.

²⁵ *Id.* at 1189 and 1202-1204.

The majority, however, declined to evaluate Clay Electric's policy arguments for two reasons.²⁶ First, the Court cited a lack of record evidence supporting the policy arguments. Second, the Court stated that the evaluation of matters that may have an impact on utility rates is best left to the legislative branch. The Court, however, did speculate that if utility insurance costs increase as the result of the opinion, auto insurance costs may decline.²⁷ Additionally, the Court supported its decision with the policy argument that liability for negligent streetlight maintenance acts as an incentive for utilities to perform maintenance that will prevent large losses.²⁸

METHODOLOGY

Committee staff reviewed case law from Florida and other states on the duty to maintain streetlights; requested information on utility practices from the four investor-owned utilities, all municipally owned utilities, and all rural electric cooperatives; and discussed streetlight maintenance issues with industry experts, trial attorneys, and regulatory representatives.

FINDINGS

Consequences of *Clay Electric*

As a consequence of *Clay Electric*, juries may now decide whether streetlights have been maintained with reasonable care. Utility representatives fear that liability for negligent streetlight maintenance could be unlimited.²⁹

Foreseeable Zone of Risk

The Court's test, the foreseeable zone of risk standard, to determine whether a duty exists has been criticized. This standard was used to determine the existence of a duty to maintain streetlights with due care.³⁰ The foreseeable zone of risk standard was detailed in *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla.

1992). According to the *McCain* Court, the duty element of negligence "is a minimal threshold *legal* requirement for opening the courthouse doors."³¹ This "duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others."³²

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 taken to protect others from the harm that the risk poses.³³

In a recent article in THE FLORIDA BAR JOURNAL, the Court's foreseeable zone of risk analysis and the *Clay Electric* decision were criticized.³⁴ The author stated that the Court's decisions applying *McCain* reveal a pattern of expanding tort liability and a justification of that expansion:

while avoiding a forthright and meaningful consideration of social and economic factors traditionally considered by the courts nationally in determining whether a legal duty exists.³⁵

The author also criticized the Court for the idea that the duty element is a minimal threshold requirement for opening the courthouse doors.³⁶ According to the author, the imposition of a legal duty is more than a minimal threshold:

it is a formal judicial recognition of a legal obligation to conform to a particular standard of conduct toward another.³⁷

When addressing the *Clay Electric* opinion, the author supported the dissent's examination of:

"policy considerations" which would "militate against imposing a duty on utility companies in these circumstances."³⁸

²⁶ *Id.* at 1189-1190.

²⁷ *Id.* at 1194.

²⁸ See *id.* at 1190.

²⁹ The fear of unlimited liability may have arisen as the result of a recent \$37 million jury verdict for the wrongful death of a minor who was killed in a car accident at an intersection with a non-functioning traffic signal. See *Florida Power & Light Co. v. Goldberg*, 856 So. 2d 1011 (Fla. 3d DCA 2003), cert. granted, 870 So. 2d 821 (Fla. Mar. 11, 2004).

³⁰ See *Clay Electric*, 873 So. 2d at 1185 and 1192.

³¹ *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992) (emphasis in original).

³² *Id.* at 503.

³³ *Id.* at 503 (emphasis in original).

³⁴ William N. Drake, Jr., *Foreseeable Zone of Risk: Confusing Foreseeability With Duty in Florida Negligence Law*, THE FLORIDA BAR JOURNAL, 10 (April 2004). The author is an assistant city attorney with the St. Petersburg City Attorney's Office.

³⁵ *Id.* at 12.

³⁶ *Id.* at 16.

³⁷ *Id.* at 16.

Conditions for Lawsuits

As a result of the *Clay Electric* opinion, utilities may face lawsuits for negligent streetlight maintenance only if all of the conditions below are satisfied.

- An accident must occur at night.
- The accident must involve the collision of an automobile with a pedestrian or bicycle.
- The accident must occur in the vicinity of a streetlight.
- The streetlight nearest the accident must be malfunctioning at the time of the accident.³⁹

As such, the accidents for which utilities may be subject to liability under *Clay Electric* are likely to be a small percentage of all motor vehicle accidents.

Duty to Maintain Streetlights in Other States

Florida is one of five states that have determined that utilities have a duty to maintain streetlights.⁴⁰ Courts for 14 states and the U.S. Virgin Islands have determined that no general duty to maintain streetlights exists.⁴¹ However, courts in six of these no-duty states

have found that a duty to maintain a streetlight may exist to illuminate a particularly dangerous condition.⁴² Little legal authority exists to determine whether a particular condition is dangerous enough to impose a duty to maintain a streetlight.

At least seven courts evaluated policy arguments when determining whether a duty to maintain streetlights exists. All seven found that no duty exists. Three of these courts expressly rejected the undertaker's doctrine as creating a duty to maintain streetlights.⁴³

Duty to Maintain Streetlights vs. Traffic Signals

The concurring opinion in *Clay Electric* drew an analogy between traffic signals and streetlights as additional support for the existence of a duty to maintain streetlights. The concurring opinion stated:

If a governmental entity has a duty to maintain traffic lights and stop signs it has erected for the safety of motorists, it also has a duty to maintain other improvements it has erected for the safety of other members of the public.⁴⁴

³⁸ *Id.* at 16.

³⁹ Based on a conversation with Thomas Slater, attorney for the plaintiff in *Clay Electric*, August 31, 2004.

⁴⁰ See *Wiggs v. City of Phoenix*, 198 Ariz. 367 (Ariz. 2000); *Espowood v. Conn. Light and Power Co.*, 1997 WL 220091 (Conn. Super. Ct. 1997); *Clay Electric Cooperative, Inc., v. Johnson*, 873 So. 2d 1182 (Fla. 2003); *Baran v. City of Chicago Heights*, 251 N.E.2d 227 (Ill. 1969); *David v. Broadway Maintenance Corp.*, 451 F. Supp. 877 (E.D. Penn. 1978); *but see Dattner v. Lamm*, 5 Pa. D. & C.2d 552 (C.P. Phila. County 1955).

⁴¹ See *White v. Southern Cal. Edison Co.*, 30 Cal. Rptr. 2d 431 (Cal. 2nd Dist. Ct. App. 1994); *Quinn v. Georgia Power Co.*, 180 S.E. 246 (Ga. App. Ct. 1935); *Shafouk Nor El Din Hamza v. Bourgeois*, 493 So. 2d 112 (La. Ct. App. 1986); *East Coast Freight Lines, Inc., v. Consolidated Gas, Electric Light & Power Co.*, 50 A. 2d 246 (Md. 1946); *Vaughn v. Eastern Edison Co.*, 719 N.E.2d 520 (Mass App. Ct. 1999); *Ridley v. City of Detroit*, 673 N.W.2d 448 (Mich. App. Ct. 2003); *Horneyer v. City of Springfield*, 98 S.W.3d 637 (Mo. Ct. App. 2003); *Sinclair v. Dunagan*, 905 F. Supp 208 (D. New Jersey 1995); *Blake v. Public Service Co.*, 82 P.3d 960 (N.M. Ct. App. 2003); *Thompson v. City of New York*, 578 N.Y.S.2d 507 (N.Y. 1991); *Gin v. Yachanin*, 600 N.E.2d 836 (Oh. Ct. App. 1991); *White v. Tilcon Gammino, Inc.*, 1992 WL 813636 (R.I. Super. Ct. 1992); *County of Cameron v. Brown*, 80 S.W.3d 549 (Tex. 2002); *Fishbaugh v. Utah Power & Light*, 969 P.2d 403 (Ut. 1998); and *Turbe v. Government of the Virgin Is.*,

938 F.2d 427 (3d Cir. 1991); *but see Lurye v. Southern Cal. Edison Co.*, 84 Cal. Rptr. 2d 225 (Cal. Ct. App. 2d Dist. 1999).

⁴² See *Plattner v. City of Riverside*, 82 Cal. Rptr. 2d 211, 214 (Cal. Ct. App. 1999) (holding that an unlit crosswalk was not a dangerous condition of public property); *Quinn v. Georgia Power Co.*, 180 S.E. 246, 248 (Ga. App. Ct. 1935) (stating that the failure of a streetlight does not give rise to liability where there is no obstruction, excavation, or other extraordinary defect); *Horneyer v. City of Springfield*, 98 S.W.3d 637, 645 (Mo. Ct. App. 2003) (holding that an unlit intersection that is large and busy is not of itself a dangerous condition); *Lee v. Morris*, 747 N.Y.S.2d 233, 234-235 (N.Y. App. Div. 2002) (holding that the accumulation of leaves on the ground is not a hazardous condition that requires illumination); *County of Cameron v. Brown*, 80 S.W.3d 549, 556-557 (Tex. 2002) (holding that a change in lighting on a narrow curving causeway was a hazardous condition); and *Fishbaugh v. Utah Power & Light*, 969 P.2d 403, 407 (Ut. 1998) (stating that no evidence showed that crosswalk was a dangerous condition requiring illumination).

⁴³ See *Vaughn v. Eastern Edison Co.*, 719 N.E.2d 520 (Mass App. Ct. 1999); *Blake v. Public Service Co.*, 82 P.3d 960 (N.M. Ct. App. 2003); and *Fishbaugh v. Utah Power & Light*, 969 P.2d 403 (Ut. 1998).

⁴⁴ *Clay Electric*, 873 So. 2d at 1191 (quoting *Johnson v. Lance, Inc.*, 790 So. 2d 1144, 1146 (Fla. 1st DCA 2001)).

However, a California court in rejecting an analogy between streetlights and traffic signals stated:

First, unlike an inoperative traffic light or obscured stop sign which may only be visible to traffic approaching from one direction, it is obvious to all when a streetlight is out. Therefore, a pedestrian such as plaintiff cannot claim she relied on the inoperative streetlight in order to cross the street. Moreover, unlike traffic lights and stop signs which are the only means by which traffic is controlled, streetlights are not the only or even the primary means by which streets are illuminated for vehicular traffic. Vehicle headlamps are designed and used for that purpose. Thus, no societal interest is promoted by applying the “reliance” rationale to streetlights illuminating crosswalks.⁴⁵

As such, arguments exist to distinguish the importance of streetlight maintenance from traffic signal maintenance.

Ratemaking

Under s. 366.04(2)(b), F.S., the Florida Public Service Commission (Commission) is authorized to “prescribe a rate structure for all electric utilities.” These rates must permit an electric utility to achieve a “reasonable rate of return upon its rate base.”⁴⁶

In fixing fair, just, and reasonable rates for each customer class, *the commission shall, to the extent practicable, consider the cost of providing service . . .*⁴⁷

According to Commission staff, the Commission has never considered whether damages awarded against a utility for negligence are a “cost of providing service” that may be passed on to rate payers.⁴⁸ As such, no Commission or court precedent exists to suggest that rate payers will directly pay for damages caused by negligent maintenance of streetlights. However, the Commission typically allows costs for insurance or self-insurance to be included in rate structures.⁴⁹

⁴⁵ *Plattner v. City of Riverside*, 82 Cal. Rptr. 2d 211, 214 (Cal. App. Ct. 1999).

⁴⁶ Section 366.041(1), F.S.

⁴⁷ Section 366.06(1), F.S. (emphasis added).

⁴⁸ Meeting with commission staff on August 30, 2004.

⁴⁹ See, e.g., *In re: Petition for rate increase by Florida Public Utilities Company*, Order No. PSC-04-0369-AS-EI, 9 (April 6, 2004).

Accordingly, the Commission is likely to permit increased insurance costs to be recovered from rate payers if insurance costs increase as a result of the *Clay Electric* opinion.

Access to Courts

If the Legislature wishes to alter the duty to maintain streetlights as stated in *Clay Electric*, it likely will not violate the access to courts provision of s. 21, Art. I, State Const. This provision states:

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The following standard determines whether a statute violates the access to courts provision of the State Constitution:

Where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. s 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.⁵⁰

No statute or common law right to a cause of action for failure to maintain streetlights with due care was recognized before the adoption of the State Constitution. As such, the Legislature may not be required to provide a reasonable alternative to the cause of action or show a necessity for the abolishment of the cause of action. Additionally, the *Clay Electric* majority acknowledged legislative authority to balance the interests of utilities, ratepayers, and accident victims.⁵¹ After declining to consider the policy arguments against the existence of a duty raised by *Clay Electric*, the Court stated:

⁵⁰ *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

⁵¹ *Clay Electric*, 873 So. 2d at 1189-1190 and note 14.

such matters [affecting utility rates] fall squarely within the purview of the legislative, not judicial, branch.⁵²

Possible Legislative Alternatives

Upon review of cases on the duty to maintain streetlights and discussions with industry representatives and trial lawyers, the Legislature has multiple potential courses of action. These courses of action range from no action, to requiring compliance with a standard of care, to providing complete immunity, as described below.

1. *No action.*

If the Legislature takes no action, utilities may have an incentive to make quick streetlight repairs. Injured parties will have utility companies in addition to the driver of the vehicle involved in the collision as a source from which damages may be sought for their injuries. Utilities, however, warn of negative impacts as described earlier.

2. *Duty to inspect streetlights at regular intervals.*

If the Legislature requires utilities to inspect the streetlights for proper operation, inoperative streetlights may be discovered and repaired quickly. A traveling amendment to SB 2226 (2004) would have required those responsible for streetlight maintenance to inspect each streetlight at night at least once every six months.⁵³ However, industry and labor representatives believe that this alternative is not cost effective.⁵⁴

3. *Duty to replace streetlights before the termination of their expected useful life.*

“Group relamping” is a maintenance procedure by which lights are replaced by the end of their projected useful life whether they are working or not.⁵⁵ According to industry representatives, the actual amount of time that streetlights continue to function

⁵² *Id.* at 1189-1190.

⁵³ See barcoded amendment no. 121286. A similar amendment, barcode no. 658101, was not adopted by the House of Representatives.

⁵⁴ Conversations with Terry Kammer of the IBEW, Aug. 26, 2004; Alex Glenn of Progress Energy, Sept. 2, 2004; and Bill Willingham of the Florida Electric Cooperatives Ass’n on Sept. 30, 2004.

⁵⁵ A streetlight maintenance contract between Maple Shade Township, New Jersey, and Public Service Electric & Gas Co. provided that the utility would replace broken bulbs upon notice from the township and would replace all streetlight bulbs once every four years. *Sinclair v. Dunagan*, 905 F.Supp. 208, 213 (D. New Jersey 1995).

varies from light to light. As a result, they argue, funds will be wasted to replace bulbs that may function well beyond their predicted useful life.⁵⁶

4. *Duty determined by contractual obligations.*

The Legislature could adopt a standard of care that requires utilities to perform to the standard established in their contracts with customers. House Bill 1573, 1st Engrossed (2004), would have allowed tort liability for failure to maintain streetlights to be assumed by contract. Similarly, one case held that the contract between the utility and a city “indicated no intent that the [utility] should become liable to the general public for its failure to” maintain streetlights.⁵⁷

5. *Duty to repair streetlights within a time certain after notification of malfunctioning streetlights.*

The Legislature could adopt a standard of care to require a streetlight to be repaired within a time certain after notification of a malfunctioning streetlight.

Proposed amendments to SB 2226 and HB 1573 would have required those responsible for maintaining streetlights to maintain a log of reported streetlight outages and to repair lights within 30 days of notice. The time for repairs would be extended to 180 days after the cessation of a declared state of emergency if the streetlight was located in the area under the state of emergency.

Committee staff has received no information to indicate that the time parameters specified in the proposed amendments are generally unattainable. However, the length of time needed for streetlight repair may vary based upon the cause of the light failure. Replacement of bulbs and photoelectric cells may take little time to complete. Replacement of underground wiring may take much longer, especially if permits for digging are required. Additionally, in some areas, many different types of decorative street lights are used. Replacement parts for decorative lights may not be delivered promptly or may be costly to maintain in inventory.

6. *Standard of care established by Florida Public Service Commission.*

The Legislature could adopt a law directing the Florida Public Service Commission (PSC) to establish a standard of care by rule. To properly balance the interests of utilities, ratepayers, and potential accident

⁵⁶ Conversations with Alex Glenn of Progress Energy.

⁵⁷ *East Coast Freight Lines, Inc., v. Consolidated Gas, Electric Light & Power Co.*, 50 A. 2d 246, 256 (Md. 1946).

victims, the PSC could conduct a detailed examination of how the risk of lawsuits for negligent streetlight maintenance can impact rates, decisions for the placement of streetlights, and what actions are required to identify and repair nonfunctioning streetlights.

7. *Rebuttable Presumption of Reasonable Care.*

A traveling amendment to SB 2226 would have created a rebuttable presumption that utilities use reasonable care or are not negligent if streetlights are maintained in accordance with certain standards.⁵⁸

A presumption of reasonable care is unusual in negligence law. Typically, a rebuttable presumption presumes that a person was negligent.⁵⁹ A rebuttable presumption of negligence imposes upon the defendant to produce evidence “to show that the real fact is not as presumed.”⁶⁰ No case law has been found, however, to explain what must be shown to overcome a presumption that a defendant acted with reasonable care. As a result, what constitutes reasonable care will remain uncertain.

8. *Cap damage awards.*

Caps on damage awards can prevent access to courts in violation of s. 21, Art. I, State Const.⁶¹ However, no cause of action for failure to maintain streetlights with due care was recognized prior to the adoption of the State Constitution. Thus, the test to determine whether a statute prevents access to court from *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973), likely will not prohibit the Legislature from placing a cap on damage awards resulting from the failure to maintain streetlights.

9. *Duty to Maintain Streetlights for a Particularly Dangerous Condition.*

The Legislature may wish to limit the duty to maintain streetlights to locations that are particularly dangerous as is the law in several other states. Little case law exists to define what particularly dangerous conditions create a duty to illuminate. Most cases discussing particularly dangerous conditions have found that the accident scene discussed in the case was not particularly dangerous.⁶² As such, the imposition of a

duty to illuminate a particularly hazardous condition appears unlikely to expose utilities to a significant amount of liability.

10. *Complete Immunity.*

Senate Bill 2226 and HB 1573 would have granted complete immunity to utilities and government entities from liability for damages resulting from the failure to maintain streetlights with reasonable care. House Bill 1573, 1st Engrossed (2004), would have allowed tort liability for failure to maintain streetlights to be assumed by contract. The House Bill, further, would have prevented fault for an accident from being attributed to the entity responsible for streetlight maintenance.

RECOMMENDATIONS

Utility companies are concerned that the duty to maintain streetlights established by the Florida Supreme Court in *Clay Electric Cooperative, Inc., v. Johnson*, 873 So. 2d 1182 (Fla. 2003), could expose them to unlimited liability and negatively affect ratepayers. Further, the opinion did not state what specific streetlight maintenance is required to avoid liability. This interim project report does not comment as to whether the duty to maintain streetlights as described in *Clay Electric* is appropriate. However, the Legislature likely has the authority to limit utility liability or create standards for streetlight maintenance if it so chooses.

Precedent also exists for the Legislature to limit utility liability for streetlight maintenance. This precedent was created when the Legislature limited liability for leading funeral processions after the Florida Supreme Court found a duty of care for leading processions.

Accordingly, if the Legislature finds that limiting utility liability for streetlight maintenance or creating maintenance standards is justified, it may wish to choose from the methods described in the Findings section of this report.

⁵⁸ See note 53 *supra*.

⁵⁹ See *Clampitt v. D.J. Spencer Sales*, 786 So. 2d 570 (Fla. 2001) (stating that a rebuttable presumption of negligence attaches to the rear driver in a rear-end automobile collision).

⁶⁰ *Duhaime v. Boggs*, 877 So. 2d 860, 861 (Fla. 5th DCA 2004).

⁶¹ See *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987).

⁶² See note 42 *supra*.