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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002513-MR

JONATHON MARK ROBERSON, INDIVIDUALLY
AND AS ADMINISTRATOR OF THE ESTATE OF
SHYTONE M. ROBERSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 01-CI-007743

LOUISVILLE GAS AND ELECTRIC
COMPANY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

COMBS, CHIEF JUDGE: Jonathon Roberson appeals from a summary judgment of the Jefferson Circuit Court which dismissed his negligence claim against the appellee, Louisville Gas and Electric Company (LG&E). Roberson argues that the trial court erred as a matter of law in concluding that LG&E "did not have a duty to repair and maintain street lamps in order to prevent accidents involving third parties." (Opinion and Order of

October 23, 2003, p. 1.) We agree that the trial court erred in dismissing Roberson's lawsuit. Thus, we vacate and remand.

On the evening of February 23, 2001, Roberson's ten-year-old son, Shytone Roberson, was struck by a motor vehicle as he attempted to cross Preston Highway near its intersection with Miles Lane in Jefferson County. The child died as a result of the injuries sustained in the accident. Neither the driver of the vehicle, Tammy Triplett, nor her passenger, saw the child before the car ran over him. They only realized what had happened by the sound made by the impact. The police report described the area where the accident occurred as "dark" and the highway as "not lighted."

On November 13, 2001, Roberson filed a complaint seeking damages from LG&E for the wrongful death of his son. He contended that the street light near the intersection was not working on the night of the accident and that LG&E was "negligent and careless in maintaining and/or servicing" the light, and that that negligence resulted in his son's death.

In answers to interrogatories, LG&E acknowledged that it owned the street light, that the light was leased to Jefferson County Fiscal Court, and that LG&E was responsible for maintaining the street light under its agreement with the county. LG&E also revealed that it has no formal or written policies or procedures for monitoring street lights, relying

solely on the public to provide notice as to which lights are in need of repair. LG&E had not received any notice that the street light near the accident scene was not illuminated.

In seeking the summary dismissal of Roberson's complaint, LG&E convinced the trial court that it owed no duty to the public -- including the decedent -- either to monitor or to maintain the street light near the accident. In its final order granting the summary judgment, the court agreed, reasoning as follows:

> A "basic element of action of negligence is the breach of a legal duty. Without such a duty, there can be no recovery." Comm., Transp. Cabinet, Bureau of Highways v. Roof, Ky., 913 S.W.2d 322, 324 (1996). Other jurisdictions have ruled a public utility does not have a common law duty to repair and maintain streetlights. Sinclair v. Dunagan, 905 F.Supp. 208 (D.N.J., 1995); Vaughan v. Eastern Edison Co., 719 N.E.2d 520, (Mass.App.Ct.1999); Martinez v. Florida Power & Light Co., 785 So.2d 1251 (Fla.Dist.Ct.App.2001). However, the issue is one of first impression for this Court.
>
> A duty may be imposed by statute, by contract or by the common law. Kentucky law does not impose a statutory duty to repair or maintain street lamps. There is no duty imposed by contract in this case.
>
> Under common law, a power company's duty of repair and maintenance pertains only to electricity as a dangerous instrumentality. [Quotation omitted.]
>
> Although the court has ruled a power company owes a duty to inspect and maintain

> electric lines, considering them as dangerous instrumentalities, there is no duty recognized under common law with regard to repair and maintenance of the non-dangerous instrumentality of a street lamp.

On appeal, Roberson contends that the court erred in concluding that LG&E owed no duty to Shytone with respect to the illumination of Preston Highway. He argues that his son was an intended beneficiary of the utility's contract with the county. He also contends that LG&E is liable under the common law. He asks us to apply § 324A of the Restatement (Second) of Torts (1965) and based on that authority urges us to determine that when it undertook the task of illuminating Preston Highway, LG&E assumed and insured a continuing duty to monitor and to repair the lighting for the protection of the public -- especially pedestrians.

The sole issue for our review is whether the trial court correctly determined that LG&E owed no duty to Shytone Roberson to maintain and to repair the street lamp near the accident scene.

The issue of whether a duty exists is a question of law that we review *de novo* without deference to the reasoning of the trial court. Pathways, Inc. v. Hammons, 113 S.W.3d 85 (Ky. 2003); Murphy v. Second Street Corporation, 48 S.W.3d 571 (Ky.App. 2001). "When a court resolves a question of duty it is essentially making a policy determination." Mullins v.

Commonwealth Life Insurance Co., 839 S.W.2d 245, 248 (Ky. 1992). When analyzing whether a duty of reasonable care exists, "[a]n enlightened legal system . . . . reasons forward from circumstances, using foreseeability, [and] the gravity of the potential harm . . . to decide what is reasonable conduct in the circumstances and what is negligence." Perry v. Williamson, 824 S.W.2d 869, 875 (Ky. 1992).

The trial court correctly observed that there are no reported cases in Kentucky concerning the duties owed by a utility company to third parties under similar circumstances. Our research reveals that there is a fairly equal division among those jurisdictions that have considered the issue. See, Jay M. Zitter, Annotation, Liability of Municipal Corporation or Electric Utility for Injury Resulting from Inoperative, Malfunctioning, or Otherwise Defective Streetlight, 111 A.L.R. 5th 579 (2003).

In dismissing the complaint, the trial court was persuaded by the decisions which refused to impose a duty on a defendant utility. Those cases focused on the public policy concern that the utility would be confronted with large and unpredictable costs as well as the likelihood of a proliferation of litigation. In the Massachusetts case of Vaughan v. Eastern Edison Company, supra, which also involved a pedestrian hit on a

street where the lights were not operating properly, the court held:

> [W]e conclude that Massachusetts should adopt the rule applied in the majority of other jurisdictions – that ordinarily an electric company under contract to make repairs and maintain street lights has no common law duty to third persons who are injured. "Duty is an allocation of risk determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed." [citing, White v. Southern Cal. Edison Co., 25 Cal.App.4th 442, (1994)] at 447, 30 Cal.Rptr.2d 431. The capacity to bear or distribute loss is a factor to consider in allocating the risk. See Prosser & Keeton, Torts § 4, at 24. We appreciate that relieving the electric company of liability may leave the "loss on the shoulders of the individual plaintiff, who may be ruined by it." *Ibid.* "But the imposition of tort liability on those who must render continuous service of this kind to all who apply for it under all kinds of circumstances could [also] be ruinous and the expense of litigation and settling claims over the issue of whether or not there was negligence could be a greater burden to the rate payer than can be socially justified." *Id.* § 93, at 671.

719 N.E.2d at 523-24.

In support of its ruling, the trial court cited the New Jersey case of Sinclair v. Dunagan, supra. The Sinclair court relied on White v. Southern California Edison Co., supra, adopting its reasoning as follows:

> We must take into consideration not only the foreseeability of harm to the plaintiff but also the burdens to be imposed against a

> defendant. In determining whether a public utility should be liable to motorists for inoperable street lights, we must consider the cost of imposing this liability on public utilities, the current public utility rate structures, the large numbers of street lights, the likelihood that street lights will become periodically inoperable, the fact that motor vehicles operate at night with headlights, the slight chance that a single inoperative streetlight will be the cause of a motor vehicle collision, and the availability of automobile insurance to pay for damages.

905 F.Supp. at 215. See also, Blake v. Public Service Company of New Mexico, 134 N.M. 789, 82 P.3d 960 (2003); and, Horneyer v. City of Springfield, 98 S.W.3d 637, 645 (Mo.Ct.App. 2003), which held that there was no duty to maintain street lights except where "illumination is necessary to avoid dangerous and potentially hazardous conditions."

Although the trial court also cited Martinez v. Florida Power & Light Co., supra, in support of its grant of summary judgment, the Florida Supreme Court actually **vacated** the decision of its intermediate appellate court in Martinez and remanded the case for a reconsidered decision consistent with its later opinion in Clay Electric Cooperative, Inc. v. Johnson, 873 So.2d 1182 (Fla. 2003). While Florida was previously aligned with the "no-duty" jurisdictions, it has abandoned that absolute approach to this issue and has instead adopted the "undertaker's doctrine" as set forth in § 324A of the

Restatement (Second) of Torts. Id. at 1186. This section addresses the duty owed by one who assumes responsibility for the safety of third persons 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.

Id. (Emphases added.)

The facts in Clay Electric are identical in all relevant aspects to those in the case before us. Clay Electric involved a fourteen-year-old child, who was walking to his school bus on a dark morning in an area where the streetlight was not functioning. He was hit by a vehicle and died from his injuries. Although the driver was operating his vehicle in a prudent manner, he was unable to see the child in time to avoid hitting him due to the "extreme darkness at the site of the collision." Id. at 1184. Although the electric company had contracted to maintain the light and was paid to do so, it had no procedures in place to determine whether the light was

working or not. The Florida court held that both the "increased risk" and the "reliance" subsections of § 324A of the Restatement (Second) of Torts were implicated. Id. at 1187. In finding the utility company potentially liable for the child's injuries, the Florida court reasoned as follows:

> [L]ong before the present accident took place, the City of Jacksonville determined that [the street] needed lighting, and streetlights subsequently were installed. When Clay Electric undertook the maintenance of those lights, the company should have foreseen that proper maintenance was necessary for the protection of the plaintiffs. The streetlight at issue was located in a residential neighborhood, on a major roadway, and on the pathway to a school bus stop. There were no sidewalks in the area and the local children, on a daily basis, walked in the early morning darkness in the grassy strip along the roadway's edge directly past the streetlight on their way to the bus stop.

Id.

Again, we note that this is a case of first impression as to the duty –- if any -- owed by a public utility to a third-party beneficiary of its contract with local government. In determining whether LG&E owed a duty to Shytone to exercise reasonable care in maintaining the street light, we believe that the moderate balancing approach taken in Clay Electric more correctly harmonizes with Kentucky law. It is well settled in Kentucky that "one who volunteers to act, though under no duty to do so, is charged with the duty of acting with due care."

Sheehan v. United Services Auto. Association, 913 S.W.2d 4, 6 (Ky.App. 1996), citing Estep v. B.F. Saul Real Estate Investment Trust, 843 S.W.2d 911, 914 (Ky.App. 1992). The Supreme Court of Kentucky has acknowledged the applicability of § 324A of the Restatement (Second) of Torts in appropriate circumstances. Ostendorf v. Clark Equipment Company, 122 S.W.3d 530, 538 (Ky. 2003).

The facts of this case fall squarely within the parameters of § 324A. The street light in question was not installed solely for aesthetic reasons. Jefferson County Fiscal Court –- the local governing body at the time of the accident –- had entered into a maintenance agreement with LG&E for the safety of those persons using Preston Highway. The record reveals that the light is near a public high school and a residential apartment complex. LG&E voluntarily undertook (for consideration) to keep the light illuminated "from dusk-to-dawn every-night" for the protection of pedestrians living near or attending school in the area. It was reasonably foreseeable that lack of lighting in the area might result in a tragedy.

Reviewing the facts as we must in a light most favorable to the party opposing the summary judgment, we observe first that LG&E's failure to maintain the streetlight **increased the risk of harm** to Shytone. § 324A(a). In Clay Electric, the utility argued that this subsection was inapplicable "because

[the pedestrian] was no worse off with an inoperative streetlight than he would have been with no light at all." 873 So.2d at 1187. The court disagreed and concluded that such reasoning "misse[d] the point":

> The plaintiffs did not allege that Clay Electric negligently *installed* the streetlights on an otherwise *un*lighted street. Rather, they alleged that Clay Electric negligently *maintained* the streetlights on an otherwise *lighted* street. Construing the present record in the light most favorable to the plaintiffs, it appears that Clay Electric undertook the maintenance of operative streetlights on Collins Road, and it was the company's subsequent negligence that resulted in the roadway being cast in darkness. (Emphasis in original.)

Id.

LG&E's failure to maintain the street light also fits within subsection (c) of § 324A, **the reliance alternative** for imposing liability. Roberson arguably suffered harm due to the reliance of both the county government and his parents that the street lights would be maintained. Relying on its contract with LG&E, Jefferson Fiscal Court failed to take additional or alternate precautions to render the area safe and lighted. Possibly in reliance on the streetlight, Roberson's parents provided no additional precautionary measures for the safe passage of their son across the highway. See, also, David v. Broadway Maintenance Corporation, 451 F.Supp. 877 (E.D.Pa.1978),

which held a utility company liable for injuries sustained by a pedestrian due to negligent maintenance of a streetlight.

We hold that LG&E owed a duty to pedestrians, including Shytone Roberson, for the faulty condition of the street light resulting from its failure to maintain the light. There is evidence in the record that the light at issue had been inoperable for more than two months. Whether LG&E breached its duty of care to Shytone Roberson and whether that breach was the cause of his injuries are matters which must be properly decided by a jury on remand.

The judgment of the Jefferson Circuit Court is vacated, and this matter is remanded for additional proceedings consistent with this opinion.

GUIDUGLI, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTS.

GUIDUGLI, JUDGE, CONCURRING. I concur in result only for the following reason. I do not agree with the majority that the facts in Clay Electric Cooperative, Inc. v. Johnson, 873 So.2d 1182 (Fla. 2003), "are identical in all relevant aspects to those in the case before us." In fact, I believe the facts differ significantly. But I do believe that the Louisville Gas and Electric Company (LG&E) does have a contractual duty to maintain the light in question. As the majority points out,

streetlights are not installed for aesthetic reasons. Someone or some entity decided that the streetlight was necessary for a specific reason – normally for safety. The Jefferson County Fiscal Court and ultimately the taxpayer pay LG&E a monthly fee for each streetlight. If the light is not functioning, the safety provided by the light is lost and the taxpayer is paying for a service not being provided. If LG&E agrees to install a streetlight and to collect a monthly fee, then it has a duty to insure the light is working and the purpose for its installation is fulfilled. As such, I concur with the majority in that I believe the trial court erred in granting summary judgment based upon its finding that LG&E had no duty to maintain the streetlight in question or for that matter, any streetlight it had installed. However, I differ from the majority in that I also believe that the facts herein are significantly different than those of the Florida case relied on by the majority. While I would reverse and remand for further proceedings, I would not preclude summary judgment being reconsidered based upon the specific facts of this case. LG&E does owe a duty to maintain streetlights but may not owe a duty to Shytone Roberson based upon his actions of crossing a five lane street approximately 112 yards from what should have been a lit crosswalk.

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