HARRIET P. THOMAS * **NO. 2000-CA-1302**

VERSUS * **COURT OF APPEAL**

SEWERAGE & WATER BOARD OF NEW ORLEANS * **FOURTH CIRCUIT**

* **STATE OF LOUISIANA**

* * * * * * *

CONSOLIDATED WITH: **CONSOLIDATED WITH:**

ALAN FREDERICK LANDRY **NO. 2000-CA-1303**

VERSUS

SEWERAGE AND WATER BOARD OF NEW ORLEANS

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 93-5648 C/W 94-11969, DIVISION "F-10"
HONORABLE YADA MAGEE, JUDGE

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JUDGE MICHAEL E. KIRBY

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(Court composed of Judge Steven R. Plotkin, Judge Michael E. Kirby, Judge Max N. Tobias, Jr.)

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REVERSED AND RENDERED

Plaintiff, Alan Frederick Landry, appeals the trial court's judgment of February 10, 2000, dismissing his lawsuit against the defendant, Sewerage and Water Board of New Orleans ("S&WB").

Plaintiff filed a petition against the S&WB on July 28, 1994, alleging that he was seriously injured when he stepped into an open water meter box in the sidewalk in the 5700 block of Magazine Street in New Orleans on March 28, 1994. He alleged that the S&WB maintained the water meter box that forms the basis of this lawsuit. According to the petition, the metal lid of the water meter hole was missing and there were no warning signs posted in the area. Plaintiff alleged that because the metal lid was not securely

fastened, locked to the ground, or on hinges, the metal cover and hole were defective in design. He alleged that the open water meter box presented an unreasonable risk of harm, for which the S&WB should be held strictly liable. He further alleged that the S&WB had actual and/or constructive knowledge of the unreasonable risk of harm created by the defect in its premises due to "hundreds of lawsuits" that have been filed against the S&WB for injuries from falls into open water meter boxes. Alternatively, plaintiff alleged that his injuries were caused by the S&WB's negligence.

Following trial, the trial court rendered judgment in favor of the S&WB. In reasons for judgment, the trial court stated that the plaintiff failed to prove that the S&WB had actual or constructive notice of the defect, as required by La. R.S. 9:2800. Therefore, the trial court found that the S&WB could not be held strictly liable under La. C.C. art. 2317.

On appeal, the plaintiff first argues that the trial court erred in finding that La. R.S. 9:2800 was applicable in this case. We agree. The S&WB concedes that the trial court erred in applying that statute in this case.

La. R.S. 9:2800, originally enacted in 1985, provides that a public entity can only be held strictly liable for damages caused by the condition of things within its care if it had actual or constructive notice of the vice or defect that caused the damage prior to the occurrence, and had a reasonable

opportunity to remedy the defect but failed to do so. In Jacobs v. City of Bunkie, 98-2510 (La. 5/18/99), 737 So.2d 14, our Supreme Court ruled that prior to November 23, 1995, the effective date of Acts 1995, 1328 and 828, R.S. 9:2800 was an impermissible legislative act limiting the State's liability in direct conflict with La. Const. Article XII, Section 10(A)'s unequivocal waiver of sovereign immunity. Acts 1995, No. 1328 amended that constitutional provision to allow the Legislature to limit the liability of public entities. Acts 1995, No. 828 reenacted R.S. 9:2800 in the same form originally enacted in 1995. Because the reenactment of R.S. 9:2800 was a substantive change in the law, the Supreme Court found that the reenacted version of R.S. 9:2800 could not be applied to pending cases asserting causes of action that arose prior to its effective date of November 23, 1995. Jacobs v. City of Bunkie, supra. Because the accident in the instant case took place prior to November 23, 1995, the provisions of R.S. 9:2800 are not applicable in this case. The legal fault principles of Louisiana Civil Code article 2317, unmodified by La. R.S. 9:2800, are applicable. See, Dupree v. City of New Orleans, 99-3651 (La. 9/1/00), 765 So.2d 1002.

Because the trial court's decision was based on an erroneous application of R.S. 9:2800, that incorrect decision is not entitled to deference by this court on review. Conagra Poultry Co. v. Collingsworth, 30,155

(La.App. 2 Cir. 1/21/98), 705 So.2d 1280. Therefore, we will review the record *de novo* and render a judgment on the merits.

In order for strict liability to be imposed under La. C.C. art. 2317, a plaintiff must prove that (1) the thing that caused the damage was in the care, custody and control of the defendant; (2) the thing had a vice or defect that created an unreasonable risk of harm; and (3) the injuries were caused by a defect. Loescher v. Parr, 324 So.2d 441 (La. 1975). In the instant case, it is undisputed that the open water meter box was in the care, custody and control of the S&WB. It is also undisputed that the plaintiff suffered injuries when he stepped into the open water meter box. Therefore, the only determinations for this Court are whether or not the open water meter hole presented an unreasonable risk of harm and whether plaintiff was comparatively at fault for his injuries.

The determination of whether a thing presents an unreasonable risk of harm should be made "in light of all relevant moral, economic and social considerations." Banks v. New Orleans Sewerage and Water Board, 98-1373 (La. App. 4 Cir. 1/27/99), 728 So.2d 527, citing Boyle v. Board of Supervisors, LSU, 96-1158 (La. 1/14/97), 685 So.2d 1080. In Banks, this Court noted that courts have consistently held that State entities are not liable for every irregularity in a street or sidewalk, and that the trier of fact is

required to weigh factors such as gravity and risk of harm, individual as well as societal rights and obligations, and the social utility involved. Id. The Banks court also stated that "[a]n owner or custodian of immovable property has the duty to discover any unreasonably dangerous condition and to either correct the condition or warn of its existence; the duty is the same regardless of whether fault is asserted under negligence or strict liability." Id. at p. 6, 728 So.2d at 531.

In Banks, the plaintiff tripped on a S&WB manhole cover, the lip of which was raised approximately one to two inches above the manhole casing in which the cover sat. The cover on top of the casing was not level with the street. The testimony presented in that case indicated that S&WB employees allowed dirt to accumulate on the casing lip of the manhole, thereby allowing the cover to be elevated above the sidewalk. The Banks court cited the case of White v. City of Alexandria, 216 La. 308, 43 So.2d 618 (La. 1949), which stated that there is no fixed rule for determining what is a dangerous defect in a sidewalk; rather, the facts and surrounding circumstances of each particular case control. Noting that the court in Boyle v. Board of Supervisors, LSU, supra, held that economic considerations could be taken into account with regard to the issues of social utility and unreasonableness of the risk of harm, the Banks court found that the S&WB

had a duty to provide pedestrians with a safe walkway and that it could have corrected this defect for a nominal sum. The Banks court found that the raised manhole cover constituted an unreasonably dangerous condition and found the S&WB strictly liable for plaintiff's injuries.

In the instant case, the S&WB argues that the plaintiff had an unobstructed view of the open hole in the sidewalk; therefore, the danger was patently obvious and there was no unreasonable risk of harm. The S&WB also argues that the costs of replacing the existing water meter covers, which can be easily removed, with hinged or locked covers would be unduly burdensome.

At trial, an employee of a nearby business testified that the cover had been missing for as much as a week. We find that a water meter box left uncovered for a week in a commercial area clearly constituted an unreasonable risk of harm. Defenses to strict liability include victim fault, third party fault or an irresistible force. Loescher v. Parr, supra.

There is no evidence that the harm to plaintiff was caused by an irresistible force. Regarding third party fault, we note that none of the evidence presented at trial established who actually removed the cover from the water meter box. Therefore, there is no proof of third party fault.

Although we find no irresistible force and no third party fault, we do

find that the harm to the plaintiff was partially caused by his own negligence. The plaintiff testified that he lived in the same block and on the same side of the street where the accident occurred for four years. He stated that in those four years, he walked on the part of the sidewalk where the water meter box was "hundred of times." The plaintiff was familiar with this sidewalk and the accident occurred during daylight hours.

If a person suffers damage as the result partly of his own negligence and partly because of the fault of another person or persons, the amount of damages recoverable must be reduced by the percentage of fault attributable to the person suffering the damage. La. C.C. art. 2323; Dupree v. City of New Orleans, supra. A pedestrian has a duty to be reasonably careful and to see what should have been seen. Alexander v. City of Baton Rouge, 98-1293 (La.App. 1 Cir. 6/25/99), 739 So.2d 262. Plaintiff was inattentive in failing to watch where he was walking. For that reason, we find that he is 15% at fault for the accident.

Based on the facts and circumstances of this case, we find the S&WB 85% at fault for plaintiff's injuries and we find plaintiff 15% at fault for his injuries resulting from this accident.

Turning now to the issue of quantum, we note that at the time of trial, plaintiff was fifty-five years old. He was using a wheelchair at that time.

Prior to the accident, plaintiff was living independently in an apartment. Since the accident, plaintiff has lived in rehabilitation hospitals, nursing homes, and an independent living facility and, at the time of trial, was living in a facility run by the Volunteers of America.

Dr. S. Daniel Seltzer, an expert in the field of orthopedics, testified that he examined plaintiff on January 7, 1999. He also reviewed plaintiff's medical records in preparation for his testimony. He stated that on the date of the accident, plaintiff was diagnosed at Charity and Baptist Hospitals with a fracture of the left lower extremity. His treatment included the use of an external fixator, where pins are inserted and frames are used to externalize the sprains. Plaintiff also sustained a peroneal nerve injury on the left side, resulting in what is commonly known as a foot drop, that is, an inability to elevate the foot.

Physicians at LSU Medical Center and Tulane University Hospital and Clinic subsequently treated plaintiff, and he was eventually diagnosed with a severe deformity of his left foot with loss of nerve function in both his left foot and left knee. Plaintiff was offered the option of amputation or multiple reconstructive procedures, and chose to undergo reconstruction. After several reconstructive surgeries and several attempts at rehabilitation, plaintiff has nonetheless been left essentially wheelchair bound except for

when he is transferring to other seated areas. Plaintiff also underwent fusion surgery on his ankle and total knee arthroplasty.

When Dr. Seltzer saw plaintiff in 1999, he had ongoing pain, a bony spur around the left knee area, and continuous problems with his left foot and ankle. Plaintiff also complained of increasing problems with his opposite lower extremity because of increased stress placed on that extremity.

In Dr. Seltzer's opinion, the plaintiff's broken leg, ankle fusion, damage to the peroneal nerve, total joint replacement in his knee and the insertion and removal of fixation devices in his leg were all related to his fall into the open water meter box. Dr. Seltzer described six surgical procedures that plaintiff underwent between March 31, 1994 and April 14, 1997, which were all related to the accident at issue.

Dr. Seltzer testified that he would assign an impairment rating of 75% to plaintiff's ankle and foot, 60% impairment of the knee based upon the surgeries plaintiff underwent, and an additional 15% impairment of the lower extremity based upon the fracture and peroneal nerve injury. His opinion is that plaintiff probably has reached maximum rehabilitation. He stated that plaintiff does not have much tolerance to stand, so his level of impairment is probably going to be that he is primarily wheelchair-bound

with the ability to transfer to other seated areas and stand for limited periods of time.

According to Dr. Seltzer, plaintiff's prognosis is guarded. He does not think that additional rehabilitation would be helpful. He recommends that plaintiff have additional surgery to remove the wound sutures from around the knee to alleviate some of his pain, but he did not recommend any other surgical procedures. He estimated that the cost of the surgical procedure to remove the wound sutures would depend on how extensive it was, but that the surgeon's fees would probably range from between $500.00 and $1000.00 and the hospital fees would depend on the extent of the surgery and the corresponding length of time that plaintiff would need to remain hospitalized.

Dr. Seltzer described the plaintiff's leg fracture as an open fracture of the tibia, in which there was penetration of the bone fragments through the skin. He explained that this is a serious condition because it predisposes the patient to infection and it makes reconstructive efforts much more difficult. When asked if plaintiff would continue to require an assisted living facility for the rest of his life, Dr. Seltzer said that because plaintiff had reached maximum medical improvement when he saw him in January 1999, his opinion is that he will require the same type of care that he was receiving at

that time for the foreseeable future and possibly for the rest of his life.

The record reveals that plaintiff's past medical expenses, which are related to the injuries suffered in the accident of March 28, 1994, total $139,698.73. On the issue of future expenses, plaintiff presented the testimony of Thomas Meunier, an expert in the field of life care planning and physical rehabilitation. He evaluated plaintiff and reviewed his medical records. He was asked to determine his needs regarding life care plans, specifically attending care, equipment and long-term residential service relative to his lower extremity. He was not asked to consider how his injury affected his ability to work.

With respect to his attending care, Meunier testified that his opinion is that plaintiff needs to have a home health aid visit him five times a week. He computed the cost of that service until age 65 to be $49,400.00. Meunier stated that after age 65, plaintiff's attending care needs are going to increase to the point where he will probably need full time care, most likely in a nursing home. He testified that the average cost of nursing home care is approximately $2,500.00 per month or $30,000.00 per year. Meunier stated that plaintiff has a life expectancy of 72 years of age, so the cost of nursing home care for him from age 65 to 72 will be approximately $210,000.00.

Meunier testified that plaintiff also requires special equipment for his

disabilities. He stated that the median price for the type of manual wheelchair currently being used by plaintiff is $800.00. This type of wheelchair needs to be replaced approximately every 8½ years, so plaintiff can expect to spend approximately $1,600.00 on new wheelchairs in the future. Meunier said that manual wheelchairs become more difficult to use as a person gets older and his physical condition deteriorates. Therefore, Meunier said that a motorized scooter, although not necessary at this time, will become necessary in the future and will help to improve plaintiff's quality of life. He stated that motorized scooters cost approximately $2,300.00 and require replacement every five to seven years. Based on plaintiff's life expectancy, the costs for motorized scooters will be approximately $6,500.00. The estimated cost of batteries for these scooters will be $1,416.00. The other equipment required by plaintiff for his disabilities are transfer benches and an adjustable adult walker. Transfer benches cost $125.00 and must be replaced every three years, at a total cost of $708.00. An adjustable adult walker has a lifetime guarantee and costs $105.00.

Meunier summarized his testimony by stating that given the plaintiff's disabilities and his life expectancy, he can expect to pay approximately $10,454.00 for equipment, $210,000.00 for nursing home assistance from

ages 65 to 72 and $49,400 for his home health care assistance from ages 55 to 65.

La. R.S. 13:5106(B)(1), enacted in 1985, imposed a $500,000.00 ceiling on general damages recoverable in a personal injury suit against the State of Louisiana, its agencies or subdivisions. The S&WB is a political subdivision of the State of Louisiana. See, Konneker v. Sewerage & Water Board of New Orleans, 96-2197 (La.App. 4 Cir. 11/19/97), 703 So.2d 1341. In Chamberlain v. State Through Dept. of Transportation and Development, 624 So.2d 874 (La. 1993), our Supreme Court held that the statutory ceiling on general damages imposed by La. R.S. 13:5106(B)(1) was unconstitutional because it conflicted with La. Const. Art. XII, Section 10's proscription against sovereign immunity. That statute was later amended and reenacted during the 1995 legislative session by Act No. 828 to provide for a $750,000.00 cap on general damages, but this amended and reenacted version of R.S. 13:5106 did not become effective until November 23, 1995. The new provision specified the effective date for the imposition of the cap to be the date of judicial demand. Farley v. State Through Dept. of Transportation and Development, 96-0538, 96-0539, p. 4 (La.App. 1 Cir. 9/27/96), 680 So.2d 750, 753. On the date of judicial demand in the instant case, July 28, 1994, there was an impediment to enforcing the $500,000.00

ceiling on general damages contained in former R.S. 13:5106, namely, the holding of unconstitutionality in Chamberlain. Magee v. Landrieu, 95-0437, 95-0438, 95-0474 (La.App. 1 Cir. 3/17/95), 653 So.2d 62. Therefore, there is no statutory limitation of the S&WB's liability for general damages in this case.

After considering all of the evidence presented, we assess the plaintiff's damages as follows: $139,698.73 for past medical expenses, $10,000.00 for future medical expenses and $1,000,000.00 in general damages for past and future pain and suffering, mental anguish, disability and disfigurement. The plaintiff's future expenses for assisted living, nursing home care and medical equipment were estimated to be $269,854.00. Discounting back to the present value of the assisted living, nursing home care and medical equipment to the date of trial, we find that the plaintiff is entitled to an award of $154,000.00 for these items. This total amount of $1,303,698.73 in damages is reduced by the 15% of fault attributable to plaintiff, for a total award of $1,108,143.92.

Accordingly, we reverse the trial court's judgment and render judgment in favor of plaintiff and against the S&WB in the amount of $1,108,143.92, together with legal interest from the date of judicial demand until paid and all costs of these proceedings.

REVERSED AND RENDERED