RENDERED: June 25, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001084-MR

BETTY CLINGAMAN, CO-EXECUTRIX
OF THE ESTATE OF
JEFFREY D. CLINGAMAN, DECEASED — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSOM, JUDGE
ACTION NO. 00-CI-007661

LOUISVILLE GAS & ELECTRIC CO. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Betty Clingaman, co-executrix of the estate of Jeffrey D. Clingaman, appeals from a summary judgment granted by the Jefferson Circuit Court in favor of Louisville Gas & Electric Company. We affirm.

Jeffrey D. Clingaman was diagnosed with amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig’s disease, in May 1999. ALS is a progressive disease which attacks the muscles in the body, including those which control breathing. In September 1999, Jeffrey developed breathing problems and was

hospitalized. When he was released from the hospital in mid-September, he required a BiPAP machine to aid his breathing. A BiPAP machine is a non-invasive apparatus that assists the user in breathing. It operates off electrical power. Jeffrey's wife, Betty, obtained a BiPAP machine as well as a battery pack for use with the machine in the event of power failure. Two oxygen canisters were also obtained for use in case of an emergency.

Jeffrey's physical therapist informed Betty of LG&E's Medical Alert Program (MAP). Those enrolled in the program are given a higher priority for restoration of services in the event of a storm or other incident which results in power loss. Also, in the event of planned interruptions of power, LG&E attempts to provide MAP customers with advanced notice to allow them to make arrangements for the pending outage.

On October 13, 1999, Betty contacted LG&E's customer service department concerning the MAP. In response to her call, LG&E mailed Betty a MAP application. She received the application, filled it out on October 17, and returned it by mail to LG&E on October 18.

Betty had taken a leave of absence from her job in order to care for Jeffrey. Because she was required to return to work on November 1, she contacted an employment agency for assistance in finding in-home medical care for Jeffrey. The

agency put Betty in touch with Patricia Filley, who had 30 years of experience in providing home health services.

Filley began working in the Clingaman home during the last week of October to allow Betty to insure that Filley was capable of providing the care necessary for Jeffrey's condition. During this week, Betty reviewed the operation of the BiPAP machine, the back-up battery pack, and the oxygen tanks with Filley. Filley assured Betty that she was familiar with them and could use them if necessary.

Betty returned to work on November 1 as scheduled. That same day, Dale Walker, a revenue collection clerk for LG&E, performed the initial processing of Jeffrey's MAP application. Walker entered the application in her computer, prepared the physician verification documents, and mailed the documents to Jeffrey's physician, Dr. Lloyd. On November 5, Dr. Lloyd completed the physician verification paperwork required by LG&E.

November 5 was also the date LG&E employees undertook maintenance on a transformer in the circuit that fed power to the Clingaman home. In connection with the job, the power to the Clingaman home was turned off. Before doing so, LG&E employees determined from LG&E computer records that none of the customers in the affected area were enrolled in MAP. As a result of the loss of power and Filley's inability to successfully use either the battery pack or the oxygen

canisters, Jeffrey suffered cardio-respiratory arrest. Although he was revived by emergency personnel, Jeffrey suffered brain damage due to the lack of oxygen and never regained consciousness. Ultimately, life support was discontinued, and Jeffrey died on November 7, 1999.[1]

Betty Clingaman, as co-executrix of Jeffrey's estate, filed a civil complaint in the Jefferson Circuit Court against LG&E and the employment agency. Both defendants moved the court for summary judgment, and the court awarded summary judgment to LG&E but denied it to the employment agency. After the court denied Clingaman's motion to vacate, she appealed from the portion of the order granting LG&E summary judgment.

The basis of the circuit court's order granting LG&E summary judgment was that Clingaman failed to create any fact issue regarding a duty on the part of LG&E to inform the Clingaman household of the planned power interruption. The court stated in pertinent part as follows:

> Indeed, the materials provided by LG&E to its customers clearly set out the procedure for both qualification and enrollment, and caution[ed] customers reliant upon electricity for medical care to plan for and provide their own back-up system in case of electrical failure, with or without enrollment in MAP. Only upon completion of the enrollment process for MAP

[1] LG&E was unaware of Clingaman's condition and continued to process the MAP application after the incident. Clingaman was entered as a MAP customer on November 24.

> did LG&E assume a duty to notify the program's members.
>
> . . .
>
> Here, LG&E had no duty to provide notice to customers of known power interruptions. LG&E voluntarily assumed such a duty via MAP, but specifically limited that duty to those who had (1) completed the application process, (2) been accepted into MAP and (3) been notified of that acceptance in writing. . . . If Mr. Clingaman had been enrolled in the MAP program, LG&E would have had the obligation to act with reasonable care in fulfilling that assumed duty as enunciated in Haddad. That is simply not the case before this Court.
>
> LG&E further argues that even if this Court were to find that it owed the Clingamans a duty to notify them of the anticipated power outage, its failure to do so did not rise to "willful negligence," as required for liability according to the PSC tariff.
>
> . . .
>
> LG&E has met its burden of demonstrating the absence of any genuine issue of material fact. Accordingly, it is entitled to summary judgment as a matter of law.

Betty argues on appeal that the circuit court committed reversible error when it ruled that there was no duty owed to Jeffrey Clingaman by LG&E and awarded summary judgment in LG&E's favor. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[2] 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991). "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

A basic element of actionable negligence is the breach of a legal duty. Commonwealth, Transp. Cabinet, Bureau of Highways v. Roof, Ky., 913 S.W.2d 322, 324 (1996). "If no duty is owed by the defendant to the plaintiff, there can be no breach thereof, and therefore no actionable negligence." Rogers v. Professional Golfers' Ass'n of America, Ky. App., 28 S.W.3d 869, 872 (2000), quoting Ashcraft v. Peoples' Liberty Bank & Trust Co., Inc., Ky. App., 724 S.W.2d 228, 229 (1987). Finally, the determination as to whether a duty exists to support an actionable negligence claim is an issue of law to be resolved by the court. Murphy v. Second St. Corp., Ky. App., 48 S.W.3d 571, 573 (2001).

[2] Kentucky Rules of Civil Procedure.

LG&E, in general, has no duty to notify customers of planned power outages. The Public Service Commission, the regulatory body that oversees power companies, has made it clear that power companies do not guarantee continuous service. Further, the Public Service Commission does not impose a requirement on a power company to create, maintain, or administer a program similar to MAP. Rather, LG&E voluntarily created the MAP for its customers.

Betty argues that LG&E's duty to give prior warning arose once it became aware of Jeffrey's condition. She asserts that this awareness arose when she made her request for a MAP application on October 13 and when Walker initially processed the application on November 1. On the other hand, LG&E maintains that any duty voluntarily assumed under MAP cannot arise until the customer's physician verification form is received and reviewed for approval or denial. As we have noted, the circuit court agreed with LG&E. It concluded that since the enrollment process had not been completed prior to the incident on November 5, LG&E had no duty to give a prior warning at that time.

Betty argues that LG&E had notice of Jeffrey's condition prior to the incident and that, therefore, the duty existed at that time. She argues that "the delays in processing the application by LG&E are inexcusable" and that LG&E had

actual notice of Jeffrey's condition. She cites Haddad v. Louisville Gas & Elec. Co., Ky., 449 S.W.2d 916 (1969), to support her claim that LG&E had sufficient prior knowledge to create a duty owed to Jeffrey. In that case an LG&E employee voluntarily went to a residence to check the appliances being fed by natural gas. The employee discovered what he believed to be leaking carbon monoxide fumes. Because it was not a natural gas leak, the employee took no action to shut off the gas. Instead, he accepted the owner's assurances that no one would occupy the house until it was repaired.

Thereafter, two persons broke into the residence and were later found dead from carbon monoxide poisoning. In an action by the estates of the deceased persons, the appellate court held that LG&E had a duty "to do something protective when its employee discovered the highly dangerous condition of the furnace." Id. at 918. However, the court upheld the directed verdict in favor of LG&E on the ground that it had no duty to the decedents because it had no reason to foresee their presence in the residence. Id. at 920.

The case *sub judice* is distinguishable from the Haddad case. In the Haddad case the LG&E employee had knowledge of the dangerous condition but took no protective action. On the other hand, in this case the LG&E employee who cut the power to the

Clingaman residence had no knowledge of Jeffrey's condition when he cut the power to begin required repairs.

At the time the power to the Clingaman residence was cut on November 5, Jeffrey's MAP application had not been completed nor had he been accepted into the program. As a result, when the LG&E employee supervising the repairs contacted his office to determine if any MAP customers would be affected by the power interruption, he was informed that no MAP customers were recorded on that circuit. Further, the employee supervising the maintenance had no personal knowledge of Jeffrey's condition prior to beginning the repairs. This lack of knowledge concerning the "dangerous condition" that could arise from a power interruption distinguishes this case from the Haddad case.

Given the incomplete status of Jeffrey's MAP application on November 5, we agree with the circuit court that LG&E had not yet undertaken any duty in connection with the Clingaman residence. The application to participate in MAP gave notice that Jeffrey would not be accepted as a member of the program until several steps had been completed. All steps had not been completed, and Betty acknowledged in her deposition that she had no reason to believe that the Clingaman residence had been accepted into the program as of the date of the incident.

Alternatively, Betty argues that LG&E had liability in this case based on the universal duty rule set forth in M&T Chems., Inc. v. Westrick, Ky., 525 S.W.2d 740 (1974), and Grayson Fraternal Order of Eagles, Aerie # 3738, Inc. v. Claywell, Ky., 736 S.W.2d 328 (1987).[3] Those cases stand for the proposition that "[e]very person owes a duty to every other person to exercise ordinary care in his activities to prevent any foreseeable injury from occurring to such other person." M&T Chemicals, 525 S.W.2d at 741. LG&E responds that the universal duty rule has been effectively abrogated and also that it fails to apply in this case. We agree with LG&E that the universal duty rule has no application in this case.

Betty makes two arguments concerning the universal duty rule. First, she argues that by having actual knowledge of Jeffrey's condition, LG&E was required to exercise ordinary care to avoid foreseeable injury prior to interrupting power. This argument fails under the facts of this case. Jeffrey's MAP application had not been completed, and he was not enrolled in MAP on November 5. As noted previously, requesting a MAP application and the completion of initial processing were insufficient to create notice to LG&E's employees as to Jeffrey's condition. In addition, the LG&E employee who

[3] The Grayson case was overruled as superseded by statute in DeStock No. 14, Inc. v. Logsdon, Ky., 993 S.W.2d 952 (1999).

supervised the cutting of the power had no actual knowledge of Jeffrey's condition. Without either constructive or actual knowledge, the LG&E employee had no reason to foresee injury as a result of the performance of required maintenance.

Betty's second argument concerning a breach of the universal duty rule involves LG&E's processing of Jeffrey's MAP application. That argument also fails based on the undisputed facts of the case. First, we note that Betty has failed to demonstrate how delay, if any, which occurred in processing the MAP application after the November 5 incident has any relevance. As for the processing time prior to November 5, Betty has failed to demonstrate willful negligence on the part of LG&E's employees.

To the extent delay occurred in processing the MAP application prior to November 5, we must address whether there was a fact issue concerning willful negligence. A tariff regarding the rules and regulations governing the supply of electric service states in pertinent part that:

> The Company will exercise reasonable care and diligence in an endeavor to supply service continuously and without interruption but does not guarantee continuous service and shall not be liable for any loss or damage resulting from interruption, reduction, delay or failure of electric service not caused by the willful negligence of Company. . . .

Public Service Comm'n of Ky. Electric No. 4, 2nd Rev. Sheet No. 44, # 13(effective June 29, 1992). "Willful negligence" has been defined as "an entire absence of care for the life, person, or property of others which exhibits indifference to consequences." Louisville & N.R. Co. v. George, 279 Ky. 24, 129 S.W.2d 986, 989 (1939). The undisputed facts are clear that, even if delay in processing the MAP application prior to November 5 were assumed, any negligence on the part of LG&E was not willful. For this reason we conclude Betty failed to demonstrate the existence of disputed issues of fact concerning LG&E's use of ordinary care in processing Jeffrey's MAP application prior to November 5. Thus, the universal duty rule has no application to this case.

Betty's final argument involves her claim that the Clingaman residence was accepted into the MAP on the date of the incident even though LG&E had not yet received the physician authorization form because the LG&E employee marked the transformer with a red cross following the incident. Under a previous program, LG&E had used a red cross marking on transformers to indicate a customer relying on electrical power due to medical reasons. However, this procedure was not in use under MAP as it was administered on the date of the incident. Further, the LG&E employee took this action based on the personal knowledge he acquired following the incident.

In Mitchell v. Hadl, Ky., 816 S.W.2d 183 (1991), the court stated that "proper application of negligence law requires courts to view the facts as they reasonably appeared to the party charged with negligence." Id. at 186. Further, the court stated that it was not "at liberty to impose liability based on hindsight." In short, the fact that the employee placed a red cross on the transformer following the incident and after he became aware of Clingaman's medical condition had no bearing on Clingaman's negligence claim.

While we acknowledge the tragic results that arose from events leading up to November 5, 1999, we are unable to conclude that Betty has established a claim of negligence as to LG&E. For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Karen L. Keith Kirsten R. Daniel Louisville, Kentucky	Edward H. Stopher Scott A. Davidson Louisville, Kentucky
ORAL ARGUMENT FOR APPELLANT:	ORAL ARGUMENT FOR APPELLEE:
Kirsten R. Daniel Louisville, Kentucky	Edward H. Stopher Louisville, Kentucky