

## Shining The Light On Summary Judgment

By Ted Babbitt

An order granting a motion for summary judgment in a personal injury case in Florida is rare indeed. A recent opinion of the Florida Supreme Court may make it even rarer. Clay Electric Cooperative, Inc. v. Johnson, 28 Fla. L. Weekly S866 (Fla. Dec. 18, 2003) was a wrongful death case involving the death of a 14 year old boy who was struck by a truck in the early morning darkness while walking to his school bus stop. The accident occurred at a place where a street light which was supposed to be maintained by the defendant was inoperative. The trial court granted a summary judgment on behalf of the electric company finding that it had no legally recognized duty to maintain the light for the benefit of the child. The First District reversed and the Supreme Court affirmed that reversal.

In writing for the majority, Justice Shaw cautioned trial judges that “a summary judgment deprives a party of his or her right to trial and must be exercised with restraint; any doubts must be resolved in favor of the nonmoving party.” (Citing Escobar v. Bill Currie Ford, Inc., 247 So. 2d 311 (Fla. 1971).

The majority pointed out that §324(a) of the Restatement of Torts provides that when anyone undertakes to provide a service voluntarily or by contract, a duty is assumed not to put others at undue risk of harm. This duty applies not just to those that are in privity with each other in either the contract or the undertaking but to third parties affected by it. The Restatement says:

“Whenever one undertakes to provide 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. This maxim, termed the ‘undertaker’s doctrine,’ applies to both governmental and nongovernmental entities. The doctrine further applies not just to parties in privity with one another – i.e., the parties directly involved in an agreement or undertaking – but also to third parties. Florida courts have applied the doctrine to a variety of third-party, contract-based negligence claims and ruled that the defendants could be held liable, notwithstanding a lack of privity.

Section 324A of the Restatement sets forth the following standard for assessing liability in such cases:

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.”

In a Motion for Summary Judgment, all facts and all reasonable inferences have to be construed in favor of the party who is moving for summary judgment. Those facts showed that the defendant, Clay Electric, assumed a duty by contract to maintain street lights and,

thus, was responsible to use due care in that maintenance. Utilizing the Restatement elements of “increased risk” and “reliance” the Court found that it could reasonably be inferred that the electric company’s failure to exercise due care in maintaining the street light caused the roadway to be dark thus increasing the risk that the truck driver would be unable to see the school child. Furthermore, the Court found it was reasonable to assume that the child’s mother would rely upon the fact that the lights would be operating properly, making it appropriate to allow her child to walk to the

bus stop in a lighted area. The Court stated:

“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. This raises a jury question as to whether Clay Electric’s negligence increased the risk of harm to Dante.

... the record, when viewed in the light most favorable to the plaintiffs, raises a jury question as to whether Clay Electric, in undertaking the maintenance of operative streetlights in Dante’s neighborhood, induced Delores Johnson to forgo other precautions for Dante, such as driving him, or walking with him, to the school bus stop.”

This decision was not unanimous. Two Justices dissented arguing against the public policy of requiring electric companies to become insurers of the public safety whenever accidents occur in unlit area. The concurring opinion of Justice Pariente counters that the majority opinion merely follows established Florida tort guidelines that a jury must determine factual issues raised with respect to negligence and foreseeability and that this opinion conforms, to rather than expands the law in that regard.

This opinion is an important reminder to trial judges that summary judgment is rarely appropriate where there are even inferences which could be resolved favorably to either side in a personal injury case. It is the jury, and not the Judge’s job, to weigh conflicting facts and inferences.

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