

Common law negligence “consists of three elements: 1) a legal duty owed by one person to another; 2) a breach of that duty; and 3) damages proximately resulting from the breach.”² Duty is the “threshold inquiry in a negligence case.”³ Further, whether a duty exists is a question of law for the court to decide – not, as Grant asserts, a question for the jury.⁴ It is true that a jury question about a duty’s existence can arise where the underlying facts used to determine duty are in dispute.⁵ But the underlying facts here are not in dispute: Grant was injured either by her unplugged appliances or an electrical outlet in her home.

A duty can be assumed by contract or imposed by law.⁶ The parties do not assert any duty assumed by contract. So we look to whether a duty is imposed by law. The court of appeals, without analysis, found that SWEPCO owed Grant a duty: “Utility companies owe a duty of ordinary care to anticipate and prevent personal injuries caused by their providing services. Whether or not SWEPCO met this duty is a question of fact for a jury to decide.”⁷ But for almost a century, the law in Texas has been that absent actual knowledge, utilities are not liable for dangerous conditions on customers’ property⁸ – the duty

² *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990).

³ *Id.*

⁴ *Id.*

⁵ *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 395 (Tex. 1991).

⁶ *See, e.g., Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 803-04 (Tex. 1999).

⁷ 20 S.W.3d at 774.

⁸ *See Ocon*, 146 S.W. at 164; *Huddleston v. Dallas Power & Light Co.*, 93 S.W.2d 199, 200 (Tex. Civ. App.–Fort Worth 1936, writ dismissed); *Central Power & Light Co. v. Romero*, 948 S.W.2d 764, 767 (Tex. App.–San Antonio 1996, writ denied); *Texaco, Inc. v. Central Power & Light Co.*, 955 S.W.2d 373, 378 (Tex. App.–San Antonio 1997, pet. denied).

of care generally ends at the meter box. This is consistent with the judgment of other states that have decided the issue.⁹

But Grant argues that because it is undisputed that SWEPCO knew of her damaged appliances, it had a duty to disconnect electric service to her home to prevent her injuries. There are two responses. First, Grant does not claim that SWEPCO actually knew of any dangerous condition in her home. The only evidence she offers on this point is her electrician's affidavit, which states that "[a]n irregular flow of electricity into any one of the electrical outlets could cause damage to the wiring in the home or could cause damage to the appliances that were plugged into the electrical outlets. Had the problem been discovered by the technician on the initial visit, the electricity could have been disconnected until the problem was found and repaired." In other words, Grant offers testimony that SWEPCO should have known that there might be a problem. That's no evidence that there was a problem. And it's no evidence that SWEPCO had actual knowledge of a problem. Indeed, all of Grant's evidence is to the contrary – not even her own electrician knew of any dangerous condition inside Grant's home. He advised the Grants that their electricity problems were all problems with SWEPCO's lines. Consequently, SWEPCO had no duty to keep Grant from being shocked in her home because there is no evidence that SWEPCO had actual knowledge of any dangerous condition existing in Grant's home.¹⁰ Absent actual knowledge of any dangerous condition, SWEPCO's duties to Grant ended at the meter box.

⁹ See, e.g., *Hegwood v. Virginia. Natural Gas, Inc.*, 505 S.E.2d 372, 376-77 (Va. 1998); *Marshall v. Dawson Cty. Pub. Power Dist.*, 578 N.W.2d 428, 431 (Neb. 1998); *Carter v. Bangor Hydro-Electric Co.*, 598 A.2d 739, 741 (Me. 1991); *N.M. Elec. Serv. Co. v. Montanez*, 551 P.2d 634, 637 (N.M. 1976); *Naki v. Hawaiian Elec. Co.*, 442 P.2d 55, 59 (Haw. 1968); *Reichholdt v. Union Elec. Co.*, 329 S.W.2d 634, 638 (Mo. 1959); *Caroway v. Carolina Power & Light Co.*, 84 S.E.2d 728, 730-31 (S.C. 1954); *Oesterreich v. Claas*, 295 N.W. 766, 768 (Wis. 1941).

¹⁰ See *Ocon*, 146 S.W. at 164.

II.

In the absence of a duty, there can be no negligence. In the absence of negligence, the negligence/personal injury disclaimer in the tariff is not implicated. Therefore, this Court need not decide whether such a disclaimer is reasonable and enforceable. And it should not.

The Court ventures an opinion on the reasonableness and the enforceability of a personal injury liability exclusion in a utility tariff provision when no other state supreme court nor any federal court has decided that issue. What the Court finds is only two opinions from state intermediate appellate courts that have addressed whether a tariff can limit liability for personal injury damages¹¹ – hardly settled authority. And neither of these courts confronted whether a utility tariff limiting liability for personal injuries is, as a matter of law, unreasonable or violative of public policy.

The Court hides the dearth of authority in the personal injury context by citing to economic damage cases, which by the mere fact they are economic damage cases makes them distinct from cases involving personal injury. Both this Court¹² and the Texas Legislature¹³ have, in several contexts, recognized that the difference between economic and personal injury damages is significant. Yet the Court today, without

¹¹ *Los Angeles Cellular Tel. Co. v. Superior Ct. of Los Angeles County*, 76 Cal. Rptr. 2d 894, 897-98 (Cal. Ct. App. 1998) and *Landrum Florida Power & Light Co.* 505 So. 2d 552, 553-54 (Fla. Dist. Ct. App. 1987).

¹² *See Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 436 (Tex. 2000) (stating that class actions are “rarely” appropriate for personal injury damages).

¹³ *See* TEX. BUS. & COM. CODE §§ 2.719(c), 17.45(11).

so much as a nod to that distinction, essentially holds that *Houston Lighting & Power Co. v. Auchan USA, Inc.*,¹⁴ an economic damages case, controls this, a personal injury case.

I agree with the Court's judgment. But I am unwilling to decide that a utility may, through its tariff, disclaim liability for personal injury damages when precedent is virtually non-existent, our state law otherwise distinguishes economic from personal injury damages, and in order to reach this question, we must skip over a dispositive threshold question, the answer to which is well-settled in Texas. Consequently, I respectfully concur.

Opinion delivered: March 28, 2002

Craig T. Enoch
Justice

¹⁴ 995 S.W.2d 668 (Tex. 1999).