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Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

FILED
JUN 24 1953
Clerk, Supreme Court

CLARENCE P. MARTIN,
Plaintiff and Appellant,

v.

RALPH L. JONES dba MOUNTAIR PHARMACY,
Defendant and Respondent

Case No. 7766

ANSWER TO RESPONDENT'S PETITION FOR REHEARING

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IN THE

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OF THE

STATE OF UTAH

CLARENCE P. MARTIN, Plaintiff and Appellant, v. RALPH L. JONES dba MOUNTAIR PHARMACY, Defendant and Respondent	Case No. 7766

ANSWER TO RESPONDENT'S PETITION FOR REHEARING

Respondent in his Petition for Rehearing has separated his argument into two phases (1) the owner's liability to a trespasser; (2) contributory negligence.

(1) *The owner's liability to a trespasser*

Respondent states at page 2 of its Petition for Rehearing:

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> "In his opinion Justice Wolfe assumes that the plaintiff was a trespasser and he departs from the rule established by the decisions of the courts to follow the academic statement in the 'Restatement of the Law of Torts,' which, we submit, if given practical application virtually makes the possessor of real property an insurer of the safety of all persons who, having no right to go upon his property, are injured by some conditition which, though it may be dangerous to such trespasser, the owner desires for his own convenience to maintain . . ."

Respondent's conclusion that the rule as given in the Restatement is merely academic and has no practical application is erroneous. The courts have sustained generally the proposition as set forth in the Restatement. It is submitted that there will not be found in the cases a direct quotation as found in the Restatement. However, this same result is reached by the courts under various doctrines such as pitfalls, traps, nuisances, or that in a situation similar to the case at bar failure to warn amounts to wilful, wanton or reckless conduct.

In 38 American Jurisprudence Par. 113, NEGLIEGENCE, it is stated:

> "Warning Trespasser of Danger. Generally speaking, an owner or occupant of real property is under no duty to a trespasser in respect of the condition of the premises. Some courts have gone quite far in the protection afforded to trespassers, holding that when the owner or occupant knows of their presence upon his premises and their probable ignorance of perils thereon he is bound to give them notice of the danger. But it would seem that the dangerous instrumentality, in such case, must be

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such as to constitute a nuisance; or the situation must be such that the failure to give a warning amounts to wilful, wanton or reckless conduct, or to a breach of the duty of ordinary care which is owed by an owner or occupant to a trespasser who is discovered to be in peril."

In the case of Central Georgia Power Co. v. Walker, 20 Ga. A. 645, 647, 93 SE 306, the court held that the plaintiff was a trespasser and at page 306 of the SE Reporter it states:

"* * * The plain answer to this assumption is that, between the defendant and the plaintiff, considering the latter as a trespasser, there was no relation which per se gave rise to any duty. The duty to a trespasser does not flow from the relation; none exists, except a wrongful relation. It can arise only with the peril to the trespasser. Until the peril arises, and until the defendant knows of the peril to the trespasser, there can be no duty to warn the trespasser * * *"

Volume I, Summary of California Law by Witkin, Sixth Edition, page 740, states:

"Duty Toward Known Trespassers. The Torts Restatement (pars. 336, 337) declares that where the defendant knows or should know that a trespasser has come on the land, he has the duty to warn of artificial conditions constituting concealed dangers, and to exercise reasonable care in carrying on activities. This same result has been reached under the theory that failure to warn of a trap or pitfall, or to conduct activities with due care toward a known trespasser, amounts to 'wilful or wanton' conduct. * * *

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> * * * But where the defendant neither knows of the plaintiff's presence, nor has any reason to expect him to be there, the duty does not exist."

In the case of Blaycock v. Coates, et al, 44 C app 2d 850 113 P 2d 256, the plaintiff, a girl of 13 years, was walking with her two sisters and a boy along the highway about a mile from their home. Her dog ran loose and became mired in a sump about 250 feet long and 100 feet wide. The surface of the sump was covered with sand or dirt, the underneath part was oil. As she went in and tried to extricate her dog from the sump, she became stuck herself. The court stated at 113 P. 2nd, page 257:

> "Defendant argues that the sump was not an 'attractive' nuisance. That since plaintiff was a trespasser, defendant was under no obligation to plaintiff to keep the premises in a safe condition although the trial court found that defendant knew that it (the sump) was attractive to children. The liability of defendant need not be predicated upon the attractive nuisance doctrine. The conclusion of the trial court may be sustained under the general rule that a land owner may not construct or maintain a trap or pitfall into which he knows or has reason to believe that a trespasser will probably fall. The liability of the owner in such cases depends upon the circumstances surrounding the maintenance of the 'trap', the extent of the danger involved and the comparative ease or difficulty of preventing the danger without disturbing or impairing the usefullness of the thing which is claimed to be a trap or pitfall. Upon the trial judge the duty is placed of determining the issue of liability in view of all the conditions shown by the evidence. In

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support of plaintiff's contention that the trial court was justified in concluding that the defendant is liable plaintiff properly cites the case of Malloy v. Hibernia Savings & Loan Society, 3 Cal Unrep 76, 21 P. 525, a case in which the owner was held liable where a child fell into a cess pool on the defendant's property about ten feet from the sidewalk. In referring to this case it was said in Loftus v. Dehail, 133 Cal 214, 217, 65 P 379, 380: 'It is true that damages were there sought for the death of an infant, occasioned by falling into a cess pool; but the complaint would have been sufficient to have warranted a recovery had an adult been killed under the same circumstances for the complaint showed a veritable trap,—a cesspool, open and unguarded, yet with its surface covered with a layer of deceptive earth to a level with the adjacent land, into such a trap anyone, adult or child might have walked.' "

In the case of Euclid-105th Streets Property Co. v. Beckman, 42 NE 2nd 789, the landlord, owner of the property, had covered a skylight of glass with roofing of tar paper and graveled over it so that it had the appearance of a roof. The employees had frequently seen servants and tenants washing the windows standing upon the covered skylight. One of the tenants fell through the skylight as a result of the tar paper giving way. The court stated in 42 NE 2d, at page 791:

"We have gone over this record and have taken up all the errors and we cannot agree with the learned counsel for the defendant that the court erred in not directing a verdict either at the close of plaintiff's testimony or at the close of all the testimony. If we understand the law upon this sub-

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ject it is that while the defendant is not liable for ordinary negligence to a trespasser or a licensee, perhaps owing a less duty to a trespasser than to a licensee, yet we think the law is very clear, confining our attention to that of the licensee only, because we think that is what this woman was in the instant case, while we admit that the owner of the premises would not be liable for ordinary negligence to a licnsee, yet where a situation is created and tolerated by the defendant, the owner of the premises, which amounts to a trap or hidden danger covered up, and the licensee is injured by reason of that danger or trap, as one might say, the defendant is responsible and liable for the damages that result therefrom."

In the case of Wolfe v. Rehbein, 123 Conn. 110, 193 A 608, the court was particularly interested in the Restatement of Torts, par. 339 with respect to the duty of a land owner with reference to trespassing children when they know of their presence or should know of their presence. The court, however, made this statement at page 610, the Atlantic Reporter:

> " * * *The court accurately instructed the jury that the owner of the land is not bound to anticipate the presence of trespassers or keep a lookout for them or maintain his premises in a safe condition for them, but that when he knows, or under all the circumstances, should know, that a trespass is being committed, it is his duty to exercise reasonable care to prevent an injury to the intruder.
>
> "The court's reasoning and as put forth by the lower court was to the effect that the dangerous condition; i.e., the stacking of the lumber upon the land ower's premises for the construction of a new house,

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constituted a dangerous condition which could be found to be a nuisance."

The court stated at page 611: "* * * One of the plaintiff's claims was that the pile of lumber as it stood upon defendant's land constituted a nuisance, and the court correctly charged the jury that if the natural tendency of the act complained of was to create danger and inflict injury upon person or property, it might properly be found a nuisance as a matter of fact."

In the case of McPheters v. Loomis, 125 Conn. 526, 7 A 2d 437 the facts are that a boy was found crushed beneath a telephone pole some ten days after the pole had been left at the side of the road. The company was chargeable with the proposition that people had trespassed along this route. The court stated at page 440:

> "* * * In other words this boy was a trespasser as to the Western Union and the Western Union ordinarily owed the boy no duty and the duty came into existence only if a *nuisance* existed, or if the Western Union was negligent in permitting a dangerous condition to remain upon its premises of which it had use, if children were actually trespassing, and if it knew of that fact, or ought to have known of it.
>
> "* * * *However, under our law when the presence of the trespasser becomes known, the land owner owes a duty to use ordinary care to avoid injuring him* * * * but, if the owner or his servants know that the presence of trespassers is to be expected, then the common obligation of exercising reasonable care gives rise to the correlative duty of taking such precautions against injuring trespassers as a reasonable fore-sight of harm ought to suggest."

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The Pennsylvania court in the case of Frederick v. Philadelphia Rapid Transit Co. 337 Pa 136, 10 A 2d 576 gives a good definition of a case of wilful or wanton negligence. In this case a passenger fell beneath the train. The conductor after being advised that someone was down there made a careful search but apparently did not find the body so he started the train. The plaintiff was horribly injured. The court stated at page 578 Atl. Reporter:

> "The legal obligation to trespassers has been traditionally stated to be the avoidance of wilful or wanton negligence. Willful negligence is an obvious misnomer. Wanton negligence, as distinguished from ordinary negligence, is characterized by a realization on the part of the tort feazor or at least ization on the part of the tort feazor—or at least what would cause such a realization to a reasonable man,—or the probability of injury to another, and by a reckless disregard, nevertheless of the consequences. *As applied to the type of cases of which the present is an example, it is not wanton negligence to fail to use care to discover the presence of an unanticipated trespasser, but it is wanton negligence, within the meaning of the law, to fail to use ordinary and reasonable care to avoid injury to a trespasser after his presence has been ascertained.*"

Professor Bohlen, in an article in the Harvard Law Review, March 1937, entitled "Fifty Years of Torts" summarizes the evolution of the trespasser. He states at page 736:

> "Even before 1886 the wind had somewhat changed. The individual citizen's interest in his personal safety, in which the state also soon came to be

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recognized as having an interest, began to be given a sufficient importance to deprive land owners of some of their original immunities. (9) *Today the trespasser may recover under many circumstances under which fifty years ago recovery would have been denied him. While the old formula that a possessor of land is liable to a trespasser or even to a bare licensee only for wanton or wilful misconduct remains in customary use, its content has been so changed as to contradict the words which express it.*

"In many jurisdictions it is held that a land owner who knows that trespassers are in the habit of intruding upon a limited part of his premises may not without warning introduce into such part a dangerous animal or create a dangerous condition which is abnormal to the land and which, therefore, the trespassers have no reason to expect to find therein. The extreme danger to those who cross railway tracks in ignorance of the approaching trains has lead courts to require warnings to be given at points on their rights of way where to the knowledge of the railway the public are accustomed to cross. The mere posting of notice forbidding trespass is not enough to absolve the railway. Warning must be given.

"Again, enough persists of the privilege of land owners to ignore the even probable intrusions of trespassers upon their land, to protect the land owners from liability for acts which are recognizably likely to injure trespassers who may, without the knowledge to the owner, roam at large over the land. Nonetheless, there are many jurisdictions which, while persisting in the formula that toward the trespasser the land owner owes no duties save to refrain from inflicting wanton or wilful injuries, hold that upon the discovery of a trespasser, the

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failure to use such care as would be required in a neutral place is wanton or wilful misconduct."

For other cases bearing out these same propositions see:

Hobbs v. George W. Blanchard & Sons Co. 74 NH 116, 65 A 382, Peters v. Bowman, 115 Cal 345, 47 P. 113, 598, 156 ALR p. 1237. "In some cases it appears that the courts have assumed that the injuries sustained by the plaintiff as a licensee did not result from any 'active' or 'affirmative' negligence on the part of the licensor. Also, Millspough v. Northern Indiana Pub. Serv. Co. 1938, 1048 Ind. App. 540, 12 NE 2nd 396 (action for death of a decedent who drowned while fishing on stream upon defendant's premises when his boat was drawn through a breach in an old dam); Gallagher v. Fordham and L Co. 1939, NYS 2nd 322 (injuries sustained by 8 year old licensee in a fall into a hole at the bottom of a slope on defendant's vacant lot); Pafford v. J. A. Jones Constr. Co. 1940, 217, NC 730, 9 SE 2nd 408 (injuries from a fall into an open elevator shaft in a building under construction); Galveston, H & S AR Co. v. Matzdorf 1908, 102 Tex 42, 112 SW 1036, 20 LRA (Ns) 833, 132 AM ST REP 849, (injuries resulting from a fall over a piece of wire projecting from a door mat).

It is apparent from a reading of the cases that the rule of the Restatement and as quoted in the majority opinion in the prior decision of this court is supported by the cases under the general propositions of nuisances, pitfalls, traps, etc. There certainly can be no basis to respondent's argument that this court is adopting a new academic statement which has no practical application.

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(2) *Contributory Negligence.*

Respondent's argument that appellant is guilty of contributory negligence as a matter of law can certainly have no application to the case at bar. Justice Wolfe in the majority opinion issued prior to the rehearing went into this question quite thoroughly on the bases of the case of Knox v. Snow — U —, 229 P 2d 874. In that case the court accepted the general rule regarding contributory negligence as stated in 38 Am Juris, Negligence, page 861:

> "It is said that when the defense of contributory negligence is urged as a ground for a non suit, it must appear that reasonable men acting as triers of fact would find without any reasonable probability of differing in their means, either that the plaintiff knew and appreciated the danger, or that ordinarily prudent men under similar circumstances would readily acquire such knowledge and appreciation. As it generally is expressed, a plaintiff will not be held to have been guilty of contributory negligence if it appears that he had no knowledge or means of knowledge of the danger and conversely, he will be deemed to have been guilty if it is shown that he knew or reasonably should have known of the peril and might have avoided it by the exercise of ordinary care."

There is nothing in this case with reference to the premises which would reasonably inform the appellant of any trap, pitfall or dangerous condition existing on the premises. The jury could certainly find that it was reasonable under these circumstances for the appellant to give his attention to the merchandise which he was

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interested in purchasing and ignore the floor. The question is one to be decided by the jury as to the many factors involved.

Justice Hendricks in his dissenting opinion concludes that the hole in the floor was open, i.e., that the elevator was in the "up" position; that the light in the basement was on which would clearly make the hole discernible; that a man the size of appellant could not fall through a two-foot hole and, therefore, the appellant jumped into the hole with "both feet;" that defendant had been a salesman and man about town for 20 years and, therefore, well acquainted with the liquor laws pertaining to the sale of liquor; that Mrs. Cannon did not see appellant go through the hole, that she was looking in another direction "waiting to usher him out sans a bottle of liquor;" that Mrs. Cannon had a right to assume appellant would move in only one direction and that would be away from the hole; that a lighting expert testified that a lighting "gadget" proved that the store lighting system made the floor as "light as day." Based upon these assumptions and some others that he sets forth in his dissenting opinion, it is concluded that the appellant is negligent as a matter of law and hence there is no reason for these matters to be submitted to a jury for a determination.

In the first place there is a dispute in the evidence as to whether or not the elevator was in the "up" position. See R. 78, 80. 81, 174. There is no evidence in the record to indicate whether there was a light on in the basement or not. The assumption that appellant could not fall through the two-foot hole in the floor is abso-

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lutely without basis in the record. There is nothing that would indicate that appellant jumped through the hole. The testimony of Mrs. Cannon, the respondent's own witness, is to the effect that she saw Mr. Martin fall through the hole. R. 74. Furthermore at page 87 in the record it is explicitly set out that the respondent's own witness testified that the fall was an obstructed fall, causing a rubbing sound. R. 49, 77. The conclusion that appellant is a salesman and man about town and therefore acquainted with the liquor laws has no basis in the record. The statement that Mrs. Cannon did not see appellant go through the hole because she was looking in another direction "waiting to usher him out sans a bottle of liquor" is erroneous. Mrs. Cannon testified that she saw Mr. Martin fall through the hole. R. 174. Furthermore, how Justice Hendricks can conclude that Mrs. Cannon had a right to assume the appellant would move in only one direction is incomprehensible. A reading of the record by appellant does not indicate anything to the effect that the lighting expert testified that the store lighting system made the floors light as day. Mr. Felt's statements were that for particular conditions certain foot candles of light were required, such as for aisles, auditoriums, passageways, etc. Questions that have been raised by Justice Hendricks in his dissenting opinion show clearly the necessity for a jury determination as to whether the appellant was guilty of contributory negligence.

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CONCLUSION

In conclusion, appellant respectfully contends that the majority decision heretofore rendered by this court should be reaffirmed and the matter remitted to the trial court for a new trial.

Respectfully submitted,

McCullough, Boyce & McCullough
Attorneys for Appellant

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