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Clarence P. Martin v. Ralph L. Jones dba Mount Air Pharmacy : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

CLARENCE P. MARTIN,

Appellant,

vs.

RALPH L. JONES, d/b/a Mountair Pharmacy,

Respondent.

No. 7766

PETITION FOR REHEARING

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PETITION FOR REHEARING

Respondent hereby respectfully petitions the court to set aside its decision in the above entitled cause and to grant a rehearing thereof on the following grounds:

1. The court has misapplied the law by holding, in effect, that, assuming appellant to have been a trespasser, respondent owed him a duty greater than that to which a trespasser is entitled.

2. The court in effect enlarges the duty owing by a possessor of land to a trespasser beyond the duty heretofore defined by the unanimous decisions of the courts

and makes indistinguishable the duty owing to trespassers and invitees.

3. The decision opens the door to all kinds of claims by persons having no right to go upon the premises and who, as a result of their trespassing, may be injured by an artificial condition which may suit the convenience and purposes of the owner of the property, and which condition he ought to have a right to maintain as such owner even though the same might be dangerous to trespassers.

4. The court has disregarded entirely the element of appellant's contributory negligence, which, even under the unusual rule of liability announced by the court, justified the verdict of the jury.

ARGUMENT

OWNER'S LIABILITY TO TRESPASSER

Who is a trespasser? The court has said:

> "A trespasser is defined as a person who enters or remains upon land in possession of another without a privilege to do so created by the possessor's consent or otherwise." In Re Wimmers Estate, 111 Utah 444, 182 Pac. (2d) 119.

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 condition which, though it may be dangerous to such trespasser, the owner desires for his own convenience to maintain. In other words, the owner must so maintain his premises that those whom he has not invited to come upon them, and who have no right there, will be protected against injury. Is that to be the law of this state simply upon the authority of the text referred to and in disregard of the time-honored principles by which a trespasser has always been held to assume all risks of his trespass except the risk of wanton or wilful injury by the owner of the property? We respectfully submit that this court should not abandon the old rule which respects the right of a person to maintain his own property as he sees fit as against persons who have no business to go upon it, and yet which justly gives a trespasser a right of action for wanton or wilful injury by such owner.

One owes trespassers no duty to keep his property in a safe condition for their use. *Ruocco v. United Advertising Corp.* (*Conn.*), 119 Atl. 48.

A trespasser must accept the existing condition of the premises as he finds them. *Printy v. Reimbold* (*Iowa*), 202 NW 122; *Pettyjohn v. Basham* (*Va.*), 100 SE 813.

A trespasser can recover nothing from the property owner for injuries resulting from the condition of the premises although it exists through the owner's carelessness. *Humphery v. Gas Company* (*Vt.*), 139 Atl. 440, 56 ALR 1011.

The only duty owed to a trespasser is to refrain from wilful and intentional injury or from active negligence. *Frederick v. Railroad Company* (*Wis.*), 240 NW 387.

No liability for injury to a trespasser can be founded upon either ordinary or gross negligence; to impose such liability there must have been a wilful, wanton or reckless act. *Ciarmataro v. Adams* (*Mass.*), 176 NE 610, 75 ALR 1171.

A trespasser upon the property of another cannot recover for defects, obstructions or pitfalls upon the premises unless the injury shall result from wilful or wanton negligence. *Brigham v. Fisk-Carter Company* (*N. Carolina*), 136 SE 125.

One who enters the premises of another as a trespasser does so at his own risk and the owner owes him no duty to keep the premises in a safe condition. His only duty is to abstain from wanton or wilful injury. *Giannini v. Campodonico* (*Cal.*), 22 Pac. 256; *Herzog v. Hemphill* (*Cal.*), 93 Pac. 36; *Roberts v. Pacific Electric Company* (*Cal.*), 283 Pac. 353; *Demmer v. City of Eureka* (*Cal.*), 178 Pac. (2d) 472.

If the rule announced in these and other authorities is to be disregarded, it will mean that in Utah, trespassers will have rights of action which heretofore, bench and bar alike, have never believed they had a right to assert. If an owner chooses to maintain an artificial condition which is dangerous, the rule of the text quoted by Justice Wolfe imposes upon such owner the duty to act as guardian of trespassers to keep away

from such dangers. The owner must "exercise reasonable care" to warn a trespasser if the owner knows *or ought to have known* that such trespasser is near the danger, or if the owner *has reason to believe that the trespasser will not discover the danger*. Under such a rule a trespasser can always assert that the owner ought to have known that he, the trespasser, would not likely discover, and that he did not discover the danger, and therefore the owner was negligent for failure to keep his premises safe for fear the trespasser would not discover the dangerous condition. Or, if the owner *ought to have known* (whether or not he actually knew) that a trespasser was in close proximity to the danger, the owner is liable if he fails to warn such trespasser.

We respectfully contend that the rule announced in the Restatement ought not to be adopted as the law of this state. It is a theoretical refinement and a repudiation of the safe and sane rule which judicial tribunals have adhered to and enforced from time immemorial. This new rule imposes an unfair obligation on property owners and it possesses no virtue just because it is new, or because it is intended as a progressive conception as to a property owner's duty to trespassers.

CONTRIBUTORY NEGLIGENCE

There is another reason why the court erred in its decision. The evidence of contributory negligence of appellant is entirely disregarded. Here are the facts:

1. Appellant had been in respondent's store on numerous occasions. He knew that customers did not

frequent the aisle in the liquor department. He had never seen any customers go into said aisle. (R. 63)

2. There was a warning sign at the very entrance to this aisle, "No Admittance — Employees Only". (Defendant's Exhibits 3 and 8)

3. It was 9:30 at night of a holiday when the liquor department was entirely closed (R. 52), and it was not an area of the premises which customers had any right, express or implied, to handle goods then, or at any time. (Defendant's Exhibit 2)

4. Even though appellant states that he was informed by the clerk that the pencils were above the shelves containing the liquor bottles (R. 43), the jury had a right to disbelieve such statement and to accept as true the denial of the clerk. (R. 186-7) In any event, no reasonable person would intrude himself into such part of the premises to retrieve a pencil from a seven-foot shelf in disregard of the warning sign and when he already had observed and understood that it was not customary for any person to enter that part of the premises.

5. The evidence is conclusive that the aisle was well lighted (R. 203) and that appellant, if he had exercised any care for his safety, would not have fallen to his injury.

6. The danger was as obvious to appellant as to respondent's employee. He was in the aisle before the clerk went in and had ample opportunity to note the condition of the premises.

Justice Wolfe declares:

> "By the respondent's own evidence, the appellant did not walk behind the liquor counter and fall down the dumb-waiter shaft without first being seen and discovered by one of the respondent's employees. One of the clerks noticed the appellant behind the liquor counter before his fall, and in fact went over to serve him. By her own testimony, she (the clerk) was standing at the side of the appellant for 'a few minutes' before he fell down the shaft."

Do these recited facts make appellant any less the trespasser? Bear in mind that he went into the aisle while Mrs. Ashley was in another part of the store. Now suppose as soon as she entered the aisle she had said, "Can't you read the sign, 'No Admittance — For Employees Only'? You are not allowed here. Please leave." And suppose he had then fallen into the shaft. Would respondent have been in any better position? Would such conduct on the part of the clerk have strengthened respondent's defense? Why, then, was appellant less negligent because the clerk was courteous enough not to offend him? Should he be advantaged by her courtesy in failing to offend him? Competition in business is too keen to warrant clerks in criticizing the conduct of patrons. Under the rule announced by the court, if appellant had been ordered from behind the counter he would still have been entitled to a warning of his proximity to the shaft, or to have relied upon the duty of respondent to know that the shaft (the artificial condition) was or might be dangerous to him, a trespasser.

Will the court please again inspect the defendant's Exhibits 3 and 8? They clearly reveal that the curtains covered the stock of liquor, and that the liquor department of the store was not open for business. Please observe the "No Admittance" sign in plain view; also the very narrow passageway into the aisle through which appellant entered,—another suggestive "No Admittance" warning to all but employees. Then as shown on Exhibit 3, ovserve the distance — 12 to 15 feet, appellant had to walk down the aisle with ample opportunity to observe and with the duty to observe the condition of the floor which the uncontradicted evidence shows was well lighted. Assuming respondent owed appellant the duty to know, at his peril, that the artificial condition of the premises would likely be dangerous to appellant, or that respondent owed the duty, in addition to the warning sign, to give him further warning of the dangerous condition, we say, assuming either of these alternatives, if appellant's conduct did not constitute contributory negligence what element is lacking to show his negligence? The jury evidently considered him negligent. It is reasonable to so conclude, and if he was negligent a different instruction from that complained of would not have produced, and ought not to have produced, a different verdict.

We most respectfully submit that this court has committed a grave error and a grave injustice to this respondent in setting aside the jury's verdict in view

of the record in this case and that it ought, in the interest of justice, to grant a re-hearing.

Respectfully submitted,

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