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Clarence P. Martin v. Ralph L. Jones dba Mount Air Pharmacy : Reply to Brief of Appellant in Answer to Respondent's Petition for Rehearing

Utah Supreme Court

Stewart, Cannon & Hanson;

IN THE SUPREME COURT
of the
STATE OF UTAH

CLARENCE P. MARTIN,
Plaintiff and Appellant,

— vs. —

RALPH L. JONES, dba MOUNT AIR PHARMACY,
Defendant and Respondent.

Case No. 7766

REPLY TO APPELLANT'S BRIEF IN ANSWER TO RESPONDENT'S PETITION FOR REHEARING

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ARGUMENT

CASES CITED IN SUPPORT OF THE COURT'S DECISION DISTINGUISHED.

In his answer to respondent's petition for a rehearing, appellant has cited a number of decisions, which it is claimed support the majority opinion in this case. Those

decisions involve different facts than the situation out of which this case arose; for example, in some of the cases cited, the injured person was a child and, therefore, not capable of exercising the same degree of care to avoid injury to himself as an adult, or to even realize he was a trespasser. Of course, under those circumstances the owner has a duty to warn the child of a dangerous condition on the premises upon becoming aware of his presence thereon or having sufficient reason to expect the child to be upon the premises in close proximity to said danger. This, in *Blaycock v. Goates, et al,* 44 Cal. App. 2d 850, 113 P2 256, cited on Page 4 of appellant's brief, the suit involved injuries to a 13-year old girl. In *McPheters v. Loomis,* 125 Conn. 526, 7 Atl. 2 437, cited on Page 7 of appellant's brief, the suit was for damages resulting from the death of a 9-year old boy.

Where the person injured is an adult, whom the owner could reasonably assume knew he is a trespasser and consequently under a duty to be more alert for danger of injury to himself from conditions or activities on the premises, the duty of the owner to warn the trespasser is much less or, depending upon the circumstances, may not exist.

In the case of *Euclid 105th Street's Property Company v. Backman,* 42 NE 2nd 789, cited on Page 5 of appellant's brief, the injured party was a tenant who fell through a sky light which had been covered with tar paper to resemble the rest of the roof. The employees of the apartment house had frequently seen the plaintiff and

others washing windows from the roof where the tenant was standing when she fell. Under such circumstances it could logically be maintained that the plaintiff had an implied invitation to be where she was, certainly not the situation at the Mount Air Pharmacy when this accident occurred.

There is no evidence that the defendant owner or his employees had reason to anticipate that plaintiff would go beyond the counter in proximity to the shaft opening. True: Mrs. Cannon, an employee, saw him there. She did not warn him of the nearness of the opening. The light was more than sufficient for him to see the shaft. To get to the place where he reached for the pencils, it was necessary for him to walk directly towards its location, which was at the extreme west end of the area behind the counter, and to get behind the counter, it was necessary for him to walk past the sign reading "No Admission—Employees Only". Under such circumstances, we submit that Mrs. Cannon was under no duty as a matter of law to warn the plaintiff of the condition which was as apparent to him as to her and, further, she was entitled to assume that the plaintiff had not only observed the opening but had also seen the sign which in itself constituted a warning of the probability of the existence of a dangerous condition in the restricted area. This principle is set out in Paragraph 2 under Section 336 of the Restatement of the Law of Torts, as follows:

> "2. The trespasser having no privilege to enter the premises must realize that he should be on the alert to observe not only the condition of

> the land but also the possessor's activities thereon. The possessor is therefore often entitled to assume that a trespasser will realize his danger under conditions in which no such assumption would be permissible if a similar situation occurred in a public place or if the trespasser were a licensee."

We have no quarrel with the Rule of law that requires an owner to warn a trespasser of a dangerous condition when the owner under the circumstances should *reasonably* know that the trespasser is unaware of the said dangerous condition and is thereby likely to be injured. In some situations, the circumstances may be such as to be tantamount to actual knowledge on the part of the owner. The decision of this court adopting Section 337 of the Restatement of Torts extends the doctrine to the extent that the owner or possessor of premises becomes in effect an insurer of the safety of all persons coming upon his land, including trespassers, even though such persons are injured by an artificial condition which the owner is lawfully maintaining. The decision in this case obviates entirely the distinction between the duty an owner has towards an invitee upon the premises and the duty that an ower has towards a trespasser. There would be very few instances where a jury could not find that the owner "ought to have known that such a trespasser is near the danger", or "had reason to believe the trespasser would not discover the danger", particularly if the injury were sufficiently serious to invoke sympathy. Heretofore, this court has always refused to apply such a rule.

In the case of *Bogden v. L. A. & S. L .R. R. Com-*

pany, 59 Utah 505, 205 P. 571, a boy went upon a railroad right of way looking for sheep and while there collected powder from the floor of a railroad car, which he exploded causing severe burns to himself. Justice Frick of this Court held there was no liability on the part of the defendant and said:

> "While the accident was an unfortunate one, yet it was one which the defendant could not have foreseen, and therefore cannot legally be held liable for. In the conduct of modern business enterprises, accidents will, and of necessity must, happen. The law, however, does not impose liability unless the party charged with negligence could by the exercise of reasonable care and diligence have prevented the accident. Although children of tender years are favored by the law, yet, even before one of them can recover for an injury, it must appear that the person causing the injury owed a duty to the injured child, and that he negligently failed to discharge that duty by failing to exercise that degree of care that the law imposed under the circumstances. It goes without saying that one cannot discharge a duty before it is known to exist, and while actual knowledge of its existence is not always necessary, yet the facts must be such that knowledge may be imputed upon the ground that the person charged by the exercise of reasonable care ought to have known, and hence, in contemplation of law, did know."

And in the case of *Smalley v. Rio Grande Western Ry. Co.,* 34 U. 423, 98 P. 311, where a minor child came upon the defendant's railroad yard and was injured while climbing on one of the cars which was being moved by the defendant, the Court said:

"That is, before negligence can be predicated on a failure to observe a reasonable lookout or in the manner in which the cars were operated or managed about the yard, it must be held that a duty to use care in such particular was owing from the defendant to the plaintiff. For every case of actionable negligence involves a duty to use care and a breach of such duty resulting in injury. Whether in a given case a duty to use care was imposed on a party charged with negligence is ordinarily a question of law. A railroad company, as a matter of law, owes a duty to those who are rightfully about its premises, or who are there with its express or implied permission or invitation, to use care. It ordinarily owes no such duty to one who is wrongfully about its premises. The employees of the defendant were under no duty to use care in the handling of the cars about the yard in anticipation of wholly unauthorized intrusions of others. As to such persons, no duty to use care arose, until their presence was discovered. . . . Where the public or the people of a neighborhood, though technically unauthorized, have for a considerable length of time generally or habitually traversed railroad premises without objection, there is much reason for holding that the employees of the railroad company are required to take notice of such facts and to regulate their conduct accordingly. But the evidence does not show that kind of a case or any case where the unauthorized or uninvited presence of any one was acquiesced in or permitted without objection."

The general rule is as stated in *Brown v. Salt Lake City,* 33 Utah 222; 93 P. 570, on Page 238, wherein the court said:

> "As against mere intruders or licensees, the owner need not maintain his premises in a reasonably safe condition but as to those who come upon them by invitation, express or implied, he owes the duty of reasonable care for their safety; that is the general rule and to depart from it in favor of adult persons would cast a burden upon the ownership in dominion of private property, which would be intolerable."

The opinion then distinguishes a situation where a child of tender years is on the premises because of an attractive nuisance. The rule announced by the cases setting out the duty of an owner towards a trespasser is overruled by the decision in this case as effectively as if the opinion had specifically held that a landowner owes the same duty to a trespasser as to an invitee; that is, to keep the premises in a reasonably safe condition for anyone who enters, whether privileged to do so or not. See also *Bird v. Cloverleaf Harris Dairy,* 102 Utah 330, 125 P. 2d 797, wherein Justice Wolfe says:

> "The owner was under no duty to keep his property safe for trespassers or mere licensees."

CONTRIBUTORY NEGLIGENCE

In his opinion Chief Justice Wolfe attempts to distinguish between the facts of the case and the facts in the case of *Knox v. Snow* (Utah), 229 P2 874. In this situation — true — there were no obstacles in plaintiff's path as he approached the opening comparable to those in the service station premises in *Knox v. Snow;* however, the narrowness of the aisle behind the counter re-

quired the plaintiff to walk directly toward the opening to get to a place where he could reach the pencils and of necessity would compel him to observe the floor area where the opening was located. Also, there was a raised border around the hole four inches wide and one inch high. The evidence was undisputed the the floor was well lighted. We agree that in the majority of cases where a person is injured by stepping or falling into a hole or defect in the floor, that the question of contributory negligence in failing to keep a proper lookout is an issue for the jury. However, the court has overlooked the distinction that the plaintiff in this case was a mature man, 46 years of age and indisputably a trespasser. He had a greater duty to be more alert for his safety and to see this hole than would an invitee or a child. There was no reason for him to assume that the proprietor would use reasonable care to keep the area behind the counter safe for his use. His testimony is quoted ver batim, (Record 63):

"Q. You had been in the Mount Air Pharmacy a a number of times before November 11th—the day of this accident?

A. A number of times, yes.

Q. And on any of those prior occasions, had you ever been behind the liquor counter?

A. Never been behind it, no.

Q. Had you ever seen any other patrons behind that counter or any one other than the persons who were working there?

A. I don't remember seeing anyone.

Q. There were other places in the store where patrons did nor ordinarily go, were there not?

A. Yes.

Q. You had never been behind the column to the east of the liquor counter?

A. No."

In the course of the argument before this court on rehearing, Justice Wolfe commented that evolution had taken place in the law since the time when a landowner could set a spring-gun trap for trespassers. No one would disagree or contend that such evolution was not beneficial to society. However, we respectfully submit that an analogy between a spring gun and the hole in this case is not justified in any degree. The former would constitute an intentional injury and make the status of a trespasser an outlaw. Under our system of law, the possessor of land has had a legally protected interest in the exclusiveness of his possession. Persons who intrude without his permission have had no right to demand that he provide them with a safe place to trespass or that he protect them in the wronful use of his property. It seems only just that an adult persons who knows that he is on a place on the premises where he has no right or invitation to be (the jury by its verdict impliedly found that the plaintiff had seen the sign "No Admittance — Employees Only") assumed the risk of injury to himself from a condition lawfully maintained on the premises.

CONCLUSION

It is respectfully submitted that the majority decisions heretofore rendered by this court should be disaffirmed and the verdict of the jury permitted to stand.

Respectfully submitted,

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