

2003

John D. Hale v. Kurt Beckstead and John Does I through V : Brief of Respondent

Utah Supreme Court

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Brent M. Brindley; Attorneys for Defendant .

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IN THE UTAH SUPREME COURT

JOHN D. HALE,

Plaintiff/Petitioner,

v.

KURT BECKSTEAD and JOHN DOES I
through V,

Defendants/Respondents.

Case No. 20030641-SC

RESPONDENT'S BRIEF ON CERTIORARI

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UTAH APPELLATE COURTS
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ISSUE PRESENTED AND STANDARD OF REVIEW

In Donahue v. Durfee, 780 P.2d 1275 (Utah Ct. App. 1989), the court of appeals determined that Utah's comparative negligence scheme effectively abolished the open and obvious danger rule as a complete defense in landowner negligence actions. In House v. Armour of America, Inc., 929 P.2d 340 (Utah 1996), this Court clarified Utah's supposed abandonment of the open and obvious danger rule and concluded that it may be applied in certain circumstances to absolve a defendant from liability. The question presented in this case is:

Whether the court of appeals correctly concluded that House overruled Donahue such that a landowner is relieved from a duty of care to protect an invitee from an open and obvious danger where the landowner should not expect the invitee to encounter the danger without protecting himself or to otherwise become distracted from the danger.

"On a writ of certiorari, the Supreme Court reviews the decision of the court of appeals, not that of the district court, and applies the same standard of review used by the court of appeals." Hutchings v. State, 2003 UT 52; P.3d 1150 (Utah 2003). A grant of summary judgment is reviewed for correctness. See Baczuk v. Salt Lake Regional Med. Ctr., 2000 UT App 225, ¶5, 8 P.3d 1037.

DECISION BELOW

The opinion of the court of appeals is reported at 2003 UT App 240, 477 Utah Adv. Rep. 8. (App. A.)

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2003. The petition for a writ of certiorari was filed on August 11, 2003. The Supreme Court granted the petition on October 29, 2003. 74 P.3d 987(Table) (Utah 2003). The jurisdiction of the Utah Supreme Court is invoked under Utah Code Ann. §§ 78-2-2(3)(a) and 78-2a-4.

CONTROLLING LEGISLATION

There are no provisions of constitutions, statutes, ordinances, or regulations of central importance to this petition.

STATEMENT OF THE CASE

A. Nature of the Case.

This case involves landowner liability to an invitee who is injured as a result of an open and obvious danger existing on the land. Specifically, this case considers whether the open and obvious danger rule may relieve a landowner from any duty to the invitee where the open and obvious danger existed prior to the invitee's entry and the landowner should not expect the invitee to encounter the danger without protecting himself or to otherwise become distracted from the danger.

B. Course of Proceedings and Disposition Below.

Respondent contracted with Petitioner, a professional painter, to paint the interior of Respondent's home while the home was under construction. Petitioner was injured in the course of painting the home. The injury was the result of Petitioner encountering an open and obvious danger—an unprotected balcony—on the construction site.

Petitioner filed suit against Respondent in the Fifth District Court for Washington County. Respondent moved for summary judgment, arguing that he had no duty to Petitioner and therefore could not be held liable for Petitioner's injuries. The district court granted the motion and entered judgment for Respondent.

Petitioner appealed to the Utah Supreme Court, which transferred jurisdiction of the appeal to the Utah Court of Appeals. The court of appeals affirmed the district court's decision.

Petitioner now petitions this Court to review the court of appeals' decision.

STATEMENT OF FACTS

In 1996, Defendant/Respondent Kurt Beckstead ("Beckstead") undertook construction of a home located in Santa Clara, Utah. (R. 75.) The home was to be the primary residence for Beckstead and his family. (R. 75.) Beckstead acted as his own general contractor in the construction of his home. (R. 75, 101.)

Beckstead hired Plaintiff/Petitioner John Hale ("Hale") to paint the interior of the home. (R. 101). While Beckstead bought the paint and generally told Hale how the paint should look, Beckstead did not control the manner in which Hale was to paint the home. (R. 101.)

Hale entered Beckstead's home solely for the purpose of painting it. (R. 101.) Because the home was under construction, the guardrails that would normally be in place were not yet installed on the second floor balcony of the home. (R. 101.) Any danger posed by the missing guardrails was open and obvious. (R. 102.) While inside the home and in the course of performing his work, despite the open and obvious nature of the

danger posed by the exposed balcony, Hale stepped off the balcony and fell to the first level of the home. (R. 101.)

On March 21, 2000, Hale filed a complaint against Beckstead in the Fifth District Court for Washington County, alleging, inter alia, negligence and premises liability. (R. 1-6.)

Beckstead moved for summary judgment on the grounds that Hale was an independent contractor who controlled his own manner and method of performance and therefore, under Thompson v. Jess, 1999 UT 22, 979 P.2d 322, he owed no duty to Hale, thereby precluding any recovery under a theory of negligence. (R. 58, 63.)

The district court granted the motion and entered summary judgment for Beckstead. See Hale, 2003 UT App 240 at ¶7. The district court found that Hale “fell while on [Beckstead’s] premises as a business visitor or invitee, that [Beckstead] did not control or direct the manner of [Hale’s] work, and that any danger posed to [Hale] by the condition of [Beckstead’s] partially completed home was open and obvious to [Hale].” (R. 101.) Thus, the district court held that “[Beckstead] had no duty of care towards [Hale] concerning the manner or method of [Hale’s] work performance and the condition of [Beckstead’s] property was not such that [Beckstead] would be subject to liability to [Hale] . . .” (R. 102.)

Hale appealed to the Utah Court of Appeals. See Hale, 2003 UT App 240 at ¶7. The court of appeals affirmed. See id. at ¶1. Applying the approach of the Restatement (Second) of Torts to landowner liability as set forth in sections 343 and 343A, the court of appeals held that Beckstead was relieved of any duty to Hale. See id. at ¶24. The

court concluded that the open and obvious danger rule, as set forth in section 343A, was determinative, and that no exception to the rule applied to impose a duty on Beckstead. See id.

Judge Thorne dissented. In Judge Thorne's opinion, the majority's decision was at odds with Donahue v. Durfee, 780 P.2d 1275 (Utah Ct. App. 1989), see id. at ¶26 (Thorne, J., dissenting), wherein the court of appeals abolished the open and obvious danger rule as incompatible with Utah's comparative negligence system. See Donahue, 780 P.2d at 1278; see also Hale, 2003 UT App 240 at ¶9 n.1. Judge Thorne opined that, under the doctrine of stare decisis, the court of appeals must adhere to Donahue. See Hale, 2003 UT App 240 at ¶¶26-27 (Thorne, J., dissenting).

The majority responded to Judge Thorne's dissent by noting that this Court, in House v. Armour of America, Inc., 929 P.2d 340 (Utah 1996), overruled Donahue sub silentio,¹ by clarifying that the open and obvious danger rule may in fact, depending upon the circumstances of the case, act as a complete bar to liability. See id. at ¶¶9 n.1, 15 n.3.

Hale now petitions this Court to review the court of appeals' decision.

SUMMARY OF ARGUMENT

The decision of the court of appeals is correct and follows this Court's precedents. The sweeping abolition of the open and obvious danger rule in Donahue v. Durfee, 780 P.2d 1275 (Utah Ct. App. 1989) has been overruled.

¹ It is worth noting that Judge Orme wrote the opinion for the court of appeals in Donahue and was also a member of the panel majority in Hale.

In Donahue, the court of appeals held that the Utah Legislature's adoption of a comparative negligence system "by necessary implication abolished the open and obvious danger rule as an absolute bar to an injured guest's recovery." 780 P.2d at 1279. The court also concluded that Utah necessarily abandoned the approach of section 343A of the Restatement, which, the court stated, provides that a "landowner is not liable for a guest's injuries resulting from an open and obvious danger unless the landowner 'should anticipate the harm despite such knowledge or obviousness.'" Id. at 1278.

However, four years later, this Court, in English v. Kienke, 848 P.2d 153 (Utah 1993), applied sections 343 and 343A of the Restatement to hold that a defendant landowner did not owe a duty of care to an injured invitee. See id. at 156. This Court reasoned that under sections 343 and 343A, a landowner has a duty to warn an invitee about two general types of hazards: "(1) those that are present on the land when the invitee enters which the possessor should expect the invitee will not discover or realize, and (2) those that the possessor creates after the invitee's entry[.]" Id.

In Laws v. Blanding City, 893 P.2d 1083 (Utah Ct. App. 1995), the court of appeals found a landowner, Blanding City, liable for injuries suffered by an invitee as a result of an open and obvious danger existing on the city's land. In Laws, consistent with English, the court held that the correct statement of a landowner's duty to an invitee "is contained in sections 343 and 343A of the Restatement." Id. at 1085.

Addressing the open and obvious danger doctrine, the court determined that the city was not relieved from a duty of care to its invitees because the defendant was a municipality and the plaintiff invitee was required by ordinance to "encounter" the open

and obvious danger. See id. at 1086. Thus, the court concluded that the city should have known a reasonable person would encounter the danger. See id.

In House v. Armour of America, Inc., 929 P.2d 340 (Utah 1996), this Court reviewed a court of appeals' decision involving a products liability action. In its decision, the court of appeals addressed an assertion from the defendant that it owed no duty to warn the plaintiff of the open and obvious danger existent in a product. See House v. Armour of Am., Inc., 886 P.2d 542, 548 (Utah Ct. App. 1994), *aff'd*, 929 P.2d 340 (Utah 1996). The court of appeals rejected this assertion concluding that Donahue abandoned the open and obvious danger rule as a complete defense in a negligence action. See id.

Although it ultimately affirmed the court of appeals, this Court took issue with the court of appeals' conclusion that Utah had abandoned the open and obvious danger rule as a complete defense in a negligence action. See House, 929 P.2d at 344. This Court determined that, in certain circumstances, the open and obvious danger rule could completely absolve a defendant from liability. See id.

As a result of these decisions, Donahue's sweeping proposition concerning the abandonment of section 343A and the open and obvious danger rule as a complete defense had been overturned by this Court.

In Hale, the court of appeals correctly concluded that Donahue was no longer viable and appropriately applied these two principles in finding Beckstead owed no duty of care to Hale. Consistent with sections 343 and 343A of the Restatement, the court of appeals framed the dispositive issue in Hale as: "whether or not Beckstead should have

anticipated that Hale would suffer injury despite the known and obvious danger posed by the unprotected balcony, either because Hale’s interior painting required a deliberate encounter with the danger, or because Hale was likely to become distracted.” Hale, 2003 UT App 240 at ¶16.

The court of appeals ultimately and correctly concluded: “Beckstead should not have expected that Hale would necessarily encounter the unprotected balcony, or that his attention would be distracted from it. Accordingly, we hold that Beckstead was relieved of any duty to Hale. Hence, we affirm the district court’s grant of summary judgment.” Id. at ¶24.

ARGUMENT

Hale asks this Court to address the issue raised by Judge Thorne in dissent, that the majority’s opinion in Hale is at odds with Donahue and therefore requires clarification from this Court. However, as set forth below, the decision of the court of appeals is correct, is consistent with and follows this Court’s precedents.

In Donahue v. Durfee, the court of appeals held that the Utah Legislature’s adoption of a comparative negligence system “by necessary implication abolished the open and obvious danger rule as an absolute bar to an injured guest’s recovery.” 780 P.2d at 1279. In so holding, the court also concluded that Utah necessarily abandoned the approach of section 343A of the Restatement, which, the court stated, provides that a “landowner is not liable for a guest’s injuries resulting from an open and obvious danger unless the landowner ‘should anticipate the harm despite such knowledge or obviousness.’” Id. at 1278.

However, four years later, this Court, in English v. Kienke, 848 P.2d 153 (Utah 1993), applied sections 343 and 343A of the Restatement to hold that a defendant landowner did not owe a duty of care to an injured invitee. See id. at 156. This Court reasoned that under sections 343 and 343A, a landowner has a duty to warn an invitee about two general types of hazards: “(1) those that are present on the land when the invitee enters which the possessor should expect the invitee will not discover or realize, and (2) those that the possessor creates after the invitee’s entry[.]” Id. This Court found neither present in English. See id. Thus, with English, Donahue’s foundation begins to erode.

Conspicuously absent from Hale’s brief is any effort to distinguish this Court’s unequivocal reliance on sections 343 and 343A of the Restatement in English. See, generally, Petitioner’s brief.

Thereafter, in Laws v. Blanding City, 893 P.2d 1083 (Utah Ct. App. 1995), the court of appeals found a landowner, Blanding City, liable for injuries suffered by an invitee as a result of an open and obvious danger existing on the city’s land. In Laws, consistent with English, the court held that the correct statement of a landowner’s duty to an invitee “is contained in sections 343 and 343A of the Restatement.” Id. at 1085.

Addressing the open and obvious danger doctrine, the court determined that the city was not relieved from a duty of care to its invitees because the defendant was a municipality and the plaintiff invitee was required by ordinance to “encounter” the open and obvious danger. See id. at 1086. Thus, the court concluded that the city should have known a reasonable person would encounter the danger. See id.

Subsequently, in House v. Armour of America, Inc., 929 P.2d 340 (Utah 1996), this Court reviewed a court of appeals' decision involving a products liability action. In its decision, the court of appeals addressed an assertion from the defendant that it owed no duty to warn the plaintiff of the open and obvious danger existent in a product. See House v. Armour of Am., Inc., 886 P.2d 542, 548 (Utah Ct. App. 1994), *aff'd*, 929 P.2d 340 (Utah 1996). The court of appeals rejected this assertion concluding that Donahue abandoned the open and obvious danger rule as a complete defense in a negligence action. See id.

Although it ultimately affirmed the court of appeals, this Court took issue with the court of appeals' conclusion that Utah had abandoned the open and obvious danger rule as a complete defense in a negligence action. See House, 929 P.2d at 344. This Court determined that, in certain circumstances, the open and obvious danger rule could completely absolve a defendant from liability. See id.

Thus, by the time Hale v. Beckstead found its way to the court of appeals, two principles had been firmly established: (1) sections 343 and 343A of the Restatement provide the standard in determining the duty of care a landowner owes an invitee and (2), in certain circumstances, the open and obvious danger rule could completely absolve a defendant from liability. As a result, Donahue's sweeping proposition concerning the

abandonment of section 343A² and the open and obvious danger rule as a complete defense had effectively been washed away by this Court.

In Hale, the court of appeals correctly concluded that Donahue was no longer viable and appropriately applied these two principles in finding Beckstead owed no duty of care to Hale. Consistent with sections 343 and 343A of the Restatement, the court of appeals framed the dispositive issue in Hale as: “whether or not Beckstead should have anticipated that Hale would suffer injury despite the known and obvious danger posed by the unprotected balcony, either because Hale’s interior painting required a deliberate encounter with the danger, or because Hale was likely to become distracted.” Hale, 2003 UT App 240 at ¶16.

With regard to the deliberate encounter exception, the court of appeals determined that, unlike the plaintiff invitee in Laws, “Hale was under no obligation by city ordinance or otherwise to encounter Beckstead’s land at all, let alone the unprotected balcony[.]” Id. at ¶18. Rather, Hale entered Beckstead’s land “to perform a freely negotiated painting contract for which he had expertise.” Id.

The court further reasoned that Beckstead could reasonably expect Hale, an experienced painter, to take the necessary safety precautions to protect himself and had no reason to believe that Hale would encounter the unprotected balcony without taking such safety precautions. See id. at ¶20. As a result, unlike the city in Laws, Beckstead

² Section 343A, adopted by this Court in English and applied by the court of appeals in Laws, expressly and specifically addresses the open and obvious danger rule. Thus, it would be error to conclude that Donahue had any continuing viability even before House.

had no reason to expect Hale would deliberately encounter the known or obvious danger and Hale presented no evidence to the trial court to show otherwise. See id. at ¶20, n.4.

With regard to the Restatement's distraction exception, the court of appeals reasoned that it did not apply to distractions that are typical of any construction site. See id. at ¶22 (citing Kotecki v. Walsh Constr. Co., 776 N.E.2d 774, 780 (Ill. App. Ct. 2002) (refusing to extend distraction exception for painter injured on construction site where no unusual distraction occurred)). Rather, the distraction must be an unusual one. See id. (citing Kotecki, 776 N.E.2d at 780). The court then noted that Hale did not put forth evidence to show that any unusual distraction existed in Beckstead's home at the time Hale was painting the same. See id. at ¶23 n.5.

Thus, the court of appeals ultimately and correctly concluded: "Beckstead should not have expected that Hale would necessarily encounter the unprotected balcony, or that his attention would be distracted from it. Accordingly, we hold that Beckstead was relieved of any duty to Hale. Hence, we affirm the district court's grant of summary judgment." Id. at ¶24.

In sum, the court of appeals' decision in Hale v. Beckstead is consistent with and follows this Court's application of the open and obvious danger rule in English.

CONCLUSION

The court of appeals correctly ruled that the open and obvious danger rule as articulated in English is controlling precedent in this case. The court of appeals was correct in affirming summary judgment in favor of Beckstead. The court of appeals decision should be affirmed.

Respectfully submitted this 11th day of May, 2004.

BRINDLEY SULLIVAN

A handwritten signature in cursive script, appearing to read "Brent Brindley", written over a horizontal line.


Brent M. Brindley

Attorneys for Respondent Kurt Beckstead

CERTIFICATE OF SERVICE

In accordance with Utah R. App. P. 26(b), I, Brent M. Brindley, certify that on May ^{12th} 2004, I served two (2) copies of Respondent's **RESPONDENT'S BRIEF ON CERTIORARI** upon counsel for Petitioner in this matter, via first class mail with sufficient postage prepaid, to the following address:

Aaron J. Prisbrey
1071 East 100 South Bldg. D, Suite 3
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Attorney for Plaintiff/Petitioner


Brent M. Brindley

Tab A

Westlaw.

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Court of Appeals of Utah.

John D. HALE, Plaintiff and Appellant,
 v.
 Kurt BECKSTEAD and John Does I through V,
 Defendants and Appellees.

No. 20020196-CA.

July 10, 2003.

Painter, who was injured when he inadvertently stepped off the second-floor balcony and fell to the first floor below, brought action against general contractor, alleging negligence, violation of the Occupational and Safety Health Act (OSHA), and premises liability. The Fifth District Court, St. George Department, G. Rand Beacham, J., entered summary judgment for general contractor, and painter appealed. The Court of Appeals, Billings, Associate P.J., held that general contractor did not owe painter any duty.

Affirmed.

Thorne, J., filed dissenting opinion.

West Headnotes

[1] Judgment ⚡185(2)
 228k185(2) Most Cited Cases

When reviewing a grant of summary judgment, appellate court evaluates the evidence and all reasonable inferences fairly drawn from that evidence in a light most favorable to the party opposing summary judgment.

[2] Appeal and Error ⚡863
 30k863 Most Cited Cases

Because the determination of whether summary judgment is appropriate presents a question of law, appellate court accords no deference to the trial

court's decision and instead reviews it for correctness.

[3] Appeal and Error ⚡842(4)
 30k842(4) Most Cited Cases

The issue of whether a duty exists in negligence action is a question of law which appellate court reviews for correctness.

[4] Negligence ⚡1205(7)
 272k1205(7) Most Cited Cases

[4] Negligence ⚡1286(7)
 272k1286(7) Most Cited Cases

Open and obvious danger rule was the applicable law with respect to negligence action brought against general contractor by painter, who was injured when he inadvertently stepped off the second-floor balcony and fell to the first floor below. Restatement (Second) of Torts §§ 343, 343A .

[5] Negligence ⚡1205(7)
 272k1205(7) Most Cited Cases

[5] Negligence ⚡1296
 272k1296 Most Cited Cases

The danger, namely second-floor balcony which lacked railings because construction at house was not yet completed, was known or obvious to painter, who was injured when he inadvertently stepped off the second-floor balcony and fell to the first floor below, with respect to painter's negligence action against general contractor; the inherent risk of such a condition in a partially-constructed house was apparent to and would be recognized by a reasonable man in painter's position as an experienced painting subcontractor exercising ordinary perception, intelligence, and judgment. Restatement (Second) of Torts § 343A.

[6] Negligence ⚡1205(7)
 272k1205(7) Most Cited Cases

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Deliberate encounter exception to the open and obvious danger rule was not applicable with respect to negligence action brought against general contractor by painter, who was injured when he inadvertently stepped off second-floor balcony and fell to the first floor below; painter was under no obligation by city ordinance or otherwise to encounter general contractor's land at all, let alone the unprotected balcony from which he fell, and instead, painter voluntarily entered land to perform freely negotiated painting contract for which he had expertise, and contractor could reasonably expect that painter would take necessary safety precautions. Restatement (Second) of Torts § 343A.

[7] Negligence ⚡1205(7)

272k1205(7) Most Cited Cases

Distraction exception to the open and obvious danger rule was not applicable with respect to negligence action brought against general contractor by painter, who was injured when he inadvertently stepped off second-floor balcony and fell to the first floor below; contractor did not have a duty to anticipate and mitigate against ordinary distractions which might cause painter harm from known and obvious dangers on construction site. Restatement (Second) of Torts § 343A.

[8] Negligence ⚡1205(7)

272k1205(7) Most Cited Cases

General contractor did not owe painter any duty to painter, who was injured when he inadvertently stepped off the second-floor balcony and fell to the first floor below; painter contracted with general contractor to paint the interior of general contractor's house while construction was ongoing, painter stepped off an unprotected balcony area that was known and obvious to him, and general contractor should not have expected that painter would necessarily encounter the unprotected balcony, or that his attention would be distracted from it.

*629 Aaron J. Prisbrey, St. George, for Appellant.

Bryan J. Pattison and Brent M. Brindley, Durham, Jones & Pinegar, St. George, for Appellees.

Before BILLINGS, Associate P.J., and ORME, and THORNE, Judges.

OPINION

BILLINGS, Associate Presiding Judge:

¶ 1 John **Hale** appeals the district court's grant of summary judgment to Kurt **Beckstead**. We affirm.

BACKGROUND

[1] ¶ 2 "When reviewing a grant of summary judgment, we evaluate the evidence and all reasonable inferences fairly drawn from that evidence in a light most favorable to the party opposing summary judgment." *Fishbaugh v. Utah Power & Light*, 969 P.2d 403, 405 (Utah 1998) (quotations and citation omitted). Accordingly, we recite the facts as presented by Hale, although there is no real dispute as to the facts.

¶ 3 In 1996, Beckstead began construction of a house on land he owned in Santa Clara, Utah. The house was to be the primary residence for Beckstead and his family. Beckstead acted as his own general contractor in the construction of the house.

¶ 4 Beckstead hired Hale to paint the interior of the house. Beckstead did not exercise control over the day-to-day performance of the painting. In fact, at the time Hale's injuries occurred, Beckstead was out of town.

¶ 5 The house was under construction when Hale performed the painting work. Accordingly, a railing had not yet been installed on the second floor balcony. While painting the interior, Hale inadvertently stepped off the second-floor balcony and fell to the first floor below, sustaining injuries.

¶ 6 Hale filed a complaint against Beckstead alleging negligence, violation of the Occupational and Safety Health Act (OSHA), and premises liability. Subsequently, Beckstead moved for summary judgment.

¶ 7 The trial court granted Beckstead's motion and entered summary judgment for Beckstead. The trial court found that "[Hale] fell while on [Beckstead's] premises as a business visitor or invitee, ... and that any danger posed to [Hale] by the condition of [Beckstead's] partially-completed home was open and obvious to [Hale]." The trial court thus held

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that "[Beckstead] had no duty of care toward [Hale]." Hale appeals.

ISSUE AND STANDARD OF REVIEW

[2][3] ¶ 8 Hale argues the district court erred in holding, as a matter of law, that Beckstead owed no duty of care to Hale. "Because the determination of whether summary judgment is appropriate presents a question of law, we accord no deference to the trial court's decision and instead review it for correctness." *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 841 (Utah 1996). Also, "the issue of 'whether a "duty" exists is a question of law' which we review for correctness." *Fishbaugh v. Utah Power & Light*, 969 P.2d 403, 405 (Utah 1998) (quoting *Weber v. Springville City*, 725 P.2d 1360, 1363 (Utah 1986)).

ANALYSIS

I. Restatement (Second) of Torts and Landowner Duty

¶ 9 Hale argues the district court erred in holding that Beckstead owed no duty of care to protect Hale from the danger posed by the *630 unprotected balcony. In *English v. Kienke*, 848 P.2d 153, 156 (Utah 1993), the Utah Supreme Court suggested that Utah follows the Restatement (Second) of Torts (1965) (the Restatement) with regard to duty in cases of landowner liability. In that case, the supreme court employed Restatement sections 328E, 332, and 343 to define the status of the plaintiff workman as a " 'business visitor' " and the landowner as a " 'possessor of land.' " *English*, 848 P.2d at 156 (quoting the Restatement sections 328E, 332, 343). The *English* court then quoted section 343 of the Restatement in its entirety and provided the following analysis:

Sections 343 and 343A of the Restatement impose on a possessor of land the duty to warn an invitee about two general types of hazards: (1) those that are present on the land when the invitee enters which the possessor should expect the invitee will not discover or realize, and (2) those that the possessor creates after the invitee's entry[.]

English, 848 P.2d at 156 (emphasis added). Because the plaintiff invitee in *English* "created the hazard which led to his death," the supreme court did not apply sections 343 and 343A in that case. *Id.* However, the *English* court clearly indicated

that a landowner's duty to an invitee in Utah is set out in sections 343 and 343A of the Restatement. *See id.* at 156-57. [FN1]

FN1. Historically, the Utah Supreme Court has applied the common law open and obvious danger rule in landowner liability cases. *See, e.g., Moore v. Burton Lumber & Hardware Co.*, 631 P.2d 865, 868 (Utah 1981) ("It has long been held that a property owner has no obligation to warn an invitee of dangers which are known to the invitee or which are so obvious and apparent that he may reasonably be expected to discover them."); *Ellertson v. Dansie*, 576 P.2d 867, 868 (Utah 1978) ("Where there is a dangerous condition on one's property, which is just as observable to an invitee as to the owner, the owner has no duty to warn or to protect the invitee except to observe the universal standard of reasonable care under the circumstances."). However, in *Donahue v. Durfee*, this court announced the abandonment of the open and obvious danger rule in Utah. *See* 780 P.2d 1275, 1279 (Utah Ct.App.1989), *cert. denied*, 789 P.2d 33 (Utah 1990). We held that by "establishing a comparative negligence system, the Utah Legislature has by necessary implication abolished the open and obvious danger rule as an absolute bar to an injured [invitee's] recovery." *Id.*

However, we conclude that *Donahue* has since been overruled sub silentio by our supreme court. *See House v. Armour of Am., Inc.*, 929 P.2d 340 (Utah 1996), *aff'g* 886 P.2d 542 (Utah Ct.App.1994). In *House*, the supreme court granted certiorari to review this court's application of the law governing duty in a reversal of the district court's grant of summary judgment for a defendant manufacturer in a products liability case. *See* 929 P.2d at 342. Defendant argued that "the court of appeals erred in failing to find that because the hazards [were] open and obvious, defendant [] did not have a duty to warn" or otherwise protect the plaintiff. *Id.* at 343. While "agree[ing] with the court of appeals' ultimate conclusion that a genuine

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issue of material fact exist[ed] as to whether the relevant danger ... was open and obvious," the supreme court felt compelled to "clarify" our "suggest[ion] that Utah has 'abandoned' the open and obvious danger rule in all circumstances." *Id.* The referenced "suggestion" arose from our discussion of, inter alia, *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301, 1303 (Utah 1981) and *Donahue*, 780 P.2d at 1279 (Utah Ct.App.1989). *See House*, 886 P.2d at 548 (Utah Ct.App.1994).

The supreme court found persuasive "the reasoning of the United States Court of Appeals for the First Circuit," wherein that court opined: " 'If a manufacturer had to warn consumers against every such obvious danger inherent in a product, 'the list of obvious [dangers] would be so long, it would fill a volume.' " *Id.* at 344 (quoting *Laaperi v. Sears, Roebuck & Co.*, 787 F.2d 726, 731 (1st Cir.1986) (quoting *Plante v. Hobart Corp.*, 771 F.2d 617, 620 (1st Cir.1985))). Our supreme court went on to "determine whether the danger posed to [plaintiff] was open and obvious as a matter of law." *Id.* After applying the open and obvious danger rule to the facts before it, the supreme court could not "say as a matter of law that the [hazard] was open and obvious [and] [t]herefore, the court of appeals correctly held that there [were] material issues of fact sufficient to preclude the trial court's grant of summary judgment." *Id.* at 345 (quotations and citation omitted); *see also Golding v. Ashley Cent. Irrigation Co.*, 902 P.2d 142, 146 (Utah 1995) ("Under the [Utah Limitation of Landowner Liability] Act, a landowner's knowledge of a dangerous condition that is inherent in the use to which the land is put and is common, open, and obvious does not give rise to liability."); *Pratt v. Mitchell Hollow Irrigation Co.*, 813 P.2d 1169, 1173 (Utah 1991) (refusing to apply the "hidden trap" exception to canal owners immunity doctrine where "[t]he hazards are open and obvious, and ... inhere[nt] in the very existence of canals and ditches").

Hence, we conclude the open and obvious danger rule remains viable in Utah law

governing duty.

¶ 10 Indeed, in *Laws v. Blanding City*, our most recent case involving an open and obvious *631 danger in the context of landowner liability, this court applied the open and obvious danger analysis of the Restatement sections 343 and 343A (Restatement approach). *See* 893 P.2d 1083, 1085 (Utah Ct.App.1995). In that case we held that "[t]he correct statement of the duty Defendant, a possessor of land, owed Plaintiff, an invitee, is contained in sections 343 and 343A of the Restatement." *Id.*

[4] ¶ 11 Thus, we conclude the open and obvious danger rule, as outlined in sections 343 and 343A of the Restatement, is the applicable law in this case. [FN2]

FN2. Beckstead asks us to decide this appeal by applying the rules of liability for employers of independent contractors as outlined in the Restatement section 409, its companion sections, and the case of *Thompson v. Jess*, 1999 UT 22, 979 P.2d 322, which applies various sections of chapter 15 of the Restatement, including section 409. *See id.* at ¶ 13. Beckstead's reliance on these authorities is misplaced. *Thompson* dealt with issues of the "retained control" doctrine and the "peculiar risk" and "inherently dangerous work" doctrines under the Restatement sections 413, 426, and 427, *Thompson*, 1999 UT 22 at ¶ 11, 979 P.2d 322 (quotations omitted), issues not relevant to this appeal. More importantly, *Thompson* contains no analysis with regard to the duty owed by a possessor of land to an invitee. *See id.* And while section 409 has some applicability with regard to the relationship between Beckstead and Hale (where Beckstead did not participate in or control the manner in which Hale performed the painting, such that Beckstead owed Hale no duty of care concerning the safety of the manner or method of performance Hale chose to implement), this analysis is not dispositive. As we discuss in detail below, Hale was a business visitor, an invitee on

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Beckstead's land--a status wholly separate from any status he may have had as an independent contractor, which no one disputes.

A. The Restatement Approach to the Open and Obvious Danger Rule

¶ 12 Section 343 of the Restatement provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against danger.

Restatement (Second) of Torts § 343. Hence, section 343 "impose[s] on a possessor of land the duty to warn an invitee about two general types of hazards: (1) those that are present on the land when the invitee enters which the possessor should expect the invitee will not discover or realize, and (2) those that the possessor creates after the invitee's entry." *English v. Kienke*, 848 P.2d 153, 156 (Utah 1993).

¶ 13 Section 343A of the Restatement substantially clarifies the duty outlined in section 343 when the dangerous "condition is known to the invitee, or is obvious to him." *Laws v. Blanding City*, 893 P.2d 1083, 1085 (Utah Ct.App.1995) (citation omitted); see also Restatement (Second) of Torts § 343 cmt. a ("Section [343] should be read together with § 343A."). Section 343A(1) of the Restatement provides that "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them [.]" Restatement (Second) of Torts § 343A(1).

[5] ¶ 14 We agree with the district court that the danger in this case--the second-floor balcony, which lacked railings because construction at Beckstead's house was not yet completed--was "known or obvious" to Hale within the meaning of section 343A of the Restatement. Hale concedes the house was only partially constructed and the second-floor

balcony was unprotected, exposing a drop of over six feet. The inherent risk of such a condition in a partially-constructed house is "apparent to and would be recognized by a reasonable man ... in [Hale's position as an experienced painting subcontractor] exercising ordinary perception, intelligence, and judgment." Restatement (Second) of Torts § 343A(1) cmt. b.

B. Restatement Exceptions to the Open and Obvious Danger Rule

¶ 15 There are, however, significant exceptions to the open and obvious danger rule *632 under the Restatement which can, in some cases, limit the protection the rule affords to landowners. [FN3] Section 343A(1) of the Restatement reads: "A possessor of land is not liable to his invitee for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement (Second) of Torts § 343A(1). Comment f states further:

FN3. The existence of such exceptions illustrates that the open and obvious danger rule of sections 343 and 343A of the Restatement "avoid[s] the rigidity of the traditional common-law rule by permitting the courts to hold that a plaintiff's knowledge of the danger does not necessarily absolve the occupier of liability, and permit[s] a plaintiff to recover if it appears and is found that the risk was one which would not be anticipated or appreciated by the invitee, or where the [landowner] can and should anticipate that the dangerous condition will cause harm to the invitee notwithstanding its known or obvious danger." 62 Am.Jur. 2D *Premises Liability* § 157 (1990) (footnotes and citations omitted). Hence, the Restatement approach to the open and obvious danger rule is not necessarily the kind of "strict all-or-nothing rule" alluded to by our supreme court in *House*, 929 P.2d at 344.

There are ... cases in which the possessor of land can and should anticipate that the dangerous

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condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection....

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.

Id. § 343A(1) cmt. f.

¶ 16 Accordingly, the dispositive issue before us is whether or not **Beckstead** should have anticipated that **Hale** would suffer injury despite the known and obvious danger posed by the unprotected balcony, either because **Hale's** interior painting required a deliberate encounter with the danger, or because **Hale** was likely to become distracted.

[6] ¶ 17 With regard to the deliberate encounter exception, *Laws v. Blanding City*, 893 P.2d 1083 (Utah Ct.App.1995), is instructive. In *Laws*, the city's invitee was injured after falling from a dumping platform at the city's landfill. *See id.* at 1084. Following a jury trial the invitee appealed the verdict in favor of the city. *See id.* This court reversed the jury verdict and remanded for a new trial, holding the district court failed to properly instruct the jury regarding the duty owed by the city to its invitees notwithstanding the known and obvious nature of the hazard posed by the dumping platform. *See id.* at 1085-86 (citing Restatement (Second) of Torts §§ 343A(1), 343A(1) cmt. f). We noted that because the appellant invitee lived outside the city's curbside trash pickup area, he was required by city ordinance to dispose of his trash himself using the dumping platform at the landfill. *See id.* at 1086. As such, the city "had a duty to protect [appellant invitee] because [the city] *should have known that a reasonable person would, recognizing the danger, nevertheless encounter it.*" *Id.* at 1086 (emphasis added); *see also* Restatement (Second) of Torts § 343A (1) cmt. f.

¶ 18 Unlike the appellant invitee in *Laws*, **Hale** was under no obligation by city ordinance or otherwise to encounter **Beckstead's** land at all, let alone the unprotected balcony from which he fell. Instead, **Hale** voluntarily entered the land to perform a freely negotiated painting contract for which he had expertise.

¶ 19 Case law from other jurisdictions that have adopted the Restatement approach under sections 343 and 343A is instructive and supports our approach. In *Sutherland v. Barton*, a powerful electric shock killed a worker at a job-site where machinery controls were being upgraded at a paper plant. *See* 570 N.W.2d 1, 2, 4 (Minn.1997). The *633 fatal injury occurred while the worker was working on live electrical wiring that he and his fellow electricians at the project site knew "could be deadly." *Id.* at 3- 4. There was no dispute at trial that "the danger was known and obvious to [the decedent worker]." *Id.* at 7. However, the appellant argued that the decedent worker's "only alternative to avoiding the risk of the live [wiring] was to forgo his employment." *Id.* The Supreme Court of Minnesota reinstated a grant of summary judgment in favor of the paper plant, holding that the paper plant "did not owe [the decedent worker] a duty to protect him from harm by [the] known and obvious danger" because: (a) the worker "had expertise as an electrician [,] ... the exact reason [for which he was] hired"; (b) "[i]t was entirely reasonable for [the paper plant] to expect that [the worker] would take the necessary safety precautions"; and (c) the paper plant "had no reason to anticipate that [the worker] would proceed to encounter the danger of the live [wires] without taking the necessary safety precautions." *Id.* at 7-8.

¶ 20 Likewise, in this case, **Hale** contracted with **Beckstead** to paint the interior of a partially-constructed house containing an unprotected second- floor balcony--clearly a known or obvious danger. **Hale** held himself out to **Beckstead** as having expertise to complete the job--the very reason for which he was hired. As such, **Beckstead** could reasonably expect that **Hale** "would take the necessary safety precautions" and "had no reason to anticipate that [**Hale**] would proceed to encounter the [unprotected balcony] without taking the necessary safety precautions." [FN4] *Id.* at 7. Hence, this is not a case where **Beckstead** "ha[d] reason to expect that [**Hale**

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would] encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." Restatement (Second) of Torts § 343A(1) cmt. f.

FN4. We note that **Hale** failed to provide the trial court with any evidence as to how his presence on **Beckstead's** land for purposes of painting might require a deliberate encounter with the unprotected balcony.

[7] ¶ 21 The distraction exception is equally inapplicable. In *Kotecki v. Walsh Constr. Co.*, a commercial painter hired to paint door frames was injured when he lost his footing on a ladder situated next to a dock-leveling mechanism at the construction site. See 333 Ill.App.3d 583, 267 Ill.Dec. 402, 776 N.E.2d 774, 776 (Ill.App.Ct.2002)

The dock leveler was being used to unload merchandise into the mostly-completed retail store where the appellant painter was working. See *id.*

¶ 22 At a pre-trial deposition, the appellant painter testified he "knew the dock area was being used ... to unload merchandise" and that there were many other tradesmen in the area. *Id.* The appellant painter conceded that the foregoing conditions constituted a known or obvious danger, "but claim[ed] that the distraction ... exception[] appl[ie]d to impose liability." *Id.* at 779. The Illinois Court of Appeals disagreed and affirmed the trial court's grant of summary judgment for the store owner. See *id.* at 775, 780-81. In so holding, the *Kotecki* court noted that the Restatement's distraction exception contemplates unusual distractions; not merely those conditions and activities typical of any construction site. See *id.* at 780 ("A distraction-free environment on a construction project would be an impossible burden to meet." "Imposing a duty to guard against [every] distraction [] ... on a construction project ignores the reality of the construction industry."); cf. *House v. Armour of Am., Inc.*, 929 P.2d 340, 344 (Utah 1996) ("If a manufacturer had to warn consumers against every such obvious danger inherent in a product, the list of obvious [dangers] would be so long, it would fill a volume" (quotations and citations omitted)).

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¶ 23 Here, like the appellant painter in *Kotecki*, **Hale** would have us apply Restatement section 343A(1) comment f to impose upon land possessors a duty to anticipate and mitigate against ordinary distractions which might cause worker invitees harm from known and obvious dangers on construction sites. [FN5] We refuse to apply such an expansive and impractical rule.

FN5. **Hale** put no evidence before the trial court to indicate that any unusual distraction existed in **Beckstead's** unfinished house. Where "there is an absence of evidence of the cause of plaintiff's injury[, we cannot know] whether [Hale] was distracted or merely inattentive to an obvious danger." *Kotecki v. Walsh Constr. Co.*, 333 Ill.App.3d 583, 267 Ill.Dec. 402, 776 N.E.2d 774, 780 (2002) (citing *Wreglesworth v. Arctco Inc.*, 317 Ill.App.3d 628, 251 Ill.Dec. 363, 740 N.E.2d 444, 454 (2000) (holding the distraction exception does not require landowners to guard against an invitee's inattention to an obvious danger)).

*634 CONCLUSION

[8] ¶ 24 **Hale** contracted with **Beckstead** to paint the interior of **Beckstead's** house while construction was ongoing. **Hale** stepped off an unprotected balcony area that was known and obvious to him. **Beckstead** should not have expected that **Hale** would necessarily encounter the unprotected balcony, or that his attention would be distracted from it. Accordingly, we hold that **Beckstead** was relieved of any duty to **Hale**. Hence, we affirm the district court's grant of summary judgment. [FN6]

FN6. **Hale** also argued the district court erred in not allowing consideration of violations of OSHA regulations in determining liability. However, **Hale** correctly notes that OSHA regulations "do[] not create a [duty] where none existed before." See *Tallman v. City of Hurricane*, 1999 UT 55, ¶ 4, 985 P.2d 892 (holding that OSHA regulations are relevant as to breach, but that OSHA regulations do not

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create a duty). Because we hold that **Beckstead** owed no duty to **Hale**, we need not reach the issue of whether the district court erred in not allowing consideration of OSHA violations in this case.

¶ 25 I CONCUR: GREGORY K. ORME, Judge.

THORNE, Judge (dissenting).

¶ 26 I respectfully dissent and disagree with the majority's assertion that the Utah Supreme Court overruled, sub silentio, *Donahue v. Durfee*, 780 P.2d 1275 (Utah Ct.App.1989). See *House v. Armour of America, Inc.*, 929 P.2d 340 (Utah 1996), *aff'g* 886 P.2d 542 (Utah Ct.App.1994); *Golding v. Ashley Cent. Irrigation Co.*, 902 P.2d 142, 145-48 (Utah 1995); *Pratt v. Mitchell Hollow Irrigation Co.*, 813 P.2d 1169, 1172-73 (Utah 1991). After reading the cases cited by the majority, I believe that the Utah Supreme Court's position is, at best, ambiguous concerning our holding in *Donahue*. [FN1] Because it is unclear that the cases relied upon by the majority do in fact "revive" the open and obvious danger rule in landowner liability cases, I conclude that this court is bound by the reasoning in *Donahue*. [FN2]

FN1. For example, *House v. Armour of America, Inc.*, 929 P.2d 340 (Utah 1996), *aff'g* 886 P.2d 542 (Utah Ct.App.1994), deals specifically with the notion of product liability. See *id.* at 342-43. *Golding v. Ashley Central Irrigation Co.*, 902 P.2d 142 (Utah 1995), addresses liability under the Landowner Liability Act and *Pratt v. Mitchell Hollow Irrigation Co.*, 813 P.2d 1169 (Utah 1991), addresses liability to trespassers and the attractive nuisance doctrine. See also *Golding*, 902 P.2d at 148; *Pratt*, 813 P.2d at 1173. I believe these arenas of the law are sufficiently different from the facts at issue here that it is unwise to conclude that the standards articulated therein necessarily apply to this factual situation.

FN2. In *House*, 886 P.2d at 548, we reaffirmed our pronouncement in *Donahue v. Durfee*, 780 P.2d 1275 (Utah Ct.App.1989), that the open and obvious danger rule is inconsistent with a comparative negligence system. *Laws v. Blanding City*, 893 P.2d 1083, 1085 (Utah Ct.App.1995), the case extensively relied upon by the majority, also cites *Donahue* favorably, but then, inexplicably, appears to depart from its principles. *Id.* at 1286. Thus, between *Donahue* in 1989 and *House* in 1994, we held firm to the idea that the open and obvious danger rule is inconsistent with a comparative negligence system.

Under the doctrine of stare decisis, once a point of law is decided, that ruling should be followed by a court of the same or a lower rank in subsequent cases confronting the same legal issue. Once the court of last resort makes a legal ruling, decisions on the same issue by courts of a lower rank are superseded.

State v. Shoulderblade, 905 P.2d 289, 292 (Utah 1995) (citations and quotations omitted). "Although the doctrine is typically thought of when a single-panel appellate court is faced with a prior decision from the same court, stare decisis has equal application when one panel of a multi-panel appellate court is faced with a prior decision of a different panel." *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993).

¶ 27 Until the Utah Supreme Court overrules *Donahue* or establishes a precedent at odds with *Donahue*, we are bound to follow our pronouncement in *Donahue* that the open and obvious dangers rule is incompatible with a comparative negligence system. *635 Accordingly, I would reverse the trial court decision and remand for proceedings consistent with *Donahue*.

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