

2003

John D. Hale, Plaintiff, Petitioner, vs. Kurt Beckstead and John Does 1 through 5, Defendants, Respondents : Reply to Brief in Opposition

Utah Court of Appeals

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IN THE SUPREME COURT OF STATE OF UTAH

JOHN D. HALE

Plaintiff / Petitioner,

vs.

KURT BECKSTEAD and JOHN
DOES I through V,

Defendants / Respondents.

Case No. 20030641-SC

Priority No. 12

2

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR CERTIORARI

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ARGUMENT

From the time that Beckstead moved for summary judgment, he has consistently argued that he owed no duty of care to Hale that would give rise to a negligence claim based on premises liability. What has not been consistent is the reasoning offered by Beckstead to support his argument. To be clear, the only issue that Beckstead presented to the district court was a question of law regarding a landowner's duty of care to an independent contractor.

Beckstead did not substantively argue to the district court that the open and obvious danger rule, in and of itself, was a reason why he did not owe a duty of care to Hale. Rather, Beckstead referenced in passing the doctrines pertaining to open and obvious dangers and assumption of the risk for the proposition that a landowner never

owed a duty of care to an independent contractor hired to work on a construction project because the premises were inherently dangerous. Moreover, Beckstead persists in his reliance on the “independent contractor” distinction, and overlooks the fact that he, as the landowner and general contractor, created and maintained the dangerous condition that caused Hale’s injury.¹

Rather than fully developing an argument in the context of Utah premises liability law, Beckstead has thus far successfully shifted his argument from one regarding an issue of law at the district court level to one regarding an issue of fact at the Appeals Court level. Specifically, Beckstead’s assertion that Hale failed to present to the district court evidence relating to the exceptions to the open and obvious danger rule as set forth in Sections 343 and 343A is misplaced. Aside from Beckstead’s erroneous presumption that the open and obvious danger rule continues to act as an automatic bar to recovery unless proved otherwise, this issue was not squarely before the district court based on Beckstead’s motion for summary judgment. Hale, as the non-moving party, could not anticipate that he would need to respond to, let alone present evidence on, issues not addressed by the moving party. Indeed, the Court of Appeals overstepped its bounds by

¹Beckstead continues to avoid reconciling, or even addressing, Utah’s Comparative Negligence Act with the Court of Appeals’ decision in *Hale v. Beckstead*, 2003 UT App 240. Instead, Beckstead argues that “in certain circumstances, the open and obvious danger rule could completely absolve a defendant from liability.” (Respondent’s Brief On Certiorari at 10.) According to Beckstead, those “certain circumstances” include occasions when a landowner invites others to perform work on his property around a plainly visible danger. (Respondent’s Brief On Certiorari at 11.) This reasoning eradicates any meaningful distinction between invitees and trespassers. An independent contractor, who is by definition a business invitee, could be deemed to have less protection than a trespasser with respect to dangerous conditions on a landowner’s property.

undertaking an analysis of the ultimate factual issue which Hale has not yet had the opportunity to present to the finder of fact in the district court.

Other inconsistencies in Beckstead's Brief on Certiorari relate to his evolving treatment of the facts as well as his use of *English v. Kienke*, 848 P.2d 153 (Utah 1993). According to Beckstead's descriptions, Hale has undergone a metamorphosis from unlicensed, un-bonded, and uninsured painter to a "professional" and "experienced" painter. Compare R 62 with Respondent's Brief on Cert. at 2, 11. Likewise, Beckstead cites to *English v. Kienke* to support diametrically opposed positions. In his brief to the Court of Appeals, Beckstead correctly conceded that *English v. Kienke* "stands for the proposition that a workman who comes onto land to make improvements, alterations, or repairs is owed a duty of care by the landowner which is equivalent to that owed to a regular invitee." Appellee's Brief at 12. Now Beckstead cites to *English v. Kienke* for the proposition that a "landowner [does] *not* owe a duty of care to an injured invitee." Respondent's Brief on Cert. at 6 (emphasis added).

Because the ultimate holding in *English v. Kienke* is that a landlord is not liable for dangerous conditions created by his tenant, its applicability in this case is somewhat limited. However, this Court in *English* did define the circumstances under which a landowner does owe a duty of care to those he invites onto his property to perform work.

First, this Court stated that a landowner who is in actual physical possession of the property and who invites others, including independent contractors, to perform work on his property, owes a duty of care to those invitees. *English* at 156. Second, this Court

made an explicit distinction between dangerous conditions that were created by the invitee and those that were created by the landowner, or at the landowner's behest. *Id.* at 156 - 157. This court expressly distinguished its holding in *English* from situations where the danger was created by, or at the direction of, the landowner. *Id.* at 156 (distinguishing cases cited in the dissenting opinion on the basis that "in each of them, the owner retained either full or partial control over the work performed by the invitee.")

This Court recognized that under these circumstances, Sections 343 and 343A of the Restatement impose a duty on the landowner with respect to dangers on the property. *Id.* Contrary to Beckstead's apparent position, this Court in *English* did not abandon the comparative negligence framework established in *Donahue v. Durfee*, 780 P.2d 1275 (Utah Ct. App. 1989). While the court in *Donahue v. Durfee* abolished the all-or-nothing effect of the open and obvious danger rule, it also directed the fact finder's ability to consider the open and obvious nature of a dangerous condition as a factor in comparing the negligence of the landowner and that of the invitee. Sections 343 and 343A of the Restatement embody the open and obvious danger rule, as well as the "safe workplace doctrine" referenced by this Court in *English*, which remain factors to be considered by the finder of fact in premises liability cases. The fact that this Court referred to Sections 343 and 343A of the Restatement in *English* did nothing to affect the vitality of *Donahue* in cases such as this where it has been established that the landowner owed a duty of care to the invitee.

Based upon the facts on the record, Beckstead was in actual physical possession of the property and had exclusive control over the creation and maintenance of the unprotected second-floor balcony. R 100 - 101. Hale was hired to paint the interior of Beckstead's home. R 101. Given these two facts and the analysis set forth in *English v. Kienke*, Beckstead clearly owed a duty of care towards Hale. Since Beckstead's sole argument to the district court was that he did not owe a duty of care to Hale, the Appeals Court should have simply reversed the district court's grant of summary judgment and remanded the case back to the district court for trial. Hale would have then had the opportunity to present evidence pertaining to the nature of Beckstead's duty at the appropriate juncture in the litigation where the finder of fact could then balance the relative duties of the parties.

CONCLUSION

It is respectfully submitted that Beckstead and the Court of Appeals have erroneously relied upon legal authority which has no application to the facts of this case and that the order granting Defendant summary judgment must be reversed and the case remanded for trial.

DATED this 9th day of July, 2004.


A handwritten signature in black ink, appearing to read "A. J. Prsbrey", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2004, two (2) copies of the foregoing PETITIONER'S REPLY TO RESPONSE TO PETITION FOR CERTIORARI were mailed, postage prepaid, as follows:

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