

2003

John D. Hale v. Kurt Beckstead and John Does I through V : Petitioner's Brief on Certiorari

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

JOHN D. HALE

Plaintiff and Appellant,

vs.

KURT BECKSTEAD and JOHN
DOES I through V,

Defendants and Appellees.

20030641-SC
Case No. 20020196-CA

Priority No. 13

PETITIONER'S BRIEF ON CERTIORARI

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Appellate Jurisdiction	1
Issue and Standard of Review	1
Citation to the Opinion of the Court of Appeals	2
Constitutional Provisions, Statutes, and Rules	2
Statement of the Case	2
A. Nature of Proceeding	2
B. Course of Proceedings in Lower Courts	2
C. Disposition in the Utah Court of Appeals	3
Relevant Facts	4
Summary of Argument	5
Argument	6
I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE UTAH SUPREME COURT HAD OVERRULED <i>DONAHUE V. DURFEE</i> , <i>SUB SILENTO</i> IN <i>HOUSE V. ARMOUR OF AMERICA, INC.</i>	6
Conclusion	16

TABLE OF AUTHORITIES

CASES:

	<u>Page</u>
<i>Dayton v. Free</i> , 46 Utah 277, 148 P. 408 (1914)	3, 13
<i>Dixon v. Stewart</i> , 658 P.2d 591 (Utah 1982)	14
<i>Doit, Inc. v. Touche, Ross & Co.</i> , 926 P.2d 835, 841 (Utah 1996)	1
<i>Donahue v. Durfee</i> , 780 P.2d 1275 (Utah Ct. App.1989)	1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16
<i>Fishbaugh v. Utah Power & Light</i> , 969 P.2d 403, 405 (Utah 1998)	2
<i>Hale v. Beckstead</i> , 2003 UT App 240, 74 P.3d 628	2, 3, 4, 11, 13
<i>House v. Armour of America, Inc.</i> 929 P.2d 340 (Utah 1996)	3, 5, 6, 8, 9, 13
<i>Jacobsen Const. v. Structo-Lite Engineering</i> , 619 P.2d 306 (Utah 1980)	14
<i>Laws v. Blanding City</i> , 893 P.2d 1083 (Utah App.1995)	5, 7, 10, 11, 12, 13
<i>Sutherland v. Barton</i> , 570 N.W.2d 1 (Minn. 1997)	13
<i>Thompson v. Jess</i> , 979 P.2d 322 (Utah 1999)	3, 13
<i>Weber v. Springville City</i> , 725 P.2d 1360, 1363 (Utah 1986)	2

STATUTES

UTAH CODE ANN. §78-2-2(3)(a)	1
UTAH CODE ANN. §78-2a-4	1
UTAH CODE ANN. §78-27-37(2)	7
UTAH CODE ANN. §78-27-38 (1987)	7

SECONDARY AUTHORITIES

Chapter 13, Topic 1 (LIABILITY OF POSSESSORS OF LAND TO PERSONS ON THE LAND) of the Restatement (Second) of Torts	3, 6, 10, 11, 13
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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

PETITIONER'S BRIEF ON CERTIORARI

APPELLATE JURISDICTION

The Utah Supreme Court has jurisdiction in this matter pursuant to UTAH CODE ANN. §§ 78-2-2(3)(a) and 78-2a-4.

ISSUE AND STANDARD OF REVIEW

Did the Utah Court of Appeals err in concluding that the Utah Supreme Court had overruled, *sub silentio*, *Donahue v. Durfee*, 780 P.2d 1275 (Utah Ct. App.1989), and, in so doing, err in affirming the district court's conclusion that Beckstead owed Hale no duty of care.

Because the determination of whether summary judgment is appropriate presents a question of law, the decision of the lower court is afforded no deference. See *Doit, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 841 (Utah 1996). Moreover, "the issue of 'whether a

“duty” exists is a question of law’ which [the appellate court] review[s] 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)).

CITATION TO THE OPINION OF THE COURT OF APPEALS

The subject decision of the Utah Court of Appeals was published as *Hale v.*

Beckstead, 2003 UT App 240, 74 P.3d 628.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

There is no constitutional or statutory text the interpretation of which is determinative in deciding the issue presented by this petition.

STATEMENT OF THE CASE

Nature of Proceeding. This is a petition by which Plaintiff and Petitioner, John D. Hale, has sought review of a decision of the Utah Court of Appeals, Honorable Judges Judith M. Billings, Gregory K. Orme, and William A. Thorne, Jr., sitting.

Course of Proceedings in Lower Courts. Plaintiff initiated a suit for damages against Defendant in the Fifth Judicial District Court, Washington County, the Honorable G. Rand Beacham presiding. Defendant moved for summary judgment contending that because Plaintiff was an independent contractor whose performance was not supervised by Defendant, Defendant owed Plaintiff “no duty of care concerning the safety of the manner or method of performance implemented.” R 63. Defendant argued that no duty

existed because Beckstead as “an employer or owner that does not control the work of the independent contractor has no duty to provide a safe workplace to the employees of the independent contractor.” R 63. Defendant touted *Thompson v. Jess*, 979 P.2d 322 (Utah 1999), and *Dayton v. Free*, 46 Utah 277, 148 P. 408 (1914), as “[t]he two authoritative cases in this area of the law.” R 63. The district court agreed and dismissed Plaintiff’s complaint. Plaintiff appealed.

Disposition in the Utah Court of Appeals. On appeal, the court of appeals correctly concluded that the analysis Beckstead had offered was incorrect and that “Hale was a business visitor, an invitee on Beckstead’s land--a status wholly separate from any status he may have had as an independent contractor.” *Hale*, 2003 UT App 240 at ¶ 11, fn 2. As such, Beckstead’s reliance on *Thompson* and *Dayton* was misplaced. *Id.* While the court of appeals rejected the theory Beckstead advanced, that court affirmed the summary judgment concluding that Beckstead owed no duty of care to Hale as a business visitor, under the open and obvious danger rule.

With a footnote in the majority’s opinion, the court of appeals concluded that the Utah Supreme Court in *House v. Armour of America, Inc.* 929 P.2d 340 (Utah 1996) had, *sub silentio*, overruled *Donahue v. Durfee*, 780 P.2d 1275 (Utah Ct. App.1989). On that basis, the court of appeals determined that the open and obvious danger rule was an absolute bar to recovery under Utah premises liability law. *See Hale*, 2003 UT App 240 at ¶ 9, fn 1. The majority of the court of appeals panel undertook to apply the open and obvious danger rule, as outlined in sections 343 and 343A of the Restatement (Second) of

Torts, without reference to the principles of comparative negligence and, in so doing, concluded that because Hale was a business visitor, “Beckstead was relieved of any duty to Hale.” *Hale*, 2003 UT App 240 at ¶ 24.

RELEVANT FACTS¹

1. Plaintiff complains in this action of injuries he received in a fall. R 100, ¶ 1.
2. Defendant was the owner of the property at which Plaintiff fell. R 100, ¶ 2.
3. A home was under construction on Defendant’s property, and Plaintiff was inside the partially completed home at the time of Plaintiff’s fall. R 101, ¶ 3.
4. Defendant was acting as his own “general contractor” for the construction of the home. R 101, ¶ 4.
5. Defendant hired Plaintiff to paint the home. R 101, ¶ 5.
6. Defendant told Plaintiff generally how the paint should look and bought the paint for Plaintiff to use. R 101, ¶ 6.
7. Defendant did not control or direct the manner in which Plaintiff was to paint the home. R 101, ¶ 7.
8. While inside the partially constructed home, Plaintiff inadvertently stepped off a second floor balcony and fell to the first level. R 101, ¶ 8.
9. There is no evidence that Plaintiff had authority to enter Defendant’s premises for any purpose other than to complete his contract to paint the home. R 101, ¶ 9.

¹The first ten numbered paragraphs are verbatim reproductions of the uncontested material facts which the district court identified in support of its ruling. See R 100-101.

10. Defendant was not in the home when Plaintiff fell, but was out of town on an extended vacation. R 101, ¶ 10.

11. The edge of the balcony in question was unprotected and in excess of 6 feet (1.8 m) above the lower level. R 3, ¶¶ 11-12.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that the Utah Supreme Court had overruled, *sub silentio*, *Donahue v. Durfee*, 780 P.2d 1275 (Utah Ct. App. 1989) in *House v. Armour of America, Inc.*, 929 P.2d 340 (Utah 1996). Since the decision in *Donahue* was announced, Utah courts have consistently held that Utah's Comparative Negligence Act subsumes the open and obvious danger rule, when a landowner controls or maintains an unsafe condition on his property. *Donahue v. Durfee, supra*; and *Laws v. Blanding City*, 893 P.2d 1083 (Utah App. 1995).

The court of appeals' interpretation of *House v. Armour of America, Inc.*, 929 P.2d 340 (Utah 1996) is misplaced. In *House*, this Court distinguished *Donahue*, a premises liability case, from the operation of the open and obvious danger rule in the strict products liability claim at issue in *House*. In no event did this Court overrule *Donahue* by implication or otherwise as it pertains to premises liability cases. Assuming for the sake of argument the strict products liability principles discussed in *House* apply to premises liability cases, Beckstead is still not absolved of liability for maintaining an unsafe condition if it would have been economically feasible for him to protect against the danger.

In conformity with *Donahue* and the subsequent premises liability cases, the open and obvious danger rule as set forth in sections 343 and 343A of the Restatement (Second) of Torts maintains a presence in the distribution of responsibility between the landowner and the landowner's guest in considering all the circumstances. However, the fact alone that an open and obvious danger exists does not automatically cancel all duty the landowner may have owed to his guests in the context of Utah's Comparative Negligence Act or sections 343 and 343A of the Restatement (Second) of Torts.

Beckstead owed a duty to Hale when he invited Hale to paint in the vicinity of an unenclosed second-story balcony on his property. The court of appeals' decision essentially wipes out all consideration of the duty Beckstead owed Hale based upon a mis-application of *House*. In light of the fact that Utah's Comparative Negligence Act has displaced the "all or nothing" effect of contributory negligence theories, *Donahue* and its progeny are the appropriate standards for balancing the relative duties of the landowner and his guests. Whether the landowner's maintenance of an open and obvious danger or the guest's culpability in sustaining injury in the all the circumstances is a question for the trier of fact to consider. Accordingly, the court of appeals' decision in this case should be reversed.

ARGUMENT

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE UTAH SUPREME COURT HAD OVERRULED *DONAHUE V. DURFEE*, *SUB SILENTO* IN *HOUSE V. ARMOUR OF AMERICA, INC.*

In cases involving licensees and business invitees, a premises liability claim is, in

substance, a negligence claim wherein the degree of the duty of care owed by the possessor of the premises is determined by the status the claimant enjoys. See *Donahue v. Durfee*, 780 P.2d 1275 (Utah Ct. App.1989) (comparative negligence applied in premises liability case); *Laws v. Blanding City*, 893 P.2d 1083 (Utah Ct. App.1995).

In *Donahue*, the plaintiff was installing rain gutter on the roof of a warehouse when he stood up and came in contact with an electrical line. He had earlier noted the proximity of the line but had not been expressly warned of it. The district court granted the defendants summary judgment, concluding the power line in question constituted an open and obvious danger and that, accordingly, defendants owed no duty to warn Donahue of the danger or otherwise protect him from it. Reversing the dismissal of Donahue's complaint, the Utah Court of Appeals concluded:

Utah has now abandoned its contributory negligence system. Utah Code Ann. § 78-27-38 (1987), entitled "Comparative Negligence," provides in part that "the fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own." Utah Code Ann. § 78-27-37(2) defines "fault" as "any actionable breach of legal duty... including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk,...." We hold that by enacting the above statutory provisions and 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 guest's recovery.

780 P.2d at 1279 (emphasis added).

The court went on to note that applying the open and obvious danger rule as an absolute bar "is fundamentally incompatible with a comparative negligence scheme, which requires the finder of fact to allocate liability for an injury based on the relative

responsibility of the parties involved.” *Id.* Additionally, the court stated that the fact that an open and obvious danger existed could be considered as a secondary matter in determining the comparative negligence of the parties.

In rendering its opinion in the present case, the court of appeals concluded that the supreme court had overruled *Donahue* and that the open and obvious danger rule therefore precluded Hale from any type of recovery. The court of appeals’ conclusion with respect to the viability of *Donahue* was based primarily upon its reading of this Court’s opinion in *House v. Armour of America, Inc.*, 929 P.2d 340 (Utah 1996). However, this Court did not overrule *Donahue* in *House*. The court of appeals’ determination that it did so, *sub silentio*, is contrary to the express language of this Court in *House* and the legislative intent of the comparative negligence statute as well as settled premises liability law in Utah. This Court in *House* mentions *Donahue* only briefly to distinguish *House* from *Donahue* as *House* was a strict products liability claim whereas *Donahue* was a premises liability case. *See House*, 929 P.2d at 344. By its own terms, this Court’s discussion of the open and obvious danger rule in *House* was centered around strict products liability only. *Id.*

In *House*, it was argued the manufacturer’s failure to warn the plaintiff’s decedent about the inherent limitations of a bullet proof vest resulted in a violation of a duty to warn owed by a commercial supplier. This Court states that in the *limited circumstance* of strict products liability the open and obvious danger rule could be applied to bar recovery. The reasoning was that manufacturers of some *finished products that are*

patently dangerous by design cannot be economically designed in a safe manner. As such, manufacturers of such products should not be liable to warn that their products are patently dangerous. *See House*, 929 P.2d at 344 (Emphasis added).

By way of example, this Court identified knives as such a product. Knives are designed to cut things and a manufacturer of knives should not be liable for the fact that knives are sharp. There is no way a manufacturer of a knife can economically make the knife “unsharp.” This reasoning makes sense in the context of strict products liability and continues to take into account the duty a manufacturer has to make products safe when it is economically feasible.

However, it does not translate equally into premises liability analysis. It is not the same to argue that unenclosed second-floor balconies are designed to be fallen off of and that the landowner should not be liable for the fact that a person who is on the premises by the landowner’s invitation indeed falls off of the balcony. One major factor that dropped out of the court of appeals’ analysis completely in the premises liability context is whether it would have been economically feasible for the landowner to protect against the foreseeable harm. Indeed, a \$10.00 - \$20.00 2 x 4 temporary railing as used at most construction sites would have been economically feasible to protect Hale and the other workers from the unprotected balcony.

In *House*, this Court simply distinguished the application of premises liability principles to strict liability issues. *House* did not overrule *Donahue* by implication or otherwise. Moreover, *Donahue* is consistent with the subsequent case law that has

addressed premises liability issues. The critical point of reference is that a person who is in possession of land and is responsible for creating a hazard on the land owes a duty to those he invites onto his land. Under Utah's comparative negligence statute, the respective fault of the parties is then weighed by the finder of fact. *See Laws v. Blanding City*, 893 P.2d 1083 (Utah Ct. App. 1995).

Indeed, sections 343 and 343A of the Restatement (Second) of Torts have always articulated viable principles of public policy relating to how the duty of care is distributed between the possessor of land and his invitee. Hale has never argued otherwise. *Donahue* never abandoned the approach set forth in sections 343 and 343A of the Restatement. The opinion in *Donahue* makes it clear that the open and obvious danger rule was abolished to the extent, and only to the extent, the rule would have operated as an absolute bar to an injured guest's recovery. *See Donahue*, 780 P.2d at 1280.

The proper application of *Donahue* and its progeny necessarily requires a factual determination regarding the reasonableness of the parties "under all the circumstances." *Donahue*, 780 P.2d at 1280. The court in *Donahue* specifically directed the finder of fact in that case to consider not only the existence of the open and obvious danger, but what precautions, if any, were taken by the landowner to prevent injury arising from the open and obvious danger. *Id.* Likewise, the court in *Laws v. Blanding City*, 893 P.2d 1083 (Utah App. 1995) overturned a jury verdict because the jury instruction did not give the finder of fact the ability to consider all the circumstances.²

²The court of appeals took umbrage with Hale for not presenting evidence regarding how Hale's presence on Beckstead's property required a deliberate encounter with the unprotected

In *Laws v. Blanding City*, 893 P.2d 1083 (Utah Ct. App.1995), plaintiff initiated an action against the defendant city, alleging he was injured as a result of the defendant's negligence in the construction and maintenance of the city dump. The jury returned a verdict for the city, concluding that the city was not negligent. On appeal, plaintiff contended that the trial court had committed prejudicial error in giving Instruction No. 17 which was taken substantially verbatim from the Restatement (Second) of Torts § 343. The plaintiff argued that if subsection (b) of section 343 is not read in conjunction with the language of section 343A, it creates the misleading impression that if the plaintiff did not realize or protect himself against the danger, the city's duty was abrogated. The court of appeals agreed.

After quoting section 343A and accompanying comments *f* and *g*, the court concluded that the trial court had erred in giving the challenged instruction as it was an incomplete and thus misleading statement of the city's duty. The question of whether or not a reasonable person would, recognizing the danger, nevertheless encounter it, was a question for the jury. *Laws*, 893 P.2d at 1086. In response to the defendant city's contention that the district court's comparative negligence instruction, together with the special verdict form, had cured any deficiency in the duty instruction, the court of appeals

balcony. *Hale*, 2003 UT App. 240 ¶ 20, fn 4. The procedural history of this issue was Defendant's motion for summary judgment on whether the landowner owed a duty of care to his guests. The weight of *Hale*'s evidence was not at issue in the original motion for summary judgment filed by Beckstead upon which the ensuing appeals are based. The original issue, couched in terms of the landowner's duty – or lack thereof, was whether the trier of fact could, as a matter of law, consider all the circumstances. This is exactly the point the court of appeals misses in its failure to apply *Donahue* or sections 343 and 343A of the Restatement correctly.

cited *Donahue* with approval, declaring:

If the jury determined that Defendant owed no duty of reasonable care to Plaintiff based on the incomplete statement of duty found in Instruction No. 17, then neither the comparative negligence instruction nor the special verdict form would have been helpful. "There would be no negligence to compare--and, therefore, no recovery" if Defendant's duty were erroneously excused because the danger is known or obvious. See [*Donahue*, 780 P.2d] at 1279. We conclude that the instructions as a whole inadequately presented the law with respect to Defendant's duty of care and undermined Plaintiff's ability to present his theory of the case to the jury.

Laws, 893 P.2d at 1086.

In this case, Beckstead was the landowner and general contractor. He was responsible for the state of construction in his house at the time that he invited Hale onto his property for the purpose of painting the interior of his house. Hale, who was only on the premises to perform this contractual service, had no control over the property other than to paint. Specifically, Hale did not have responsibility for or control over the construction of the second floor balcony or installation of a rail. Further, Beckstead has not offered any evidence as to steps he took to protect against the risk of falling from the unprotected balcony. Instead, Beckstead appears to argue that he owes no duty, among other reasons, because he was on vacation when Hale got injured.

Beckstead, and not Hale, created the risk of danger by maintaining the unenclosed balcony and inviting Beckstead to paint in that area. This is not to say that Hale may not bear some fault for falling off of the balcony. However, Beckstead is not an innocent party who should be relieved of all liability simply because Hale mis-stepped while painting.

But this is how the court of appeals has applied sections 343 and 343A of the Restatement in the absence of *Donahue* and under its reading of the supreme court's strict products liability analysis in *House v. Armour of America, Inc.*, *supra*. In addition, the court of appeals tacitly nullifies all factors except the factor at issue in *Laws* which are identified in the comments to section 343A of the Restatement that would allow the finder of fact to take all the circumstances into account when an invitee deliberately encounters a known hazard. *Hale*, 2003 UT App. 240 ¶ 18. Moreover, the court of appeals goes on to explain that a business invitee can never overcome the open and obvious danger rule, essentially making no distinction as far as the landowner is concerned between a business invitee and a mere trespasser. Specifically, the court of appeals cites to a Minnesota case, *Sutherland v. Barton*, 570 N.W.2d 1 (Minn. 1997) for the proposition that a business invitee can never overcome a complete bar to recovery under the "deliberate encounter" exception.³

In holding that Beckstead owed Hale no duty whatsoever the court of appeals has rendered the open and obvious danger rule an "all or nothing" doctrine that would deny Plaintiff any recovery without regard to the reasonableness of the respective parties'

³ What the court of appeals fails to acknowledge is that *Sutherland* is identical to *Thompson v. Jess*, 979 P.2d 322 (Utah 1999), and *Dayton v. Free*, 46 Utah 277, 148 P. 408 (1914), which the court of appeals expressly stated did not dispose of the issue regarding Hale's status as a business invitee. *See Hale*, 2003 UT App 240 at ¶ 11, fn 2. Like the injured parties in *Thompson* and *Dayton*, the decedent in *Sutherland* was the employee of an independent contractor who was killed because of the manner he undertook to perform the specialized job the independent contractor was hired to do. The ultimate conclusion of the Minnesota court was that "as a matter of law [the landowner] owed no duty to Sutherland, an independent contractor's employee." *Sutherland*, 570 N.W.2d at 7-8 (Emphasis added).

conduct. Such a conclusion is not in harmony with the authorities that have considered the application of other “all or nothing” doctrines in the framework of Utah’s comparative negligence scheme. In addition, the court of appeals’ conclusion replaces the Legislature’s authority to pass law with that of the Court of Appeals.

Common law rules that once may have provided a complete defense in a negligence action still have relevance under Utah’s comparative negligence system. For example, in *Jacobsen Const. v. Structo-Lite Engineering*, 619 P.2d 306 (Utah 1980), the supreme court noted:

We thus hold that under our comparative negligence statute “assumption of risk” language is not appropriate to describe the various concepts previously dealt with under that terminology but is to be treated, in its secondary sense, as contributory negligence. Specifically, and with particular reference to our comparative negligence act, the reasonableness of plaintiff’s conduct in confronting a known or unknown risk created by defendant’s negligence will basically be determined under principles of contributory negligence. Attention should be focused on whether a reasonably prudent man in the exercise of due care would have incurred the risk, despite his knowledge of it, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in light of all the surrounding circumstances, including the appreciated risk. Then, if plaintiff’s unreasonableness is viewed to be less than that of defendant, according to the terms of the statute, “any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering.”

Id. at 312 (citation omitted).

In *Dixon v. Stewart*, 658 P.2d 591 (Utah 1982), the supreme court concluded that the doctrine of last clear chance as a distinct tort doctrine was extinguished with the enactment of Utah’s comparative negligence act declaring that “assumption of risk, last clear chance, and discovered peril resemble the old contributory negligence doctrine in

that they are ‘all or nothing’ doctrines in terms of recovery by the plaintiff.” *Id.* at 598.

Nevertheless, the court stated:

Our decision here does not preclude argument to the jury as to whether a party may or may not have had the “last clear chance” to avoid injury. However, the old “all or nothing” doctrine is now subsumed within comparative negligence and, as bearing on which party was guilty of the greater negligence, “last clear chance” becomes just one of many factors to be weighed in the comparison by the finder of fact.

Id. at 598, fn. 7.

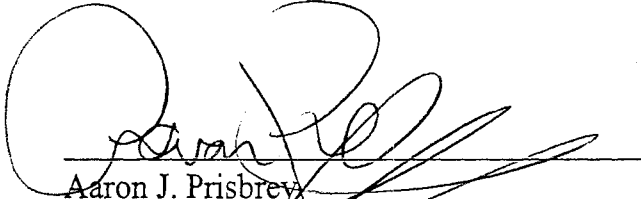
The abolition of the open and obvious danger rule as an absolute bar does not mean that the underlying principles of public policy relating to how the duty of care is distributed between the possessor of land and his invitee are likewise abolished. Clearly, the conduct of one who voluntarily assumes a known risk remains relevant in the context of comparative negligence notwithstanding the fact that his assumption of such risk may no longer be asserted as an absolute bar to his recovery. Likewise, the open and obvious danger rule remains relevant as one of the factors to be considered in weighing the claimant’s negligence in approaching the danger and the landowner’s failure to abate it.

This case, like *Donahue*, illustrates why the open and obvious danger should continue to operate as a factor, and not a complete bar to recovery, in premises liability cases. This is especially true where Hale, as a business invitee, was more than a mere trespasser on the property. Under Utah’s comparative negligence act, as well as a complete reading of sections 343 and 343A, the finder of fact should consider all the circumstances, including what steps, if any, Beckstead took to protect against the risk of danger.

CONCLUSION

Based upon the forgoing it is respectfully submitted that the court of appeals erred in concluding that *Donahue v. Durfee* had been effectively overruled. Accordingly the decision of the court of appeals should be reversed.

DATED this 10 day of March, 2004.

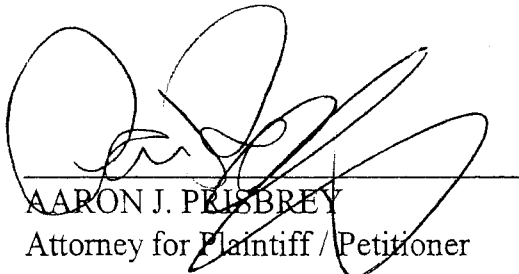


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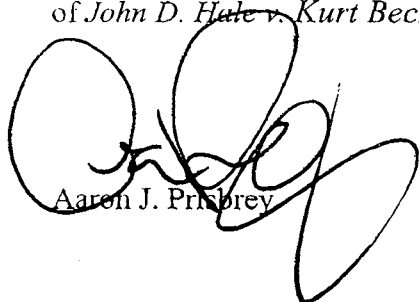
I hereby certify that on the 10 day of day of March, 2004, two (2) copies of the foregoing PETITIONER'S BRIEF ON CERTIORARI were mailed, postage prepaid, as follows:

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I hereby certify that no addendum is required for the Petitioner's Brief on Certiorari in the matter of *John D. Hale v. Kurt Beckstead*, Supreme Court Case No. 20030641-SC.



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