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Darren J. Pollick, By and Through His Guardian Ad Litem, John R. Pollick, and John R. Pollick v. J. C. Penney Company : Respondents' Petition For Rehearing and Brief In Support Thereof

IN THE SUPREME COURT OF THE STATE OF UTAH

DARREN J. POLLICK, by and through his Guardian ad Litem, John R. Pollick, and JOHN R. POLLICK,
Plaintiffs-Respondents,

vs.

J. C. PENNEY COMPANY, a corporation,
Defendant-Appellant.

Case No. 11880

Respondents' Petition for Rehearing and Brief in Support Thereof

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TABLE OF CONTENTS

CASES CITED

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PETITION FOR REHEARING

COMES NOW plaintiffs and respondents herein and respectfully petition this Honorable Court for a rehearing in the above-entitled case and, for an order vacating this Honorable Court's decision and reinstating the judgment of the trial court based on the jury's verdict.

POINT I

This Court has assumed the jury's prerogative of weighing evidence and resolving issues of fact.

POINT II

This Court has deprived plaintiffs of their constitutional and statutory right of a trial by jury.

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INTRODUCTION

The defendant, in its brief of appellant, presented issues which it requested this Court to review. Plaintiffs met said issues in the traditional manner, confident that the case would be determined one way or another, on the basis of the issues presently in the briefs. The majority opinion, however, is based on a purely collateral issue.

It is a position of plaintiffs that if the case is to be based on a collateral issue not raised in the briefs, at the least, a rehearing should be granted in order that plaintiffs may be afforded a full opportunity to meet all of the issues, including the new ones upon which the majority of this Court has based its opinion.

POINT I.

THIS COURT HAS ASSUMED THE JURY'S PREROGATIVE OF WEIGHING EVIDENCE AND RESOLVING ISSUES OF FACT.

The plaintiff, Darren J. Pollick, age 3, accompanied his father to defendant's store in Murray for the purpose of making a purchase. While the boy was in the store, he was injured when he stepped up on the mopboard of a bannister approximately 38 inches and toppled over same falling to the basement below. The mopboard was 7½ inches in heighth and surrounded the base of the bannister.

Plaintiffs instituted this action to recover damages for the injuries sustained by the boy on the theory that defendant, as a storeowner, had the legal duty to maintain the store in a reasonably safe condition for business invitees. That the defendant breached this duty because the bannister and mopboard combination was not reasonably safe in view of expected occupancy of the store by children of tender years and exposed them to an unreasonable risk of harm.

The testimony clearly revealed that defendant solicited parents to bring their children with them to the store and knew that said children would be near the bannister over which plaintiff fell. The testimony also established that the mopboard could have been easily and inexpensively removed or that the top railing of the bannister could have been raised and thus have mini-

mized the likelihood of children falling over the bannister. It thus appeared obvious to both the trial court and the trial jury that just a little bit of precaution and foresight on the part of the defendant, who clearly owed a duty to exercise such precaution would probably have prevented the child's injury. The manager admitted as much in his testimony on cross-examination.

Defendant urged that because the bannister was constructed in substantial compliance with the building code it could not be considered unsafe. But it has never been the law that unnamed administrative employees, by scrivening codes of this sort, can deny to citizens substantial common law rights which spring up from fundamental duty of a corporate entity inviting the public to attend its place of business, with profit as its motive, to make said place reasonably safe for anticipated use.

The Honorable Court has ruled as a matter of law that reasonable minds could not differ on the question of defendant's negligence even though both the trial judge and the eight-man jury felt otherwise. We respectfully submit that this decision is in direct opposition to this Court's prior decision in the case of *Brent Wheeler etc. vs. Dennis D. Jones, et al,* 19 Utah 2d 392, 431 P.2d 985 (1967). In the *Wheeler* case a 12-year old child was an invitee to a swimming pool operated by defendants. Upon leaving the pool area, the minor walked into a glass panel door and sustained injuries. Plaintiff claimed defendants were negligent for failing to warn of the presence of the door and failing to have safety

glass in the door. The jury found defendants negligent for maintaining a door with glass insufficient to withstand ordinary bumping and awarded plaintiff damages. The defendants appealed and this Court affirmed the jury verdict stating:

> "Negligence is the breach of a duty to use due care under the circumstances of the situation. When children are involved, the duty to look out for their safety is increased, and failure to make a given discovery might be negligence when children are involved and not negligence if adults only are affected. It is a relative thing and generally must be left to the jury to say if under all the circumstances the conduct of the actor measures up to the standards of a reasonably prudent man. * * *
>
> All the world must know the tendency of children to play rough and not to have the judgment and maturity of adults."

In analyzing the evidence to determine if a jury question was presented, the Court explained:

> "The serious cuts sustained by the plaintiff are mute evidence of the dangers inherent in the type of door used, and we think it was a jury question as to whether the dangers should have been recognized and corrected. The claim of error in allowing the expert witness to express an opinion that the glass door was dangerous could not be prejudicial when the jury saw the result of a collision between the minor plaintiff and that very door. There could be no question but that the door was dangerous and a menace to those children who were playing near it."

This Honorable Court then concluded the opinion by stating:

> "We believe that the defendants had their day in court, and an impartial jury has said that their conduct in leaving a dangerous type of glass in a partly closed door was an act which did not measure up to the standards of due care under the circumstances in the case."

The majority opinion states: "But except for the fact that this accident occurred, there is no evidence that those or any other aspects of the bannister or the mopboard were in any way at variance with the ordinary construction of such a protective guardrail or bannister;" It is true that there is no evidence as to "ordinary construction" of similar guardrails. But, as was said by Justice Holmes in *Texas and Pacific Ry. Co. v. Behymer,* 189 U.S. 468, 23 S.Ct. 622, 47 L.Ed. 905, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." Certainly, the factual question of what is or is not "ordinary construction" should not be decisive on the issue of whether ordinary minds may differ as to whether or not the low bannister and mopboard constructed in an area frequented by small children constituted ordinary care, especially when it would have taken such a little amount of effort to eliminate the danger.

We respectfully submit that this Honorable Court should grant a rehearing in order that the *Wheeler case,*

supra, and the case at bar may be reanalyzed. It appears that one or the other of said cases should be the law of Utah, but not both. The two cases are diametrically opposed to one another on both theory and principle. Of course, it is our belief that *Wheeler* should prevail.

POINT II.

THIS COURT HAS DEPRIVED PLAINTIFFS OF THEIR CONSTITUTIONAL AND STATUTORY RIGHT OF A TRIAL BY JURY.

Plaintiffs respectfully submit that this Honorable Court by overturning the jury verdict has taken over the function of the jury and denied plaintiffs their right to a jury trial. The right of plaintiffs to have a jury decide their case should have flowed in a natural easy way from the likelihood of harm to children from this little, low-built bannister.

An outstanding and often cited case that prescribes guide lines in determining whether given fact situations raise jury questions is ***Brown vs. Salt Lake City,*** 33 Utah 222, 93 P.2d 570 (1908), where the Court stated:

> "We have no hesitancy in saying that, if the facts were for us to pass upon, we should be forced to arrive at a conclusion different from that reached by the jury; for it would be quite difficult for us to see how the officers of the city as reasonably prudent men, should have foreseen that boys would go down a dark passage way of over six hundred feet in length, nearly four hundred feet

> of which was totally dark, and play therein, and that although they did so, they would go or fall into the water coming into the conduit from the Jordan Canal. And if childish instincts induced them to resort to the conduit to play "jail" or otherwise, one would naturally assume that they would instinctively avoid going into the dark passage way to the length of nearly two ordinary city blocks. In the statement herein made that, were we permitted to pass on the facts and determine the question, not as matter of law but of fact, we would arrive at a conclusion different from that found by the jury, the Chief Justice authorizes us to say that he is not prepared to say that, if he were a trier of the fact, he would find in favor of the defendant on the question of negligence (upon this question he expresses no opinion); but that he is, however, clearly of the opinion that the facts amply justified the court in submitting the question of negligence to the jury."

The leading modern Utah case on the right of trial by jury is *Stickle v. Union Pacific R.R. Co.*, 122 Utah 477, 251 P.2d 867, where this Court stated:

> "In our democratic system, the people are the repository of power whence the law is derived; from its initiation and creation to its final application and enforcement, the law is the expression of their will. The functioning of a cross-section of the citizenry as a jury is the method by which the people express this will in the application of law to controversies which arise under it. Both our constitutional and statutory provisions assure trial by jury to citizens of this state.
>
> Courts, as final arbiters of law, could arrogate to themselves arbitrary and dangerous powers by

presuming to determine questions of fact which litigants have a right to have passed upon by juries. Part of the merit of the jury system is its safeguarding against such arbitrary power in the courts. To the great credit of the courts of this country, they have been extremely reluctant to infringe upon this right, and by leaving it unimpaired have kept the administration of justice close to the people. Of course, the rights of litigants should not be surrendered to the arbitrary will of juries without regard to whether there is a violation of legal rights as a basis for recovery. The court does have a duty and a responsibility of supervisory control over the action of juries which is just as essential to the proper administration of justice as the function of the jury itself. Nevertheless, we remain cognizant of the vital importance of the privilege of trial by jury in our system of justice and deem it our duty to zealously protect and preserve it.

CONCLUSION

It is our position that this Honorable Court's majority decision has for the first time, brought clearly into focus the question of whether the Plaintiffs have been deprived of their right to a jury trial. This question is of overriding importance, not only to the Plaintiffs but to the bench and bar generally. We would like to have it reviewed.

Respectfully submitted,

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