No. 20118 -- Paul Huffman v. Appalachian Power Company

Neely, J., concurring:

I concur with finding APCO not liable to the trespasser, Mr. Huffman. However, in light of Justice Workman's separate opinion, I feel compelled to discuss the putative new rules about duties to trespassers.

I do not agree with the dicta in the majority opinion that would create new ways to hold property owners liable for injuries to trespassers. As the majority correctly states, "[W]ith regard to a trespasser, a possessor of property only need refrain from wilful or wanton injury." See maj. op. at 5. I don't understand why the majority opinion then goes on to speculate that perhaps there should be liability when: (1) the possessor knows or should know that trespassers constantly intrude in an area where

a dangerous condition is located; (2) the possessor is aware that the condition is likely to cause serious bodily injury or death to trespassers; (3) the possessor has reason to believe that trespassers will not discover it; and, (4) the possessor has failed to exercise reasonable care adequately to warn the trespassers of the condition. Id. at 13. This sounds like the "attractive nuisance" doctrine for adults which West Virginia has always (at least explicitly) rejected even for children! See e.g., Hatten v. Mason Realty Co., ___ W. Va. ___, 135 S.E.2d 236 (1964); Justice v. Amherst Coal Co., 143 W. Va. 353, 101 S.E.2d 860 (1958); Waddell v. New River Co., 141 W. Va. 880, 93 S.E.2d 473 (1956); Tiller v. Baisden, 128 W. Va. 126, 35 S.E.2d 728 (1945).

The majority opinion in the case before us attempts to adumbrate a duty to trespassers that has never been the law and never will be the law with my vote. A businessman may own a building into which

burglars regularly trespass. He may know that such felons routinely seek entry through the skylight and that the skylight is inherently dangerous for the purpose of felonious entry because of loose beams in the rafters. Under the dicta of Syllabus Point 4, the businessman must either place a sign (lighted at the businessman's expense during the hours of darkness) next to the skylight warning burglars to find a better route, or suffer liability for injuries to unwary burglars. This is the type of ludicrous result that makes courts look stupid!

Property owners do not owe a duty of care to trespassers, period. See, e.g., Miller v. Monongahela Power Company, __ W. Va. __, __, 403 S.E.2d 406, 411 (1991); Simmons v. Chesapeake & O. Ry. Co., 97 W. Va. 104, 107, 124 S.E. 503, ___ (1924).

The "excess fat" in the majority opinion is not necessary to the

decision of this case, is contrary to our established principles, and probably is not what a majority of this court would decide if the question were squarely presented to us. Indeed, this is the exact reason that this case was not remanded for further proceedings in which the Plaintiff could attempt to develop a case under the putative new rules.

Much of law, alas, is explainable only in terms of mechanics: on a multi-member court, you can only argue in conference about so many things for so long before the whole operation becomes unravelled. This is particularly true for cases like this one, decided at the end of a busy term. Indeed, courts are in the case-deciding business; law professors are in the reason-giving business! See H. Berman, Law and Revolution: The Formation of the Western Legal Tradition (Cambridge, Mass.: Harvard University Press, 1983). All courts, from the U. S. Supreme Court on down, would serve the bar better if they decided more cases with

shorter opinions.

All judges should recognize that we are not writing for the ages; the shelf life of law is about 180 days or the next vacancy on the court -- whichever shall first occur. Our job is simply to tell the world what the law is today. Certainly at the level of the U. S. Supreme Court, there is little need for separate opinions that recycle (unpublished) law review articles to concur with parts I, III, Iv, and VIII of the majority opinion, dissent to parts II, V and VI, and concur with the result but dissent to the reasoning of part VII. Even a first year law student can tell the difference between genuine thought instructed by political experience and the pseudo-scholarship of young law clerks put on autopilot!