Starcher, J., Concurring Opinion, Case No.23348 Gaynelle Self v. Mayme Queen

No. 23348 -- Gaynelle Self v. Mayme Queen

Starcher, J., concurring.

I agree with the conclusion reached by the majority in this case, but for an entirely different reason: the novel arguments raised by the appellant on appeal were never raised below. This Court will usually decline to address a legal position when it was not addressed below, and more particularly, it will decline to address a legal principle when the facts fail to implicate the principle. The appellant asks on appeal that in premises liability cases we dispense with the distinction between licensees, invitees, and trespassers. As much as I might agree with this proposition, I am compelled to accept the majority's position that this is not the right case for taking that step.

That being said, the majority opinion's assertion[(1)] that our law "*always* favors the more exact and specific rule as opposed to the vague and indefinite," ___ W.Va. at ___, ___ S.E.2d at ___ (Slip op. at 6) [emphasis added], is simply wrong. When Justice Oliver Wendell Holmes spoke of "fixed and uniform standards of external conduct" in his 1881 lecture series (now found in *The Common Law* (1909)), we must keep in mind that Holmes was writing in a time when the harsh rules of contributory negligence, assumption of the risk, and the fellow-servant doctrine were taking root in the law. These rules, which were once new, shiny principles designed to immunize entrepreneurs and businesses from liability at a time of early industrialization, have since weathered and fallen in the face of time, reason, and a growing intolerance for human suffering that has accompanied the post-industrial era. *See Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979) (abolishing contributory negligence rule and adopting modified comparative negligence principles); *King v. Kayak Mfg. Corp.*, 182 W.Va. 276, 387 S.E.2d 511 (1989) (abolishing assumption of risk and adopting comparative assumption of risk); *W.Va. Code*, 23-1-1, *et seq.* (abrogating fellow-servant doctrine by providing workers' compensation benefits to workers injured in the course of and as a result of their employment, including injuries by fellow employees). Contrary to extensive precedents from the recent past, the majority opinion erroneously suggests that this Court should always rely upon such weather-beaten "specific and definite standard[s]" and never "adopt a single reasonable care standard, which Holmes calls a 'featureless generality.'" ___ W.Va. at ___, ___ S.E.2d at ___ (slip op. 7-8).

Unfortunately, rules and ready-made generalizations usually have nothing to do with the real world that exists outside of a courtroom. Holmes himself suggested that courts should never blindly follow precedent when he said,

It is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

O.W. Holmes, *The Path of the Law*, 10 Harv.L.Rev. 457, 469 (1897). A successor to Holmes, Justice Benjamin Cardozo, entreated courts to abandon artificial rules and precedents that have nothing to do with the way people order their affairs. Justice Cardozo stated:

. . . I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . There should be greater readiness to abandon an untenable position *when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants*, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.

B. Cardozo*, The Nature of the Judicial Process*, 150-151 (Yale 1949) (emphasis added). We have often turned to Justice Cardozo's theories when forsaking cumbersome precedents and legal theories that are known only to lawyers and judges, and embracing concepts which are in accord with an evolving sense of justice. *See, e.g., Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 871, 253 S.E.2d 666, 674 (1979) (adopting principles of strict liability in product defect cases); *Bradley v. Appalachian Power Co.*, 163 W.Va. at 347, 256 S.E.2d at 887 (abandoning contributory negligence and adopting comparative negligence principles).

Applying these principles to the instant case, rarely are the distinctions between licensee, invitee and trespasser proven "to have determined the conduct of the litigants." A licensee is a person who enters onto property with permission; an invitee enters onto property with permission for some pecuniary or business benefit to the landowner; and a trespasser enters on land without any permission whatsoever. A landowner owes no duty to a licensee or trespasser, but owes a duty of due care to an invitee. I agree that a landowner doesn't owe a trespasser the time of day. I have a right to assume people will obey the law and not trespass onto my land; therefore, I don't owe a trespasser any duty whatsoever (except to not intentionally cause harm).

But I fail to understand why the invitee-licensee distinction should continue to exist, primarily because I don't think landowners manage their property with these common-law status distinctions in mind. The invitee-licensee rule creates the fictional premise that a social visitor to a home walks across a lawn with full knowledge that they do so at their own peril, but a babysitter,[(2)] mail carrier,[(3)] taxi driver,[(4)] garbage collector,[(5)]

deliveryman,[6] paperboy,[7] or meter reader[8] walking in the social visitor's footsteps may feel safe in the knowledge that he or she can recover from the homeowner their damages for any negligently caused injury.[9]

For example, if I have a yard sale to get rid of junk accumulating in my garage, and a neighbor comes into my garage to make a purchase, the neighbor is a business invitee. I owe the neighbor a duty of due care, and if the neighbor, exercising due care, gets hurt tripping over dangerous tools I carelessly forgot to remove from the walkway, I may be held responsible. But if that same neighbor is coming intending to visit me, as he regularly does upon my standing invitation, and trips over the same tools, I won't be liable because he is a licensee and I owe him no duty. As a licensee, he comes "upon the premises subject to all the dangers attending such [existing] conditions." *Cavender v. Fouty*, 195 W.Va. 94, 98, 464 S.E.2d 736, 740 (1995) (*quoting* Syllabus, *Hamilton v. Brown*, 157 W.Va. 910, 207 S.E.2d 923 (1974)). This is silly. No one declines to clean the garage, shovel snow off a sidewalk, or fill in potholes in a yard with the licensee-invitee rule in mind.

The majority breezes through the appellant's argument without any discussion, saying simply:

[T]he appellant makes an extraordinary proposal and urges us to abandon well-settled and long-established common law relating to the circumstances of this case, and to revisit the common law rule which now defines the duty an owner/possessor of premises owes to persons upon those premises. . . . The appellant would have us depart from the precise, detailed rule, abolish the invitee/licensee distinction, and adopt a single reasonable care standard.

___ W.Va. at ___, ___ S.E. 2d at ___ (Slip op. at 5-6). This brief discussion of the appellant's argument wholly ignores a crucial point: *at least twenty-five of our sister states plus the District of Columbia have already abandoned the licensee-invitee status distinction in premises law cases*. The United States Supreme Court has similarly rejected the distinction in admiralty cases.[10]

Twelve jurisdictions have concluded that reasonable care by a premises owner towards others is determined on the basis of what is foreseeable, thereby abolishing all invitee-licensee-trespasser restrictions.[11] Twelve other states have to some extent abolished the licensee-invitee distinction, but still hold that a premises owner owes a trespasser no duty whatsoever.[12] At least two states have enacted statutes abrogating the distinction.[13]

Thomas Jefferson said that we should not look at our constitutions and laws with "sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched." Jefferson wrote that:

I am certainly not an advocate for frequent and untried changes in laws and constitutions. . . . But I know also, that laws and institutions must go hand in hand with the progress of the human mind. . . . *We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.*

Letter to Samuel Kercheval, July 12, 1816, *Writings of Thomas Jefferson* 10:42-43 (Paul L. Ford ed. 1899) (emphasis added).

I think that this Court in fact might well, in the future, address the possibility of dispensing with the distinctions between licensees, invitees, and trespassers, provided the argument is first cogently addressed at the circuit court level. As Cardozo suggested seventy years ago, if there is no proof in the record that the plaintiff and defendant based their conduct on the licensee-invitee-trespasser distinctions, and proof that such a rule is "inconsistent with the sense of justice or with the social welfare," there should be no hesitation by this Court in the future of frank avowal and full abandonment of the current set of common-law status distinctions in premises liability cases.

I am authorized to state that Chief Justice Workman joins in this concurring opinion.

1. Practitioners should keep in mind that the Court's statements appear in a *per curiam* opinion. We have repeatedly said that *per curiam* opinions are used to decide only the specific case before the Court; everything in a *per curiam* opinion beyond the syllabus points is merely *obiter dicta*. *See*, *Graf v. West Virginia University*, 189 W.Va. 214, 429 S.E.2d 496 (1992); *Lieving v. Hadley*, 188 W.Va. 197, 423 S.E.2d 600 (1992).

2. *Lloyd v. Weimert*, 146 Ind.App. 666, 257 N.E.2d 851 (1970) (babysitter tripped over tarpaulin on stairs); *Powell v. Vracin*, 150 Cal.App.2d 454, 310 P.2d 27 (1957) (babysitter fell walking out open door where homeowner had failed to construct steps).

3. *Capener v. Duin*, 173 N.W.2d 80 (Iowa 1969) (mail carrier slipped on icy porch steps).

4. *Markee v. Turner*, 140 Conn. 701, 103 A.2d 533 (1954) (taxi driver slipped on unlit, icy porch while going to knock on customer's door).

5. *Toomey v. Sanborn*, 146 Mass. 28, 14 N.E. 921 (1888)(city collector of "ashes and offal" fell in hole when landowner removed plank from walkway).

6. *Downs v. Cammarano*, 207 Pa.Super. 478, 218 A.2d 604 (1966) (man delivering dry cleaning slipped and fell on icy porch steps); *Nottie v. Picchione*, 74 R.I. 93, 59 A.2d 177 (1948) (delivery man for department store tripped on rope stretched across sidewalk); *Lessow v. Sherry*, 133 Conn. 350, 51 A.2d 49 (1947) (fruit and vegetable peddler slipped on icy sidewalk).

7. *Clink v. Steiner*, 162 Mich.App. 551, 413 N.W.2d 45 (1987)(paperboy slipped on icy driveway); *English v. Thomas*, 48 Okla. 247, 149 P. 906 (1915) (paperboy fell when railing collapsed). *But see, Sidle v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968) (paperboy slipped on icy steps)(*superseded by statute, LaPlaca v. Brunswick Ambassador Lanes*, 61 Ohio App.3d 598, 573 N.E.2d 706 (1988)); *Stapleton v. Hyman*, 69 R.I. 466, 35 A.2d 6 (1943) (paperboy slipped on icy sidewalk).

8. *Ross v. Lowe*, 619 N.E.2d 911 (Ind. 1993) (meter reader bit by dog); *Cowan v. One Hour Valet*, 151 W.Va. 941, 157 S.E.2d 843 (1967)(electric meter reader fell through floor); *Bradley v. Sobolewsky*, 91 Conn. 942, 99 A. 1067 (1917) (gas company employee bit by dog).

9. Judge Bazelon was similarly confused by these distinctions in *Smith v. Arbaugh's Restaurant, Inc*, 469 F.2d 97, 99 (D.C. 1972), *cert denied*, 412 U.S. 939, 93 S.Ct. 2774, 37 L.Ed.2d 399 (1973):

[W]e are once again struck by the awkwardness of fitting the circumstances of modern life into the rigid common law classifications of trespassers, licensees and invitees. More importantly, we do not believe the rules of liability imposed by courts in the eighteenth century are today the proper tools with which to allocate the costs and risk of loss for human injury.

The *Smith* Court went on to rule that the status of an entrant to property does not determine the duty of care owed by the landowner, thereby abolishing the licensee-invitee-trespasser distinctions.

10. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959). The United States Supreme Court referred to the judicial interpretation of the common-law distinctions in premises liability cases as a "semantic morass." 358 U.S. at 631, 79 S.Ct. at 410, 3 L.Ed.2d at 555.

11. *Moudy v. Manny's Auto Repair*, 110 Nev. 320, 871 P.2d 935 (1994); *Limberhand v. Big Ditch Co.*, 218 Mont. 132, 706 P.2d 491 (1985); *Keller by Keller v. Mols*, 129 Ill.App.3d 208, 472 N.E.2d 161 (1984) (only with regard to child entrants); *Webb v. City and Borough of Sitka*, 561 P.2d 731 (Alaska 1977); *Cates v. Beauregard Electric Cooperative, Inc.*, 328 So.2d 367 (La. 1976); *Ouellette v. Blanchard*, 116 N.H. 552, 364 A.2d 631 (1976); *Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564, 352 N.E.2d 868 (1976); *Mariorenzi v. Joseph DiPonte, Inc.*, 114 R.I. 294, 333 A.2d 127 (R.I. 1975) (*but see*, *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056 (R.I. 1994), restoring the status category of trespasser); *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. 1972), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2774, 37 L.Ed.2d 399 (1973); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (Colo. 1971)(*but see*, *Lakeview Associates, Ltd. v. Maes*, 907 P.2d 580 (Colo. 1995), discussing the partial legislative resurrection of the status categories); *Pickard v. City & County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969); *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561 (1968).

12. *See Heins v. Webster Co.*, 250 Neb. 750, 552 N.W.2d 51 (1996); *Ford v. Board. of County Comm'rs of County of Dona Ana*, 118 N.M. 134, 879 P.2d 766 (1994); *Jones v. Hansen*, 254 Kan. 499, 867 P.2d 303 (1994); *Clarke v. Beckwith*, 858 P.2d 293 (Wyo. 1993); *Hudson v. Gaitan*, 675 S.W.2d 699 (Tenn. 1984); *Ragnone v. Portland School Dist. No. 1J*, 291 Or. 617, 633 P.2d 1287 (1981); *Poulin v. Colby College*, 402 A.2d 846 (Maine 1979); *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977); *Antoniewicz v. Reszcynski*, 70 Wis.2d 836, 236 N.W.2d 1 (1975); *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973); *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972). *See also, Wood v. Camp*, 284 So.2d 691 (Fla. 1973) (landowner owes a duty of reasonable care to "licensees by invitation" of the property owner, as well as business or public invitees, but Florida Court declined to extend the unified standard of care to licensees who were uninvited or to trespassers).

13. Connecticut, *Conn.Gen.Stat.* 52-557a [1963]; Illinois, 740 *ILCS* 130/2 [1995].