IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RONALD A. GABLE,

Plaintiff,

vs.

DEBORAH GABLE and JOHN DOE(S),

Defendants

CIVIL DIVISION

NO: 19-1077

PETITIONER'S BRIEF IN SUPPORT OF APPEAL

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ASSIGNMENTS OF ERROR

I. THE CIRCUIT COURT IMPROPERLY DISMISSED PLAINTIFF'S COMPLAINT BY HOLDING PLAINTIFF WAS A TRESPASSER WHEN HE ENTERED DEFENDANT'S PROPERTY WITH IMPLIED CONSENT IN THE ABSENCE OF ANY EVIDENCE SUCH IMPLIED CONSENT WAS REVOKED AND AS SUCH, ITS DISMISSAL SHOULD BE REVERSED.

II. THE CIRCUIT COURT ERRONEOUSLY FOUND THAT THE ALLEGED HAZARDOUS CONDITION ON DEFENDANT'S PROPERTY WAS OPEN AND OBVIOUS AS A MATTER OF LAW IN THE ABSENCE OF OBJECTIVE EVIDENCE DESPITE PLAINTIFF'S CLAIM THE HAZARD WAS HIDDEN AND AS SUCH, ITS HOLDING SHOULD BE REVERSED.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Plaintiff, Ronald A. Gable (Mr. Gable), filed a complaint against Defendants, Deborah Gable (Ms. Gable) and John Doe(s), on July 10, 2019 alleging Defendants negligently allowed a dangerous condition to exist on Defendant Ms. Gable's property and which injured Mr. Gable. Defendant served Plaintiff with interrogatories, requests for production, and requests for admissions on August 6, 2019, to which Plaintiff served timely responses. Defendant filed a motion to dismiss on October 6, 2019, to which Plaintiff filed a response on October 24, 2019. The Circuit Court of Ohio County, West Virginia issued an order granting the motion to dismiss on October 30, 2019, holding Mr. Gable was a trespasser upon Defendant's property because he "was on Defendant Gable's property without her invitation, express or implied, and did so for his own purpose or convenience, and not in the performance of any duty to Defendant Gable." AR at

40. The circuit court added that even if Mr. Gable were not a trespasser, the alleged hazard was open and obvious, and so a bar to Plaintiff's action, because "a golf ball . . . is typically easily seen" and "a reasonably prudent person would have seen a golf ball on the steps and exercised reasonable care in avoiding such an item." Id. at 41. Plaintiff filed a motion for relief from the judgement under Rule 59(e) of the West Virginia Rules of Civil Procedure on November 9, 2019, which the circuit court denied on November 12, 2019. Plaintiff then filed this appeal.

II. STATEMENTS OF FACT

On September 18, 2017, Mr. Gable visited the home of his daughter, Defendant Ms. Gable. AR at 19. The purpose of his visit was to inform her of the death of a relative. Id. Gable approached Defendant's front door, which is located upon an elevated porch and accessible by steps connected to it. Id. Mr. Gable knocked on the door, realized Ms. Gable was not home, and turned to leave. Id. While descending the steps, Mr. Gable stepped upon a small ball located on the crease of the steps between the riser and the tread. Id. at 20. The ball was initially described as a golf ball. Id. at 3. Mr. Gable was unable to see the ball, both during his approach towards and descent upon the staircase, because it was obscured by paint chips and debris and due to the steep angle of the steps. Id. at 20. Stepping on the ball caused Mr. Gable to fall and suffer serious injuries. Id.

SUMMARY OF THE ARGUMENT

The circuit court erred in dismissing Mr. Gable's complaint for failing to state a claim by ignoring that he had implied consent from Defendant to enter the property and concluding that Mr. Gable was trespasser not owed a duty of due care. Mr. Gable had the implied consent of Ms. Gable to enter her property based upon custom, which is recognized by the Supreme Court, multiple states, and the Restatement (Second) of the Law of Torts. When Mr. Gable entered Ms.

Gable's property, approached the front door, knocked, and attempted to leave, he was no more a trespasser than a deliveryman, a postal worker, a trick-or-treater, or a next-door neighbor. Defendant never indicated any intent to exclude Mr. Gable or other visitors from her property. As a non-trespassing entrant, Mr. Gable was owed a duty of care that Ms. Gable failed to provide. The circuit court's ruling to the contrary should be reversed.

The circuit court further erred in holding that even if Mr. Gable were not a trespasser, the alleged hazard was "open and obvious" as a matter of law. The circuit court did not accept Plaintiff's factual and provable assertion that the dangerous condition was hidden, as is required at a preliminary objection stage. Instead, in the absence of any objective evidence supporting or refuting the alleged condition of Defendant's premises, the circuit court declared that a golf ball is an open and obvious hazard that could not possibly be hidden and would be noticed and avoided by a reasonable person. Because the circuit court did not appropriately construe Plaintiff's allegations at a preliminary objections stage and employed superficial reasoning, its ruling that the alleged hazard was open and obvious should be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Guided by Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, Plaintiff asserts that oral argument is unnecessary.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review of "a circuit court's order granting a motion to dismiss a complaint is de novo." State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 775, 461 S.E.2d 516, 521 (W. Va. 1995). "In determining whether a motion to dismiss . . . is appropriate, [this Court] appl[ies] the same test that the circuit court should have applied initially." Conrad v. ARA Szabo, 198 W.Va. 362, 369, 480 S.E.2d 801, 808 (W. Va. 1996). The Court is required to "accept all the well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff." Id.

II. PLAINTIFF ENTERED DEFENDANT'S PROPERTY WITH HER IMPLIED CONSENT BASED UPON CUSTOM AND THE CIRCUIT COURT'S HOLDING THAT HE WAS A TRESPASSER SHOULD BE REVERSED.

The circuit court's holding that Mr. Gable was a trespasser did not account for the fact that he possessed an implied license to enter based upon custom and should be reversed. In Mallet v. Pickens, this Court abolished the common law classifications of invitee and licensee, holding that landowners owe non-trespassing entrants a "duty of reasonable care under the circumstances." 206 W.Va. 145, 155, 522 S.E.2d 436, 446 (W. Va. 1999). Despite the new standard, the common law approach to distinguishing trespassers from other entrants still applies. Id. The Court in Waddell v. New River Co. discussed the distinctions between trespassers and other entrants, declaring that a trespasser is "one who goes upon the property or premises of another without invitation, express or implied, and does so out of curiosity, or for his own purpose or convenience, and not in the performance of any duty to the owner." 141 W.Va. 880, 884, 93 S.E.2d 473, 476 (W. Va. 1956). It also stated that "mere sufferance or failure to object to

[a] person's presence upon the property of another is insufficient in itself to constitute a license [to enter], unless under the circumstances that permission should be inferred." Id. (emphasis added). The Supreme Court of the United States has recognized custom as a circumstance granting an inferred or implied permission to enter, which typically allows "a visitor to approach a home by the front path, knock promptly, wait briefly to be received, and then . . . leave." Florida v. Jardines, 569 U.S. 1, 8 (U.S. 2013). See also Breard v. City of Alexandria, La., 341 U.S. 622, 626 (U.S. 1951) (recognizing an implied license for visitors to enter can be revoked by notice or order barring them from the property). The Restatement of the Law of Torts also recognizes that custom can create an implied license to enter a property, stating

> '[t]he well-established usages of a civilized and Christian community' entitle everyone to assume that a possessor of land is willing to permit him to enter for certain purposes until a particular possessor expresses unwillingness to admit him . . . So too, if there is a local custom for possessors of land to permit others to enter it for particular purposes, residents in that locality and others knowing of the custom are justified in regarding a particular possessor as conversant with it and, therefore, in construing his neglect to express his desire not to receive them as a sufficient manifestation of a willingness to admit them.

Restatement (Second) of Torts § 330(e) (1965). Section 330(h) further describes a licensee as "One whose presence upon the land is solely for his own purposes . . . and to whom the privilege of entering is extended as a mere personal favor to the individual, whether by express or tacit consent or as a matter of general or local custom." Restatement (Second) of Torts § 330(h). West Virginia courts have not yet expressly commented on an implied license based upon custom, but the concept is widely recognized. The North Carolina Supreme Court held in Smith v. VonCannon that a cab driver who pulled into a private driveway on a passenger's instructions was not a trespasser and added

> the construction of a driveway or a walkway leading to the entrance of a residence, may, in the absence of notice to the contrary, be reasonably construed, not only by acquaintances of the landowner but also by strangers, as an expression

> of the landowner's consent to their entry thereon for the purpose of approaching and entering the house on any lawful mission.

197 S.E.2d 524, 529-30 (N.C. 1973) (emphasis added). See, i.e., Hamby v. Haskins, 630 S.W.2d 37, 39 (Ark. 1982) (holding a woman injured after entering a property to ask for directions was not a trespasser under local custom) ; Frye v. Trustees of Rumbletown Free Methodist Church, 657 N.E.2d 745, 750 (Ind. Ct. App. 1995) (holding a man whose car had broken down was not a trespasser but rather a licensee under custom when he approached a nearby house and asked for help) ; Jones v. Manhart, 585 P.2d 1250, 1253 (Ariz. Ct. App. 1978) (holding a woman who approached the front door of a house to conduct a commercial survey had an implied license to enter absent any notice to the contrary).

It is respectfully submitted that the circuit court erroneously read Waddell's definition of trespasser to conclude that the purpose of Mr. Gable's visit necessarily made him a trespasser, whereas its correct application hinges on the existence of an express or implied license to enter and engage in specific conduct. AR at 37. As the Restatement and the above cases indicate, the fact a person enters another's premises for his own benefit does not automatically turn him into a trespasser when an implied license to enter exists. Mr. Gable's conduct at the time of his injury also exactly matches that allowed under an implied license to enter, as interpreted by the Supreme Court of the United States, specifically to approach a residence on a path, knock on the door, wait to be received, and then leave. Id. at 20. An implied license can only be revoked upon notice or order, and none of the Plaintiff's pleadings contained any fact suggesting the implied license was revoked, such as an explicit statement from the Defendant, a physical barrier blocking public entry to the premises, or posted "No Trespassing" signs. Under the circuit court's reasoning, it is difficult to see how Girl Scouts selling cookies, census workers, salespeople, neighbors who want to borrow or discuss something, or others who routinely visit

residences could ever lawfully enter a property without first obtaining the landowner's express permission.

Because of the reasoning adopted by the Supreme Court and the Restatement, the decisions issued in other jurisdictions, and the common-sense wisdom of recognizing an implied license to enter under custom, the circuit court's decision holding Mr. Gable was a trespasser should, it is respectfully submitted, be reversed.

III. THE CIRCUIT COURT DID NOT FOLLOW WEST VIRGINIA RULES OF CIVIL PROCEDURE GOVERNING PRELIMINARY OBJECTIONS AND ENGAGED IN UNSUPPORTED ANALYSIS WHEN IT HELD THE HAZARD CAUSING PLAINTIFF'S FALL TO BE OPEN AND OBVIOUS.

The circuit court did not accept Plaintiff's factual assertions as true and exceeded its fact-finding role by determining the hazard causing Mr. Gable's fall was open and obvious as a matter of law and its holding must be reversed. As a general rule, a circuit court should construe pleadings favorably to the plaintiff and only grant a 12(b)(6) motion when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Chapman v. Kane Transfer Co., Inc., 160 W.Va. 530, 538, 236 S.E.2d 207, 212 (W. Va. 1977) (internal citations omitted). In personal injury cases, motions to dismiss are particularly disfavored when questions of due care, primary negligence, and contributory negligence are involved. Id. at 212. The court in McGraw described the application of notice-pleading standards in assessing the adequacy of a complaint as follows:

> Rule 8 of the [West Virginia] Rules of Civil Procedure requires clarity but not detail . . . The primary purpose of these provisions is rooted in fair notice. Under Rule 8, a complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is. Although entitlement to relief must be shown, a plaintiff is not required to set out facts upon which the claim is based.

461 S.E.2d at 522. See also Nellas v. Loucas, 156 W.Va. 77, 82, 191 S.E.2d 160, 164 (W. Va. 1972) (stating "so long his opponent is fairly apprised and presented with the notice to contradict [a claim], [a plaintiff] should not lose the merits of his position by imprecise and less than conclusive pleading"). Additional facts not contained in the complaint but presented in a plaintiff's memorandum in opposition to a motion to dismiss are relevant so long as they "could be proven consistent with the allegations." McGraw at 522 n. 7 (internal citations omitted). See Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705, 717 (D. Haw. 1964) aff'd, 401 F.2d 182 (9th Cir. 1968) (stating courts may "take cognizance of contradictory facts set forth in the pleading" to rule a plaintiff failed to state a claim).

In its analysis of the open and obvious nature of the hazard, the circuit court first erroneously puts weight on an alleged inconsistency in Plaintiff's pleadings regarding the exact site of Mr. Gable's fall to conclude any assertion that the ball was hidden was "dubious at best." AR at 38. The allegedly inconsistent matter regards the use of the terms "front porch" and "front steps" in Plaintiff's pleadings, generating confusion in the circuit court over where Plaintiff fell. Id. The alleged discrepancy is not severe enough to warrant dismissal of the complaint because the pleaded facts provide sufficient notice and are consistent with Plaintiff's claim. Plaintiff's pleadings consistently identify the hazard causing Mr. Gable's fall to be a small ball located on the Defendant's front steps. Id. at 3, 18-20, 22, 25. A liberal construction of the pleadings supports Plaintiff's assertion that Mr. Gable was injured due to a ball that could not be easily seen and was located on Defendant's steps, concealed in part due to the overall condition of the porch, and not that Mr. Gable fell due to any other hazard located elsewhere. Plaintiff's pleadings sufficiently put Defendant on notice of the nature of Plaintiff's claim, despite the existence of any imprecise choice of words, to the extent that Defendant moved to dismiss the

action on the bases of trespasser liability and the open and obvious doctrine rather than confusion over the cause or site of Mr. Gable's fall.

The circuit court also improperly decided a disputed issue of material fact when it ruled the hazard described in Plaintiff's pleadings was open and obvious as a matter of law. West Virginia law states that landowners are not liable for injuries resulting from dangerous conditions on their property that are "open, obvious, reasonably apparent or as well known to the person injured as they are to the owner or occupant." W. Va. § 55-7-28 (West through 2019 Second Extraordinary Session). The open and obvious nature of a hazard is often a fact-specific inquiry reserved for the jury but can be decided as a matter of law by the court when the facts are undisputed. 62A Am. Jur. 2d Premises Liability § 676 (Westlaw through Nov. 2019). Several courts have echoed this view. See, i.e., Ruther v. Robins Eng'g and Constructors, a Div. of Litton Sys., Inc., 802 F.2d 276, 278 (7th Cir. 1986) (stating a summary judgment determination of an open and obvious danger is appropriate under Indiana law when no jury could reasonably decide otherwise under uncontested facts) ; Lirano v. Hobart Corp., 700 N.E.2d 303, 309 (N.Y. 1998) ("Where only one conclusion can be drawn from the established facts, however, the issue of whether the risk was open and obvious may be decided by the court as a matter of law") ; Alqadhi v. Standard Parking, Inc., 938 N.E.2d 584, 587 (Ill. App. Ct. 2010) ("[W]here there is no dispute about the physical nature of the condition, the question of whether a condition is open and obvious is a legal one for the court"). Plaintiff's counsel could not locate any West Virginia cases that have addressed a court's determination that a hazard was open and obvious as a matter of law at the preliminary objection stage, but courts in other jurisdictions have granted Rule 12(b)(6) motions when the dangerous condition was a natural feature of the terrain or otherwise readily apparent. See, i.e., Tushaj v. City of New York, 258 A.D.2d 283, 284 (N.Y. 1999)

(holding an easily visible cliff in a park was open and obvious) ; Park v. Ne. Ill. Reg. Commuter R.R. Corp., 960 N.E.2d 764, 770 (Ill. App. Ct. 2011) (holding an approaching train posed an open and obvious danger).

The circuit court determined the hazard causing Mr. Gable's injury was open and obvious as a matter of law despite that its condition remains a disputed fact and by employing erroneous reasoning. Plaintiff's description of the hazard, a golf-ball sized object hidden by debris, was disputed by Defendant, who declared it was an open and obvious hazard. AR at 13. Despite the absence of any corroborating evidence, the circuit court agreed with the Defendant, taking judicial notice of its own understanding of golf balls. Id. at 38. While it may be true, as the circuit court stated, that a golf ball "is typically easily seen," a golf ball, or any other ball with a diameter barely exceeding an inch and half, is just as typically easily hidden, as it was here. Plaintiff's assertion that such a small object could be concealed from view due to debris and the angle of steps falls well within a provable set of facts. Neither is a small ball a natural feature of a staircase to be anticipated by a reasonable person, or as readily noticeable and indicative of danger as an approaching locomotive. The circuit court's finding to the contrary, that balls of such size, as a matter of law, are to be considered open and obvious dangers regardless of any factual circumstances, is at odds with existing caselaw and common sense and must be reversed.

CONCLUSION

For all of the foregoing reasons, the circuit court's order dismissing the action should be reversed on the ground that its findings that Mr. Gable was a trespasser and the alleged hazard was open and obvious were erroneous, and this Court should remand the case for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, James A. Villanova, Esquire, do hereby certify that a true and correct copy of Petitioner's Brief in Support of Appeal was served by mailing a true and correct copy of the same to the parties below on this 13th day of Feb, 2020 via email and First Class, U.S. Mail, postage prepaid upon the following:

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