IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RONALD A. GABLE,

Petitioner,

vs.

DEBORAH GABLE and
JOHN DOE(S),

Respondents.

CIVIL DIVISION

NO: 19-1077

2020

PETITIONER'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT[1]

Respondent's assertion that Petitioner's Complaint fails to state a claim rests upon an exceedingly narrow interpretation of West Virginia's pleading standards. Respondent suggests a complaint must explicitly detail all facts related to a claim when such allegations are unnecessary.

Respondent also mischaracterizes an implied license to enter based upon custom by suggesting it has only been applied when accompanied by an existing duty between the licensee and the landowner and is limited to uniquely local events such as annual festivals. Respondent's attempts to factually distinguish Petitioner's supporting cases ignore that courts have recognized an implied license based upon custom without any such limitations.

Neither does Respondent meaningfully dispute Petitioner's assertion that the hazardous condition identified in the Complaint was not open and obvious as a matter of law. None of Respondent's cited cases contain similar facts and nearly all were decided under motions for summary judgment or a directed verdict rather than a motion to dismiss, making them inapplicable to this case.

ARGUMENT

I. RESPONDENT MISAPPLIES THE STANDARD OF REVIEW FOR A DISMISSAL FOR FAILURE TO STATE A CLAIM WHEN IT ASSERTS PETITIONER

[1] In its Assignments of Error, Petitioner did not contend that the lower court erred by considering facts contained in Plaintiff's Brief in Opposition to Dismiss to conclude that Mr. Gable was a trespasser and that the alleged hazard was open and obvious as a matter of law and in so doing dismissed the action under a summary judgment standard. Specifically, the lower court cited Mr. Gable's purpose for visiting Ms. Gable's property, contained in Plaintiff's Brief in Opposition to Dismiss, to conclude that Mr. Gable was a trespasser. AR at 37. The lower court also cited facts contained in Plaintiff's Brief in Opposition to conclude the alleged hazard was open and obvious as a matter of law. Id. at 38. In the interests of justice, Petitioner requests this Court consider the merits of the lower court's dismissal under a summary judgment standard in addition or in alternative to a preliminary objection standard.

DID NOT PLEAD SUFFICIENT FACTS TO ESTABLISH THE DEFENDANT'S DUTY OF CARE.[2]

Respondent relies upon an erroneous and exceedingly narrow interpretation of West Virginia's pleading standards to assert that Petitioner did not plead sufficient facts to establish Respondent owed Mr. Gable a duty of care. A court should not dismiss an action for failing to state a claim unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Murphy v. Smallridge, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (W. Va. 1996). The primary standard for adequacy of a complaint is that it must be "intelligently sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged." State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (W. Va. 1995). A negligence complaint need not explicitly state a duty existed so long as one can be inferred from the facts alleged. Gasber v. Coast Const. Corp., 134 W.Va. 576, 579, 60 S.E.2d 193, 195 (W. Va. 1950). However, neither is a plaintiff "required to set out facts upon which the claim is based." McGraw, 194 W.Va. at 776. This Court applied this rule in Roth v. DeFeliceCare, Inc. when it reversed a lower court's dismissal of a sexual harassment claim. 226 W.Va. 214, 220, 700 S.E.2d 183, 189 (W. Va. 2010). The lower court held the complaint did not allege that the conduct the female plaintiff was exposed to was based upon her gender, an essential element of the claim. Id. In reversing the decision, this Court cited McGraw and held that while the Petitioner still needed to develop "sufficient facts in order [to] ultimately prevail," it did "not appear beyond doubt to the Court that the Petitioners can prove no set of facts in support . . . which would entitle her to relief." Id. (emphasis added).

[2] Petitioner concedes that in a motion to dismiss for failure to state a claim, the analysis must be limited to facts contained in the complaint and that its assertion that "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'" was erroneous and based upon dicta in State ex rel.McGraw v. Scott Runyan

Petitioner's Complaint sets forth sufficient facts to establish that Respondent owed Mr. Gable a duty of care by inference and its alleged failure to fully develop that element of the claim is insufficient to justify a dismissal. The Complaint describes Mr. Gable as a "visitor." AR at 2. "Visit" is defined as "to go or come to see (a person)," which suggests a temporary lawful presence on another's property. Webster's II New Riverside Dictionary, Revised ed. 1996. It also alleges Mr. Gable was injured on the front steps of Respondent's property, which is consistent with the lawful presence of a person approaching the door of a residence under an implied license based upon custom. Id. The facts asserted in the Complaint establish that Mr. Gable entered Respondent's property as a lawful and respectful licensee who was visiting, not trespassing, burglarizing, or invading; such is the common and well-known meaning of "visiting." Under the proper standard of review, which is whether the facts preclude the inference of a legally plausible claim and provide sufficient notice to the court and the opposing party, Petitioner's Complaint is sufficient.

II. RESPONDENT ERRONEOUSLY SUGGESTS COURTS' TREATMENT OF AN IMPLIED LICENSE TO ENTER BASED UPON CUSTOM IS IRRELEVANT UNDER WEST VIRGINIA LAW AND LIMITED TO A LOCALIZED ANALYSIS.

Contrary to Respondent's assertion, an implied license to enter based upon custom remains applicable in West Virginia. Respondent argues that this Court's decision in Mallet v. Pickens, 206 W.Va. 145, 522 S.E.2d 436 (W. Va. 1999) abolished the distinction between trespassers, licensees, and invitees, and therefore the statements regarding rights of licensees contained in Restatement (Second) of Torts § 330(e) (1965) are no longer relevant persuasive authority. The Mallet court, however, only eliminated the distinction between licensees and

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Pontiac-Buick, Inc.. 194 W.Va. 770, 775, 461 S.E.2d 516, 521 no. 7 (W. Va. 1995). Pet'r's Br. in Supp. of App. at 12.

invitees, stating "We retain our traditional rule with regard to a trespasser, that being that a landowner or possessor need only refrain from willful or wanton injury." Mallet, 206 W.Va. at 155. It added in a footnote that "We make no change today to our law and its treatment of trespassers, nor to the complex body of law dealing with exceptions to the normal standard of care with regard to trespassers." Id. at 148, no. 2. The Mallet court consolidated licensees and invitees into the category of "non-trespassing entrants" and left existing law regarding trespassers intact. Id. at 155. It does not follow that a person who would have been classified as a licensee prior to a decision merging licensees and invitees should be considered a trespasser after it. As Section 330(e) describes licensees, it remains, along with cases from other jurisdictions, applicable persuasive authority for distinguishing non-trespassing entrants.

Respondent's assertion that an implied license to enter based upon custom is limited to a locality is unsupported by both the Restatement and existing case law. Section 330(e) of the Restatement does speak of "local custom" and "residents in [a] locality," but its application has not been limited to the customs of any specific community. Section 330(h), describing other licensees, includes those for whom the privilege of entering is extended by "express or tacit consent or a matter of general or local custom." Restatement (Second) of Torts § 330 (emphasis added). Courts have read Sections 330(e) and 330(h) liberally to find an implied license to enter based upon general custom as a matter of judicial notice absent any analysis of the habits of an individual community. See, e.g., Florida v. Jardines, 569 U.S. 1, 8 (U.S. 2013) (stating "A license [to enter] may be implied from the habits of the country" regarding the general ability of a police officer to approach a home and knock) (internal citations omitted) (emphasis added) ; Frye v. Trustees of Rumbletown Free Methodist Church, 657 N.E.2d 745, 750 (Ind. Ct. App. 1995) (holding that a person has implied consent to approach a residence and ask for directions

as a "generally accepted custom" in all of Indiana) ; Romine v. Koehn, 730 S.W.2d 558, 560 (Mo. Ct. App. 1987) (Holding a man who entered another's property to plant the landowner's crops while he was away had an implied license to enter under the "cherished American custom" of helping a neighbor in need) ; Garrard v. McComas, 450 N.E.2d 730, 734 (Ohio Ct. App. 1982) (holding that in the local community a person has implied consent to approach a residence to ask directions as a matter of judicial notice). Courts have asked for proof of the prevailing custom in an individual community only when the conduct in question falls outside that recognized as customary under judicial notice. See, e.g., Moss v. Aaron's, Inc., 140 F.Supp.3d 441, 448 (E.D. Pa. 2015) (Holding that the record on appeal was insufficient to determine if the customs of a local community allowed an implied license to approach a home to speak with the occupants in the evening, as opposed to daylight hours) ; State v. C.B., 380 P.3d 626, 633 (Wash. Ct. App. 2016) (Upholding a lower court's finding that the custom of a county did not grant an implicit license for the defendant to enter a property, knock on a resident's door, and run away while shouting racial slurs absent any supporting evidence from the defendant). Contrary to Respondent's assertions, an implied license to enter a property based upon custom also does not depend upon any intent to provide a benefit to the landowner. Restatement (Second) of Torts § 330(h)(1).

Respondent cites three cases to claim that states have adopted an implied license based upon custom only in narrow circumstances, yet none of them discuss such a license and are decided on completely different grounds. Sims v. Giles involved a meter reader injured on a property on which she was expressly granted permission to enter under a contract benefitting the landowner and whom the court classified as an invitee. 541 S.E.2d 857, 864 (S.C. Ct. App. 2001). In Wrinkle v. Norman, the court determined a man injured on a property while helping

return escaped cattle was a non-trespassing entrant because he did so under a privilege to prevent public harm as recognized in the Restatement (Second) of Torts §§ 197 and 345. 301 P.3d 312, 314-15 (Kan. 2013). The court in Haffey v. Lemieux held that a landowner owed a duty of care to a mail carrier injured on another's property in performance of a public duty as described in Restatement (Second) of Torts § 345. 224 A.2d 551, 553-54 (Conn. 1966). Since none of the cases even address an implied license based upon custom, they do not support Respondent's claim that the license has been interpreted narrowly.

The question might be asked, "Does West Virginia want to be a state in which its citizens cannot visit their neighbors to borrow a cup of sugar, to notify them of a danger, or to tell them of an illness or death of another without a formal written invitation or be judged a trespasser?"

Neither does Respondent meaningfully dispute the applicability of an implied license as demonstrated in the cases Petitioner cites. Respondent correctly notes that the holding of Jardines relates to criminal searches but ignores the Court's applicable discussion of an implied license based upon custom. Jardines, 569 U.S. at 8-10. Respondent discounts the Hamby v. Haskins court's recognition of the doctrine as well, even though the court stated Restatement (Second) of Torts § 330 was directly applicable to the dog bite case before it and strongly suggested the lower court's jury instruction describing the injured person as a trespasser was erroneous. 630 S.W.2d 37, 39 (Ark. 1982). Respondent also attempts to distinguish Jones v. Manhart, 585 P.2d 1250 (Ariz. Ct. App. 1978) but admits that the court held the plaintiff to be a licensee. While Respondent suggests that the holding depended on the existence of a strict liability statute for dog bites, the court explicitly rejected the defendant's assertion that the plaintiff was a trespasser by citing Restatement (Second) of Torts § 330 and found the landowner gave implied permission to the injured plaintiff to "come up the walk and knock on the door" absent any notice to the

contrary. Id. at 1253. As the above cases show, an implied license to enter based upon custom is widely recognized and is perfectly applicable to Petitioner's case.

III. RESPONDENT CITES CASES DECIDED UNDER A HEIGHTENED STANDARD OF REVIEW TO ASSERT THE HAZARD ALLEGED IN PETITIONER'S COMPLAINT WAS OPEN AND OBVIOUS AS A MATTER OF LAW.

The cases Respondent cites to assert that the alleged hazard was open and obvious as a matter of law were all, with one exception, decided under a summary judgment standard. The one case decided at the preliminary objections stage does not involve a similar hazard to that Mr. Gable encountered. As a result, none of them support Respondent's claim.

In nearly all of the cases cited by the Respondent, the courts held that the alleged hazard was open and obvious primarily based upon the plaintiff's testimony. The court in Senkus v. Moore affirmed a lower court's determination that a scale at a veterinary hospital was open and obvious when the plaintiff testified that the scale was in plain view and could not explain why she did not see it before tripping on it. 207 W.Va. 659, 661, 535 S.E.2d 724, 726 (W. Va. 2000). In Schwartz v. Selvage, a directed verdict against the plaintiff was upheld because he testified that he noticed the hazardous condition before tripping on it and was therefore contributorily negligent. 277 N.W.2d 681, 683 (Neb. 1979). The plaintiff in Eubanks v. Smith also testified that she had seen the hazardous items that later caused her to fall. 2003 WL 22850649, 1 (Mich. Ct. App. 2003). Similarly, the court in Coleman v. US cited the plaintiff's deposition testimony that he had noticed the tripping hazard upon previously visiting the property when holding it to be an open and obvious hazard. 369 Fed.Appx. 459, 463 (4th Cir. 2010). In Petitioner's case, the lower court did not cite any testimony from Mr. Gable indicating his awareness of the hazard but instead concluded it was open an obvious solely as a matter of judicial notice.

Though the decision does not mention the plaintiff's testimony, Scalice v. Braisted is also inapplicable because the court's determination that "pine cones and seed balls" were open and obvious hazards as a matter of law rested upon their natural character. 2012 WL 9338897, 1 (N.Y. Sup. Ct. 2012). The court stated that previous New York decisions had "found that such naturally occurring materials do not rise to the level of inherently 'dangerous.'" Id. at 2. (internal citations omitted). Unlike in Scalice, the alleged hazard as described in Petitioner's Complaint was "golf balls and other objects and debris," subsequently interpreted to mean a golf ball by the lower court. A golf ball or a similar manufactured ball on a residence's front steps is not a naturally occurring condition.

The single case Respondent cites that was decided at the preliminary objections stage does not concern a plaintiff who injured himself upon a small ball, but a plaintiff who fell off a 60 to 90-foot high wall. Addison v. Amonate Coal Co., Inc., 2008 WL 2787716, 1 (S.D. W.Va. 2008). In concluding the wall was an open an obvious hazard as a matter of law, the court noted the abundance of case law holding high cliffs and walls to be open and obvious conditions and took judicial notice of the "ubiquitous" presence of such hazards in West Virginia. Id. at 4. There is no similar case law regarding small balls on staircases in this case and Addison does not support Respondent's assertion.

CONCLUSION

Wherefore, for all of the foregoing reasons, the lower 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 Reply Brief was served by mailing a true and correct copy of the same to the parties below on this 2ND day of June, 2020 via email and First Class, U.S. Mail, postage prepaid upon the following:

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