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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6000

SIMON WAGMAN, LAWRENCE L. LEVIN and MYRON L. LEVIN,
A PARTNERSHIP KNOWN AS
COLONIAL INVESTMENT COMPANY,
TRADING AS GRAND VIEW APARTMENTS,

Appellants,

v.

DOMINIQUE BOCCHECIAMPE, A MINOR,
BY NEXT FRIEND AND FATHER, FRANCOIS BOCCHECIAMPE AND
FRANCOIS BOCCHECIAMPE,

Appellees.

PETITION FOR A REHEARING

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PETITION FOR A REHEARING

Come now the Appellees, Dominique Boccheciampe, a minor, and Francois Boccheciampe, by and through their Counsel of Record, and petition the Court for a rehearing of the appeal heretofore ruled upon on the 10th day of September, 1965, at Staunton, Virginia, wherein this Court reversed the judgment for the Plaintiffs, appellees here, and entered final judgment for the defendants herein. Appellees say that this Court has

erred in reversing the jury verdict and judgment entered thereon in the Circuit Court of Fairfax County and that this Court should vacate its prior action and affirm the judgment of the said lower Court for the reasons more fully set forth for granting this Petition for a Rehearing.

REASONS FOR GRANTING A REHEARING

1. This Court, in reviewing the evidence in this cause has erroneously examined and viewed the evidence in this cause in a manner most favorable to the Appellants contrary to the basic and fundamental principles of due process of law uniformly followed, that upon appeal all evidence must be construed to support the verdict and that the evidence on appeal will be viewed as though the jury has resolved the evidence in all instances of factual issues in favor of the prevailing party.

2. This Court has erroneously examined and reviewed the evidence upon isolated statements of witnesses taken out of the context of the complete testimony and placed inferences thereon most favorable for the Appellants contrary to the verdict and the evidence as a whole.

3. This Court has erroneously found that negligence of a landlord is a narrow and to-be-scientifically defined legal principle contrary to the general principle that negligence or lack of negligence, proximate cause and injury are questions for the jury and is dependent upon the facts and circumstances of the case, the age and intelligence of the parties involved, the knowledge or lack of knowledge of the defendants or their agents in a given cause, the general duty imposed upon the defendants toward the plaintiffs, the negligent, careless or indifferent performance of the duty owed to the plaintiffs, and the cause of the injury or damage and extent thereof, all of which are questions which must be decided upon an overall view of the evidence and circumstances.

4. This Court, in examining the record to determine causation and duty of the defendants toward the infant plaintiff, have erroneously held for the defendants contrary to the doctrine of liability established by this Court, owed even to bare trespassers, where the defendants or their agents actually knew of the danger to infant plaintiff and failed to fulfill its duty to actively protect and avoid the said injuries by the exercise of ordinary care, and has erroneously placed upon the plaintiff the burden of proving more than a fair presumption of negligence on the part of the appellants.

ARGUMENT

Appellees feel that a complete review of the facts in this brief would serve no useful purpose inasmuch as the Court has before it the entire record which it has already reviewed in passing upon this case. The evidence, however, has clearly established that the rail in question was a handrail for people walking up and down the stairs and not a guard rail to stand as warning of danger to all users of the stairs. It has been clearly established that the plaintiff was a child of immature years who should be expected to take childish liberties and play upon the premises in the manner as shown by the evidence. The evidence shows that the defendants' agent knew that children not only played upon the stairway in a dangerous manner, but knew that the type of railing repeatedly enticed them back to play over and over again. Defendants' agent knew that her actions were wholly ineffective to actively protect and avoid injuries to the plaintiff and the evidence manifested that the fall and injury to some small child was merely a matter of time unless active and effective protection was extended by landlord. The evidence established that this type of railing naturally induced children to play upon it, not unlike "monkey bars," and that to close in the bars with wire mesh, while physically it would not prevent a child from going around the end, would take all the joy out of playing on the bars and thereby extend a permanent and active step

of protection to the children and infant plaintiff. Other steps were available to defendants to extend active protection and to avoid injury, none of which were sought out by them, that is, the railing could have been changed to one which children could not crawl through, some of which was already utilized in other dangerous places on the said premises; the said handrail could have been extended along the vertical wall to connect with the "guard rails" along the entrance ramps to the apartments, thereby leaving no "ends" for children to walk around; the plaintiff-father could have been directly warned or advised of danger to his child which was not done; and in all probability other steps such as landscaping the terrain so as to eliminate vertical drop-offs in the apartment area may have been done in fulfilling its duty of active protection. Notwithstanding all of plaintiff's evidence of reasonable steps which could have extended active protection, the defendants upon whom the burden of showing active protection presented nothing except the evidence that when seen, children were ordered away. Testimony of the defendants' expert witness established that the necessity of extending the handrail so as to connect with the guardrails of the ramps is a question of fact depending upon the location of the wall and the attending circumstances (R. 70) and the jury, by its verdict, has resolved this issue against the defendants. While plaintiffs' expert acknowledged that there is always a limit to that which one can do to extend active protection, the jury found as a fact that the defendants had not approached the point of reasonable care, and the evidence supports this.

In a most recent and still unpublished case, this Court has reiterated the basic doctrine controlling cases of this nature, that is, no person has the right to assume that a child of tender years would exercise proper care for her own protection; that the person was charged with knowledge of the fact that such child acts heedlessly, thoughtlessly and upon childish impulses and that the

person must exercise such vigilance and precautions as the circumstances demand. *Sullivan v. Sutherland, Admr.*, No. 5995, 206 Va. __, 143 S.E. 2d __.

I.

It is evident from the Court's review of this case, upon the uncontradicted evidence and other isolated statements of witnesses, which, out of context with the whole of the evidence and not properly construed in the light of the jury verdict, that the evidence of record in this review has been construed most favorably for the Appellants. Appellees contend that this is not only erroneous but amounts to a basic departure from the principles of due process of law at the appellate level. Appellees urge that the appellate court is bound by the fundamental principle established in the jurisdiction and all other Anglo-American systems of law that upon appeal, all evidence must be construed to support the verdict as entered by the trial Court. This means that all favorable inferences of evidence have been resolved for the prevailing party. As said in *Filer v. McNair*, 158 Va. 88, 163 S.E. 335, 337, the Court reiterated a principle of law repeated in more than 100,000 cases, as follows:

> "A verdict must stand unless there is a plain deviation from the evidence, or it is palpable the jury have not drawn a correct inference from these facts as certified. . . .
>
> "*Courts constantly have to refer to juries the question of fact of what is reasonable conduct or reasonable prudence, under all the circumstances of the case, with no other guide than their own judgment and conclusions as reasonable men.* (italics ours)

In *Ball v. Witten*, 155 Va. 40, 154 S.E. 547, 548, previously cited, this principle is again confirmed as the Court there said:

> "The facts narrated appear from the defendants' evidence. The testimony will be

> considered in a light favorable to him, because we are confronted with the verdict of the jury in his favor, which is controlling on the conflicts in the testimony."

The jury, by its verdict, has rejected the defenses set up by appellants in the trial, namely, by calling to the children on the stairway in question, defendants' agent fully discharged their duty of active protection and avoidance of injury; and by showing that the lease with the parent stated in an isolated paragraph "Children will not be permitted to play in public halls or on the lawn or entrance steps or walks of the building." Defendants failed to discharge their duty of active protection and reasonable care to maintain the premises in a safe condition to a child, not a party to a lease, who could not comprehend it and which document could be construed, not only a duty upon the landlord to execute these terms on property under their exclusive control, but also an assurance to the parent tenant that the landlord will see to it that children will not be permitted to play in the designated places. *Johnson's Adm. v. Richmond and Danville R.R. Co.*, 86 Va. 975, 11 S.E. 829, previously cited, rejects defendants' contentions, on basic public policy, that such lease paragraph can excuse them for negligence in failing to perform a general duty to plaintiff.

II.

Upon the premises heretofore presented, Appellees urge that this Court has erroneously indulged in examining the evidence upon isolated inferences of evidence most favorable to the defendants-appellants without recognizing that the whole evidence viewed as the jury so viewed it rejects the inferences and conclusions of facts made by this Court. The evidence supports the fact that the handrail properly closed in with wire mesh bears a direct and causal connection between the lack of mesh and the injury. The evidence clearly shows that in its condition, the handrail appears to the children as an object to play upon and when closed by the wire mesh, all the

joy of playing thereon would be taken away and they would stop playing there (See R. 46, 47). Therefore, such action on the part of the defendants would probably have caused the children to go away and play elsewhere. This was not a fantasy, nor was the position of appellee nebulous or difficult to follow as shown by the lower Court's overruling the demurrer to the pleadings, the motions to strike the plaintiffs' evidence, and the jury's finding or verdict for the plaintiffs. Appellees aver that the logic is clear, that the evidence points directly to the duty and the failure to perform. The mesh, pointed out by plaintiffs, is a suggested course of action, the sole determination and performance of which was upon the defendants, not the plaintiffs.

While the Court condemns expert testimony based upon actual experience in matters not usually available to jurors and indulges in the erroneous assumption that plaintiffs' expert witness assumed the defendants were required to furnish a handrail safe for children to play on, the evidence clearly shows that the expert witness was in fact demonstrating that maintenance of the handrail under the known circumstance was a dangerous condition which could be eliminated by a number of acts of reasonable care. To penalize and criticize appellees for attempting to enlighten the jury with some acceptable methods to eliminate a dangerous condition seems incredible in view of the fact that these duties are those of the defendants. Appellants' witness not only recommended the mesh to stop children from going under and through it but also to permanently cause the children to stay away from the handrail and not play upon it at all.

Appellants have drawn the Court's attention so closely to isolated facts and induced an examination of each piece of evidence under microscopic care so that the Court is now in a position not unlike the woodsman, who, so intent upon the examination of the bark of a tree under

his magnifying glass could not see the forest for the tree. All that was necessary for him to orientate himself, was to back away from the tree and look at the forest as a whole. In this case, likewise, the clarity of the duty, the negligence, the causal connection and the proximate injury becomes apparent when the evidence, properly reconciled, is viewed as a whole, and the justification of plaintiffs' verdict in the lower Court will be clear.

To view the case as appellants urge, would, like Dr. Frankenstein, create a monstrous principle of law which would, instead of making the landlord a possible insurer of their tenants' safety, issue an insurance policy to the landlord, making him absolutely immune to liability except under gross and wanton circumstances.

The Court should look at the handrail through the eyes of a small and innocent child, acting upon childish impulses and playing upon the stairway and handrail. This rail does not appear as a barrier but as a place to play; it does not serve any purpose of keeping a child from falling off the wall but rather presents the opportunity for injury. Of course, an adult or minor of discretion would not be subject to this same danger. To the plaintiff, under the circumstances of this case, this place is as dangerous as the neglected dynamite cap, the uncovered well or hole, the washing machine which was left unattended and running, the driver who fails to watch the child playing on the edge of the street, the brush fire unattended at a place where children congregate, and innumerable other cases which fill the law books and which were at one time a unique set of facts upon which negligence was founded.

III.

Appellees in the lower Court were not required to prove their case by direct evidence alone. In *Gregory v. Lehigh Portland Cement Co.*, 157 Va. 545, 162 S.E. 881, 885, 886, the Court said:

> "It is very generally held that direct evidence of negligence is not required, but the same may be inferred from the facts and attendant circumstances, ... The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence to rebut the presumption. . . . If the facts proved render it probable that the defendant violated its duty, it is for the jury to decide whether it did so or not. To hold otherwise would be to deny the value of circumstantial evidence."
>
> "It would be to eclipse the duty of one who knows of the dangerous character of an agency, to control it, by magnifying the innocent failure of another to imagine a danger of which she had no knowledge, into a positive duty to know and avoid it. It would be to miss entirely the basic principle of the exercise of reasonable care, which measures the duty by the magnitude of the danger reasonably to be anticipated by one possessed of the knowledge necessary to foresee it."

In the case before the Court, the appellants, by pointing their finger at the father and mother and crying out magical words "loco parents" have eclipsed their duty to the infant plaintiff by saying the parent should have been with the child; the parent should also know of the danger. Appellants ignore the fact that their agents actually knew of the danger and there is no evidence to justify magnifying the innocent failure of the parents to imagine a danger into a defense. Even this Court assumed that the parents were shifting a parental duty to the defendants, when as a matter of fact and law, the

appellants were seeking to shift their own duty to the parents. Not only did appellants owe the duty to exercise reasonable care for infant plaintiff's safety, but actually assumed same and then abandoned it without appropriate precautions. Numerous instances of liability exists founded only upon the fact that a defendant assumed a duty not otherwise owed and negligently performed it or abandoned its performance. This case in that respect alone is no different.

IV.

In previous citations in appellees' brief, it has been pointed out that this Court has established that a landowner owes even to bare trespassers, in cases where the landowner or his authorized agent actually knew of a danger to an infant, who, acting upon immature impulses, was in danger upon the landowner's premises, the duty to actively protect said infant from injury by exercising ordinary care.

According to *Baecher v. McFarland,* 183 Va. 1, 31 S.E. 2d 279, 281; the owner of property owes even to a trespasser the active duty of protection after he knows of danger and should avoid that danger by the exercise of ordinary care. This certainly follows the humanitarian doctrine of liability and directly placed upon the defendants the active duty to protect infant plaintiff and to exercise ordinary care to avoid injuries to her. Under the evidence, appellants clearly failed in this respect.

CONCLUSION

To delve further into the reasons for granting a rehearing would amount to no more than reiterating arguments by brief heretofore submitted. Appellees therefore urge that a rehearing upon the briefs heretofore filed and the reasons herein be granted to appellees and that this Court vacate the opinion heretofore rendered and affirm the judgment of the lower Court.

Respectfully submitted,

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Arlington, Virginia

CERTIFICATE OF SERVICE

I, Roland D. Hartshorn, an attorney qualified to practice in the Supreme Court of Appeals of Virginia do certify that three copies of the aforesaid Appellees' Petition for a Rehearing were mailed to Donovan, Turnbull and Brophy, Attorneys for Appellants, at their offices located at 106 Little Falls Street, Falls Church, Virginia, on the _____ day of _____ 1965, in accordance with Rules of this Court.

_____
Roland D. Hartshorn