IN THE COURT OF APPEALS OF MARYLAND

No. 51

September Term, 1994

BALTIMORE GAS AND ELECTRIC COMPANY

v.

TYRONE LANE, a Minor et al.

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker

JJ.

Concurring Opinion by Chasanow, J.
in which Bell, J. joins

Filed: March 28, 1995

The Court unanimously reaches the same result reached by the Court of Special Appeals, i.e., that an eight-year-old child, Tyrone Lane, is not, as a matter of law, barred from recovering against Baltimore Gas and Electric Company (BGE) if he proves BGE was negligent and also proves that defenses such as contributory negligence and assumption of the risk are inapplicable. I concur in the result, but I am unable to join or, I confess, to fully understand the legal analysis used by the majority to reach that result.

An owner of land or a possessor of land is not liable for negligently injuring child or adult trespassers to the land. Premises liability is only imposed for willfully or wantonly injuring or entrapping a trespasser. ___ Md. ___, ___, ___ A.2d ___, ___ (1995)(Majority Op. at 6). We should not extend that well established real property principle to children who are invited onto land, but who may be trespassing on chattels.

The majority holds that all of the real property law principles regarding limitation on liability to trespassers on real property are universally applicable to all trespassers on chattels. Recognizing the unfairness of such a limitation on liability to the plaintiffs in the instant case, the majority fails to critically analyze the applicability of real property trespasser rules to children trespassing on personal property, and instead creates a novel new exception for children who would seem to be trespassers to chattels, but who are not deemed trespassers because someone

else trespassed before they did.

The Court holds that BGE can be liable because it failed to foresee 1) that a four hundred pound spool might be turned on its side and rolled away by a group of children, and 2) that the first group of trespassing children who took the spool would negligently leave it on top of a hill where it could be ridden by, and cause injury to, a "nontrespassing" child. The Court states: "A reasonable fact finder could find it foreseeable that, when BGE left the spool near a residential neighborhood, boys would move it for the purpose of riding it down a nearby hill. Furthermore, it could reasonably be foreseeable that another child [plaintiff] might notice this activity and join in it. In sum, we cannot hold that the intervening acts, which culminated in Lane being injured, were unforeseeable as a matter of law." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 16). It seems to me that as BGE argued, it is far less foreseeable that the first trespassers would negligently move the spool to the top of a hill where it could cause injury to the plaintiff than it is foreseeable that a thief, who takes a car with the keys left in the ignition, would drive the car negligently and cause injury. What we said in Hartford Ins. Co. v. Manor Inn, 335 Md. 135, 642 A.2d 219 (1994), would seem applicable to the majority's analysis in the instant case. In Hartford, we held that the thief's conduct in taking the van with the keys left in the ignition was predictable, but the negligent manner in which he drove the van and its consequences were "highly

extraordinary" and not predictable. 335 Md. at 160, 642 A.2d at 232.

The majority apparently holds that Lane, who would seem to be a trespasser on this four hundred pound spool and therefore only entitled to recovery for willful or wanton conduct by BGE, is really not a trespasser because someone else trespassed before he did. The notion that Lane is not a trespasser is apparently based on antiquated, universally discarded distinctions in old common law pleading. Prosser and Keeton note:

> "The original common law rule [for an action in trespass to chattel] required that the plaintiff be in possession of the chattel at the time of the trespass, or the action could not be maintained. This was relaxed slightly, at a later date, to allow trespass to be maintained by one who is entitled to possession immediately, or upon demand...." (Footnotes omitted).

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 14, at 87-88 (5th ed. 1984). Surely after the first group of trespassers abandoned the spool or left it at the top of the hill for Lane to use, BGE was entitled to possession and did not want Lane using its property.[1] His unauthorized use of this spool with BGE's name embossed on the side would certainly seem to be a trespass, even if he did not realize he was trespassing. See Bramble v. Thompson, 264 Md. 518, 287 A.2d 265 (1972), where

[1]The majority seems to conclude that the first group of trespassers had abandoned the spool, rather than assuming that Lane became a joint participant in the initial trespass by joining in the use of the spool together with the initial trespassers.

plaintiffs contended that the limitations on defendant's duty to trespassers should not apply to them because they were inadvertent trespassers. This Court held that even inadvertent trespassers are still considered trespassers. We further stated:

> "To accept appellants' contention would result in a categorization of the trespass doctrine that Maryland does not recognize. This Court has long and studiously avoided distinctions or deviations in the law of trespass in an attempt to achieve consistency and certainty, so people will understand their respective rights and obligations." (Citations omitted).

264 Md. at 522, 287 A.2d at 267-68.

Perhaps the most unusual aspect of the majority's opinion is the apparent implication that the first group of children who used the spool were trespassers, and BGE would not be liable to them for simple negligence, but since Lane was a subsequent user, BGE is liable to Lane for negligence. In holding that the trespasser doctrine is applicable to the first group of trespassers, but is not applicable to Lane, the majority candidly acknowledges that "[w]e recognize that deeming BGE to have been in possession of the spool until it was moved might generate the somewhat strange result of increasing BGE's exposure to liability based solely on the existence of an intervening event--the moving of the spool." ___ Md. at ___ n.6, ___ A.2d at ___ n.6 (Majority Op. at 10 n.6).

There are several unresolved problems in the majority's analysis. For example, since BGE is apparently only liable to the first user trespassers if it was guilty of willful and wanton

conduct but is liable to subsequent users like Lane for simple negligence, is BGE's liability to Lane conditioned on its negligent failure to recognize that other children would use the spool after it was used by the first group of trespassing children? The majority seems to recognize that liability is premised on the foreseeability of subsequent users when it states, "it could reasonably be foreseeable that another child [Lane] might notice this activity [by the initial trespassers] and join in it." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 16).

In addition, the Court states: "When an owner loses possession it is relieved of the duties associated with possession. Having lost all its ability to control the property, a former possessor cannot possibly continue to keep the property safe for persons who come in contact with it." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 8). Yet the Court fails to explain why BGE should be liable since when BGE had possession, the spool was on its base on level ground and not dangerous to children. It was only after BGE lost possession when the spool was turned on its side and rolled by the initial trespassers to the top of a hill that it became dangerous to eight-year-old Lane.

The ramifications of the Court's holding may also prove to be far greater than anticipated. Just by way of example, assume an owner negligently leaves the keys in a car which is negligently maintained. The car is stolen by thief A, who in turn also leaves the keys in the car so that it is then taken by thief B. Thief B

is injured because the car has bad brakes. Under the majority holding, thief B has a potential cause of action against the owner because "if the owner gives up possession, it gives up the right to exclude all others and thereby gives up the benefit of a lessened duty to trespassers." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 9).

There are better ways to reach the proper result in the instant case which are generally consistent with the holdings, if not the language in all of our prior cases. One possibility is to hold as the Court of Special Appeals held that the limitations on liability to trespassers are applicable only where the plaintiff is a trespasser on real property. In light of the language in several of our prior cases that the limitations of an owner's liability to trespassers applies to personalty as well as realty, a second, and perhaps preferable, alternative would be to recognize some form of the attractive nuisance doctrine in cases where children are injured trespassing on a chattel which is not on the defendant's real property but is on someone else's real property where the children have a right to be. Although we have consistently rejected the attractive nuisance doctrine in cases of children trespassing on real property, we could, and should, adopt the doctrine at least for children injured by personal property which is left on real property where the children have a right to be.

BGE concedes Lane was probably an invitee on the land since the spool was left in Lane's housing development next to Lane's

playground, but they contend "the only issue of any relevance was his status on the spool." I disagree. Where, as in the instant case, both the plaintiff and the defendant have co-equal rights to be on the real property where the defendant leaves a chattel and if the defendant knew, or should have known, that the chattel is unreasonably dangerous to children who are invited on the property, then the defendant should be liable.

Leaving a chattel which could constitute a dangerous but attractive lure to children on the land of another is legally distinguishable from keeping such a chattel on one's own land. In the latter situation, we have rejected the attractive nuisance doctrine based on the traditional rights of owners and occupiers of real property. In the former situation where one places an "attractive nuisance" which is a dangerous magnet for children on someone else's land, there is far greater justification for applying some form of the attractive nuisance exception to the traditional limitations on liability to trespassers. If BGE leaves a spool unattended and unsecured on its own property, even if the area is accessible to children, it should be entitled to greater immunity from liability then when it leaves the spool on <u>someone else's</u> property in an area where children are invited. In the instant case, BGE's acts are particularly aggravated because it left this potentially "attractive nuisance" in front of a day care center and next to a playground where children were certain to be playing.

As to whether there was negligence, in an analogous case the Supreme Court of New Jersey stated:

> "Despite the size and weight of the pipes, they could be rolled about by children with relative ease and therefore became potentially dangerous instruments when left unguarded and unsecured in a public playground to be subjected to whatever treatment or use the minds and energies of curious and naturally mischievous youngsters could devise. Under these circumstances, whether the construction company exercised reasonable care was a question that should have been submitted to the jury for its determination."

Terranella v. Union Building & Construction Co., 70 A.2d 753, 756 (N.J. 1950).

The eight-year-old plaintiff was neither a trespasser nor a bare licensee on the land where the defendant's spool was located. He was an invitee with at least as much right to be there as the defendant's spool. Where both the child and the chattel have equal rights on the realty, the attractive nuisance doctrine ought to apply, and the Court should fashion an attractive nuisance doctrine applicable only to chattels which would be similar to the Restatement Rule with the following modifications indicated in brackets. 2 Restatement (Second) Torts § 339, at 197 (1965) states:

> "A possessor of [~~land~~ a chattel] is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the [~~land~~ chattel] if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to

> trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

My suggestion is consistent with the holdings, if not the language, in our prior cases and offers a good explanation for the results in this case and prior cases like Mondshour v. Moore, 256 Md. 617, 261 A.2d 482 (1970); Grube v. Mayor, etc., of Balto., 132 Md. 355, 103 A. 948 (1918); and Stansfield v. C. & P. Tel. Co., 123 Md. 120, 91 A. 149 (1914).

In Mondshour, supra, Kerry Mondshour, a six-year-old child, climbed on the rear wheel of a stopped Baltimore Transit Company bus to show a friend a "trick." When the bus started to move, the child was injured. Suit was filed on the child's behalf against Baltimore Transit Company and the bus driver. This Court held the child was a trespasser on the bus wheel and, therefore, not entitled to recover. Although the Court rejected plaintiff's attractive nuisance argument, it seems clear that the rear wheel of

a bus momentarily stopped on a public street could not be considered an attractive nuisance where children are likely to trespass. As a matter of law, there is no reason to anticipate that children will trespass on bus wheels while the bus is traveling its route.

In State v. Fidelity Warehouse Co., 176 Md. 341, 4 A.2d 739 (1939), an eleven-year-old child drowned while playing on defendant's raft moored in public waters alongside defendants property. To get to the raft, the child had to climb a two foot stone wall and trespass across defendant's property. We held there was no liability. In rejecting plaintiff's attractive nuisance argument, we stated:

> "In State v. Longeley, 161 Md. 563, 566, 158 A. 6, 7, it is said: `The doctrine of attractive nuisance has never been applied in this state, although this court has had before it [a number of] appealing cases in which it was strongly urged that the doctrine was applicable. Grube v. Baltimore, 132 Md. 355, 103 A. 948, 951; Baltimore v. De Palma, 137 Md. 179, 112 A. 277, 279; State, use of Lease, v. Bealmear, 149 Md. 10, 130 A. 66. It was said in the Grube case, supra, that it might be justly applied in some cases. But as it was not applied in that case it is safe to say that it would not be applied here under ordinary circumstances.'" (Emphasis added).

Fidelity, 176 Md. at 349, 4 A.2d at 742-43. A significant fact in Fidelity was that the child had to trespass on defendant's land to get to the raft.

Grube, supra, a case cited by the majority may actually support applying the Restatement form of attractive nuisance

doctrine where children trespass on the defendant's chattels but not on the defendant's land. In Grube, a young boy climbed on an electric pole located in a school yard. He fell off, was injured, and sued the city and the electric company which erected the pole. Prior to the accident, the electric company had removed the lower level spikes used to climb the pole to prevent children from being able to climb the pole. This Court first analyzed the evidence as follows:

> "[T]he uncontradicted fact is that spikes had been removed from the lower part of the pole, so a boy could not reach one from the ground, and everything that could reasonably be expected or required was done, unless it be that the pole was not removed. There was, in our judgment, no obligation on either of the defendant's to remove the pole."

Grube, 132 Md. at 360, 103 A. at 950. From those facts, we went on to hold:

> "The doctrines of attractive nuisances, implied invitations, etc., may be justly applied in some cases, but in this case we can find no just or reasonable ground upon which a recovery can be had." (Emphasis added).

Grube, 132 Md. at 361, 103 A. at 951. This Court did not merely hold that the child was a trespasser on the pole, we carefully analyzed why there was no negligence and why the attractive nuisance doctrine was not applicable.

In Stansfield, supra, an adult was injured when he climbed a telephone pole located on a public street. There could be no claim of "attractive nuisance" because the injured plaintiff was an

adult. In Hicks v. Hitaffer, 256 Md. 659, 261 A.2d 769 (1970), where a boy was injured by the explosion of a .22 caliber blank cartridge taken from a car parked on defendant's property, we noted that plaintiffs did not "advocate the adoption of the attractive nuisance doctrine in any form." 256 Md. at 666-67, 261 A.2d at 772. In addition, the child was a trespasser on the land where the bullets were found.

In Hensley v. Henkels & McCoy, Inc., 258 Md. 397, 265 A.2d 897 (1970), we rejected the attractive nuisance doctrine where a boy swinging on a rope was injured because the boy was a trespasser or licensee on real property owned by one defendant and occupied by the other defendant. We did reject the attractive nuisance doctrine, but noted the child "was not allured, induced, invited, or persuaded by the licensor to enter onto the right of way nor to swing upon the ropes." 258 Md. at 412, 265 A.2d at 905.

Thus, although Maryland has steadfastly rejected any form of the attractive nuisance doctrine where children are trespassers or licensees on the defendant's real property and although there is broad language rejecting the attractive nuisance doctrine in any form, the results in our prior cases are not inconsistent with a limited form of attractive nuisance doctrine where the defendant leaves personal property which could constitute an attractive nuisance on someone else's land where children are invitees on the land. In the instant case, the traditional landowner's liability limitations should not protect BGE because BGE was not the

landowner, and the owner of the property, where BGE left its attractive nuisance, invited children on the property. The children had at least as much right on the property as did the BGE spool.

If we adopt my suggestion, then Harper, James, and Gray will at least have to partially modify their apparent criticism that:

> "By 1985 there were only about three states that had adopted neither the attractive nuisance doctrine nor a substitute such as the `dangerous instrumentality' rule ... nor the Restatement view. Of these states only one, Maryland, had reaffirmed its position in unqualified form in recent years. See Murphy v. Baltimore Gas and Elec. Co., 290 Md. 186, 428 A.2d 459 (1981); Osterman v. Peters, 260 Md. 313, 272 A.2d 21 (1971)."

5 Fowler V. Harper et al., The Law of Torts § 27.5, at 166 (2d ed. 1986). See also 3 J. D. Lee and Barry A. Lindahl, Modern Tort Law: Liability & Litigation § 30.01, at 57 (1988)("Almost all states have adopted the attractive nuisance doctrine.")(footnote omitted).

The overwhelming majority of those states which still cling to the old premises liability theories at least ameliorate the harshness of the doctrines by adopting the attractive nuisance exception for children. Although we are not ready to adopt the attractive nuisance doctrine to child trespassers on a defendant's real property, we should adopt the doctrine for children who are injured while trespassing on a defendant's personal property which is negligently left by the defendant on someone else's land.

The majority and I agree that BGE could be liable if it

negligently failed to foresee that a child could be injured by this spool. The majority would permit liability for negligence because it concludes the child did not trespass on the defendant's spool. I believe the child did trespass on the defendant's spool, but would permit liability for negligence under the attractive nuisance doctrine because the child was an invitee on the land where he was injured.

Judge Bell has authorized me to state that he joins in this concurring opinion.