

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.

OPINION BY MURPHY, C.J.

Chasanow and Bell, JJ., concur.

Eldridge, J., concurs in result only.

Filed: March 28, 1995

This case focuses upon tort duty principles associated with injuries sustained by a minor upon using personal property owned by the defendant, but located on premises not owned nor controlled by the defendant.

I

On September 1, 1992, Tyrone Lane, a minor, through his mother, filed a complaint against the Baltimore Gas and Electric Company (BGE), alleging that he was injured as a result of BGE's negligence. Specifically he averred that in June of 1985 employees of BGE were engaged in construction and maintenance activities near a day care center and community laundromat in the Meade Village area of Anne Arundel County; that when BGE employees finished their work, they "carelessly caused to remain unattended, unmarked, and unsecured, a large empty wooden cable spool, weighing nearly 1/2 ton, in an area known by the Defendant to be frequented by children in the community;" that BGE was the owner of the spool; that on June 16, 1985, Lane was a resident of Meade Village and was an invitee on a nearby playground belonging to Meade Village Housing Project, and that he "was engaged in play with other minor children on or about the . . . spool, whereupon it was caused to roll over [his] face, head and body" and thereby injure him. The injury, the complaint stated, was caused by BGE's negligence in that it "knew or should have known by the exercise of reasonable care that the . . . spool was unreasonably dangerous for . . . children . . . who might come in contact with it." It was further alleged that BGE was negligent in that it (1) did not remove the spool when the work was finished; (2) did not post

warnings on the spool; (3) did not attempt to restrict access to it by fencing it in, and (4) did not secure it so that it would not roll. The complaint emphasized that BGE knew the spool created a serious risk of injury and knew the area in which the employees left the spool was "frequented by children."

BGE answered, generally denying liability and raising, among others, the defenses of contributory negligence, failure to state a claim, and assumption of risk. BGE later filed a motion for summary judgment on the ground that Lane was a trespasser to the spool and consequently BGE owed him no duty other than to avoid willfully or wantonly injuring him. BGE further maintained that, as matters of law, (1) Lane's injuries were not proximately caused by BGE's alleged negligence; (2) Lane assumed the risk of injury, and (3) Lane was contributorily negligent. In Lane's deposition, which accompanied BGE's motion for summary judgment, he said that employees, whom he believed were from BGE, had been working near the laundromat the week before his injury; that he had seen the spool at the work site; that on Sunday, the day of the accident, he first noticed the spool while it was being pushed by a boy onto the playground where he was playing at the time; that he watched as some boys rode the spool down a hill; and that he, Lane, mounted the spool and attempted to ride it down the hill, but as it accelerated, he got scared and jumped off, after which the spool rolled over him, causing his injuries. He also stated that the spool had some writing on the side, but that he could not remember what it said. In addition, BGE submitted the deposition of Antonio

Harold, Lane's cousin, who claimed to have witnessed the injury and the events leading up to it. Harold stated that he saw workers from BGE and from a company called "Riggs and Diggs" working near the laundromat the week before the accident; that the spool had been there for two or three days before the accident; that, on the day of the accident, he saw about five boys moving the spool from its location near the laundromat; that Lane was not one of these boys; that the boys rolled the spool to a hill on a nearby baseball field; that Lane was present when they rolled the spool down the hill a few times without anyone riding it; that Lane watched as the other boys rode the spool about twelve times cumulatively; that Lane then rode the spool once successfully; and that on his second ride Lane fell off and was injured. The circuit court granted BGE's motion for summary judgment without stating reasons.

Lane appealed to the Court of Special Appeals, which reversed the circuit court in an unreported opinion. It declined to apply the trespasser rule, apparently concluding that the rule applied only to trespassers to real property. The court noted that BGE "decided to leave the spool on property it did not own or occupy without considering whether neighborhood children would be likely to do the very thing they were doing when [Lane] was injured." The court further observed that the spool "was left in front of a day care center and in close proximity to a public playground."

Concerning proximate cause, the court noted the intervening action of the boys moving the spool onto the playground, but said that intervening acts break the chain of proximate causation only

when they are unforeseeable. Explaining that foreseeability is a question of fact, the court held: "Reasonable persons could ... conclude that it is foreseeable that children would move the spool to a nearby playground."

The court also stated that it could not hold as a matter of law that Lane was contributorily negligent or that he assumed the risk of injury. We granted certiorari to consider whether the trespasser rule should preclude liability in this case and whether, as a matter of law, BGE's negligence was not a proximate cause of Lane's injury.

II.

Concerning summary judgment, Maryland Rule 2-501(e) provides: "The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." In determining whether a party is entitled to judgment under this rule, the court must view the facts, including all inferences, in the light most favorable to the opposing party. Beard v. American Agency, 314 Md. 235, 246, 550 A.2d 677 (1988); Kramer v. Bally's Park Place, 311 Md. 387, 389, 535 A.2d 466 (1988); Liscombe v. Potomac Edison Co., 303 Md. 619, 621-22, 495 A.2d 838 (1985). The trial court will not determine any disputed facts, but rather makes a ruling as a matter of law. Scroggins v. Dahne, 335 Md. 688, 691, 645 A.2d 1160 (1994); Southland Corp. v. Griffith, 332 Md. 704, 712, 633 A.2d 84 (1993); Beatty v. Trailmaster, 330 Md. 726, 737,

625 A.2d 1005 (1993). The standard of appellate review, therefore, is whether the trial court was legally correct. See, e.g., Southland, supra, 332 Md. at 712.

III.

To succeed in a negligence action, the plaintiff must establish the following: "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty." Rosenblatt v. Exxon, 335 Md. 58, 76, 642 A.2d 180 (1994). This case presents questions of duty and proximate causation.

A.

BGE argues that Lane was a trespasser to whom it owed no duty other than to refrain from willfully or wantonly injuring him. It asserts that the trespasser analysis applies to personal property as well as to real property, and that Lane trespassed upon BGE's personal property without its permission. BGE further argues that, consistent with our previous cases, we should not recognize any special exception to the trespasser rule because of Lane's youth.¹ Lane argues, on the other hand, that this is a simple negligence case to which the trespasser concept does not apply. That concept applies, Lane contends, only when the defendant is an owner or

¹ BGE refers to our express rejection of the so called "attractive nuisance doctrine." See, e.g., Murphy v. Baltimore Gas & Elec., 290 Md. 186, 195, 428 A.2d 459 (1981).

occupier of land, not personal property.

We have long recognized that a possessor of property owes a certain duty to a person who comes in contact with the property. E.g., Wagner v. Doeiring, 315 Md. 97, 101, 553 A.2d 684 (1989). The extent of this duty depends on the person's status while on the property. Id. at 101; Rowley v. City of Baltimore, 305 Md. 456, 464-65, 505 A.2d 494 (1986). Maryland law recognizes four classifications: invitee, licensee by invitation, bare licensee, and trespasser. Wagner, supra, 315 Md. at 101-02. To an invitee -- one on the property for a purpose related to the possessor's business -- the possessor owes a duty of ordinary care to keep the property safe for the invitee. Id. at 102. To a licensee by invitation -- essentially a social guest -- the possessor owes a duty to exercise reasonable care to warn the guest of dangerous conditions that are known to the possessor but not easily discoverable. Id. To a bare licensee -- one on the property with permission but for his or her own purposes -- the possessor owes a duty only to refrain from willfully or wantonly injuring the licensee and from creating "new and undisclosed sources of danger without warning the licensee." Id. (quoting Sherman v. Suburban Trust Co., 282 Md. 238, 242, 384 A.2d 76 (1978)). To a trespasser -- one on the property without permission -- the possessor owes no duty "except to refrain from willfully or wantonly injuring or entrapping the trespasser." Id.

Two points regarding the duty of the possessor of property are often overlooked in this area of the law which is sometimes

labelled, too narrowly, "landowner liability" or "premises liability." First, the property need not be real property. The same principles apply to personal property as to real property. See, e.g., Murphy, supra, 290 Md. at 191 n.3 (1981) ("Whether the property being used is personalty or realty is of no consequence in the present cases because it is clear that the same common law rule [concerning duty to trespassers] applies to both types of property."); Restatement (Second) of Torts § 217, Comment a ("[T]he fact that one person is a trespasser [to a chattel] is important in determining the duty of care owing to him by the possessor of the chattel.").² It is possible, therefore, for a person to trespass upon personal property without trespassing on the real property upon which the personal property sits. See Mondshour v. Moore, 256 Md. 617, 619-20, 261 A.2d 482 (1970) (assigning trespasser status to a child who stepped up onto a wheel of a transit bus while the bus was sitting at an intersection of public streets); Grube v. Mayor, etc., of Balto., 132 Md. 355, 103 A. 948 (1918) (holding a boy to be a trespasser to an electric pole and stating "while he had the right to be in the yard he had no right to get upon the pole"); Stansfield v. C. & P. Tel. Co., 123 Md. 120, 91 A. 149 (1914) (holding a man to be a trespasser or a "mere licensee" when he climbed onto a telephone pole located in a public street).

Second, it is the possession of property, not the ownership, from which the duty flows. In Rowley, supra, 305 Md. at 464, we

² Restatement (Second) of Torts is hereinafter cited as "Restatement."

said:

"In determining whether the City as owner of the Convention Center owed a duty to invitees, we must consider the threshold question of whether the City was in possession and control of the building. The liability of a landowner for injuries received on the land is dependent upon whether the device which caused the injury is in his possession and control. Section 328 [E] of the Restatement defines an owner and occupier of land in terms of a possessor of land...."

See also W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 57, at 386 (5th ed. 1984) ("Largely for historical reasons, the rights and liabilities arising out of the condition of land, and activities conducted upon it, have been concerned chiefly with the possession of the land, and this has continued into the present day.") (emphasis added).³ Possession involves both the present intent to control the object and some ability to control it. Restatement §§ 216, 328 E. See also Rowley, supra, 305 Md. at 464 (quoting Restatement § 328 E); Oliver Wendell Holmes, Jr., The Common Law 238 (stating that a person has possession when "he has the present intent and power to exclude others").

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. The former possessor is not relieved, however, of its duty to exercise reasonable care in the manner in which it gives up possession. It

³ While these authorities write in terms of possession of land, Maryland courts, as we explained above, apply the same rules to personal property as they do to real property.

can endeavor to retain control over the property or to relinquish possession in a prudent manner, and it may incur liability, at least, for breaching its duty of reasonable care in these endeavors.

The former possessor cannot escape this liability by asserting that the plaintiff trespassed on the property which was no longer in its possession. A person cannot trespass to property unless another person has possession of the property.⁴ See Restatement § 217 ("A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another.") (emphasis added); Restatement § 329 (defining trespasser to land as "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise") (emphasis added). The ability to claim that another person is a trespasser is part of the right to exclude all others

⁴ According to § 219 of the Restatement, the true owner may still recover under a trespass to chattels theory in the following limited circumstances even when it has lost possession:

"(a) the chattel is impaired as to its condition, quality, or value, or (b) the person entitled to immediate possession is deprived of the use of the chattel for a substantial time, or (c) bodily harm is thereby caused to the person entitled to immediate possession, or harm is caused to some person or thing in which he has a legally protected interest."

None of these things happened, however, in this case. Therefore, BGE could not maintain an action against Lane for trespass to chattels.

from the property, which is an incidence of possession.⁵ See Keeton, supra, § 58, at 393 ("The possessor of land has a legally protected interest in the exclusiveness of his possession."); Restatement § 333, comment b ("The possessor's immunity from liability [to trespassers] is based upon his privilege, as possessor...."). Therefore, 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.

Accordingly, Lane cannot be a trespasser to the spool if BGE, at the time of the alleged trespass, had given up all physical control over the spool and had indeed lost possession of it (actual and constructive). Viewing the facts in the light most favorable to Lane, the finder of fact could conclude that BGE had lost possession of the spool when some other neighborhood children -- not including Lane -- took possession of it for recreational purposes (i.e., to ride it down a nearby hill).⁶ Further, the

⁵ This right is also protected by the criminal laws, the torts of trespass and conversion, and the legally recognized privilege to use reasonable force to defend possession of property.

⁶ We do not decide in this case whether the neighborhood children who originally took possession of the spool, removing it from its place of rest, would have been considered trespassers if any of them had asserted a claim against BGE. We note, however, that their status may be different from Lane's status, depending on whether BGE, in the eyes of the law, could be considered to be in possession of the spool even after it was left in the neighborhood. We 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. On the other hand, ruling that BGE lost possession of the spool when the employees left it unattended in the neighborhood might be inconsistent with concept of possession as it is generally applied in other areas of the law. Comment c to § 216 of the Restatement

fact-finder could determine that Lane came in contact with the spool only after the other children took possession of it, moved it to the community playground, and began rolling it down a hill.⁷ Based on these findings, the fact-finder could decide that Lane was not a trespasser to the spool. Then, the trier of fact could consider whether BGE, as a former possessor of the spool, breached a duty of care by failing to maintain adequate control over the spool. We hold, therefore, that the circuit court's grant of summary judgment cannot be supported by a conclusion, as a matter of law, that Lane was a trespasser.

Our decision is consistent with cases similar to the instant case, in which the plaintiff was arguably a trespasser to personal property rather than to land. In Murphy, supra, 290 Md. at 188-89,

states:

"Cases arise in which one who has been in possession of a chattel temporarily relinquishes physical control of it, without abandoning the chattel. In such a case, so long as no other person has obtained possession by acquiring physical control over the chattel with the intention of exercising such control on his own behalf, or on behalf of another, the law protects the property interest by attributing the possession to the original possessor."

⁷ Because Lane was not a trespasser upon the community playground, we need not decide in this case whether the owner of a chattel who loses possession of it may be relieved of liability because the person injured on the chattel was, at the time of the injury, a trespasser to land owned by a third party. See Texas Company v. Pecora, 208 Md. 281, 296, 118 A.2d 377 (1955), (noting but not approving or disapproving a jury instruction that if the jury found the plaintiffs to be trespassing on the land possessed by one defendant, the owner of a gas tank left on the property was also to be relieved of liability).

the plaintiff had been bowling and returned to his car parked in the parking lot of the bowling alley. He noticed that his citizen's band radio was missing and approached several teenage children to question them about the radio. As he approached, he heard a noise that sounded like a trash dumpster closing. Thereafter, he proceeded to the side of the building and lifted the lid off of what he thought was a trash dumpster but was actually an enclosed electric transformer. He could see nothing but darkness inside the unit, so he returned to the bowling alley to wait for the police. Growing impatient, he returned to the unit, and felt around inside with his hand. As he did so, he received a severe electric shock. We held that he was a trespasser to the electric company's property. Evidence showed that the unit had been locked and that sometime within the preceding two weeks, the lock had been broken off by some unknown person. Nevertheless, the plaintiff could not have contended that BGE lost possession of the transformer unit because even though the lock had been removed, the unit remained covered and was permanently affixed to the ground.

In Mondshour, supra, 256 Md. at 618-19, Mondshour and a friend were at a Baltimore City intersection at which a transit bus had stopped. Mondshour stepped up onto the wheel of the bus and tried to reach the bus window. The bus started to move and Mondshour was pulled under the wheel, which crushed his right leg and pelvis. We held him to be a trespasser to the bus, it being apparent that the bus company's agent, the driver, had possession of the bus at the time of the incident.

In State v. Fidelity Warehouse Co., 176 Md. 341, 4 A.2d 739 (1939), a boy drowned when he attempted to use a raft that was moored in public waters along the defendant's property. We held: "The child was a trespasser." Id. at 345. Even though the raft was physically located in public waters, the defendant clearly had maintained possession of the raft. It was moored next to the defendant's property and there was no allegation "that it was carelessly or unlawfully moored." Id. at 344. Furthermore, the only way to reach the raft by land was to jump over a two-foot stone wall and trespass on the defendant's land. Id. at 345.

In Grube, supra, 132 Md. at 356-57, a young boy, climbed an electric pole located in a school yard where children regularly played. He fell off the pole and was injured. We held that the boy was a trespasser. We noted that children had been ordered away from the pole and that the spikes used to climb the pole had been removed as far up as a child could reach. We concluded that the defendants had done "everything that could reasonably be expected or required" except moving the pole. Id. at 360. The implication from our discussion was that the defendants were clearly in possession of the pole, having maintained control over it.

In Stansfield, supra, 123 Md. at 122-23, a man was injured when he climbed a telephone pole located in a public street. We concluded that he was, at best, a bare licensee. We based our decision, in part, on our conclusion that the poles "were the defendants' property and were necessarily subject to their control in order that their obligations to the public might be performed

and that their own interests might be protected." Id. at 123. In essence, we deemed the defendants to be in possession of the telephone pole.

BGE relies heavily on two cases in which children removed personal property from a defendant's land and were thereafter injured by the property. See Hicks v. Hitaffer, 256 Md. 659, 261 A.2d 769 (1970) (boy injured by explosion of .22 caliber blank cartridge); Kirby v. Hylton, 51 Md.App. 365, 443 A.2d 640 (1982) (boy fatally injured when 1,850 pound drain pipe rolled over him). Both cases, however, are distinguished from the present case because in each the injured boy was no more than a bare licensee on the land from which he removed the personal property.

BGE also relies on Hensley v. Henkels & McCoy, Inc., 258 Md. 397, 265 A.2d 897 (1970), in which a boy began swinging on a rope that was being used by a contractor at a work site. While the boy was swinging, the contractor began taking up the slack in the rope, and the boy was lifted off the ground. Eventually, the boy could not hold on any longer, fell off, and was injured. We refused to grant the boy any status greater than a bare licensee. The case, however, is distinguishable from the present case in two important respects. First, the contractor was clearly in possession of the rope at the time the boy came in contact with it. Second, the boy never claimed any status on the land greater than that of a bare licensee.

B.

BGE argues that the alleged negligence of leaving the spool in

a neighborhood cannot be, as a matter of law, the proximate cause of Lane's injury. The chain of causation was broken, BGE argues, by two intervening events: 1) the children moving the spool from its original location to a nearby park, and 2) Lane "riding" the spool down the hill. BGE further characterizes the events that occurred in this case as "completely unforeseeable." Lane argues, on the other hand, that the children's use of the spool in the circumstances was easily foreseeable.

The element of proximate cause is satisfied if the negligence is 1) a cause in fact of the injury and 2) a legally cognizable cause. See, e.g., Hartford Ins. Co. v. Manor Inn, 335 Md. 135, 156-57, 642 A.2d 219 (1994). The second of these inquiries is essentially one of fairness and social policy. Scott v. Watson, 278 Md. 160, 171, 359 A.2d 548 (1976). We have, nevertheless, established guidelines in determining whether a defendant's actions will be considered a proximate cause of an injury. In some cases, an intervening event itself causes the injury, thereby superseding the original negligence of the defendant and breaking the chain of causation. Hartford Ins., supra, 335 Md. at 157. Not all intervening events, however, are what have become known as superseding causes. We have held that "a defendant guilty of primary negligence remains liable 'if the intervening event is one which might, in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation.'" Atlantic Mutual v. Kenney, 323 Md. 116, 129, 591 A.2d 507 (1991)

(quoting State v. Hecht Company, 165 Md. 415, 421, 169 A. 311 (1933)). In cases involving intervening negligent acts, we have held:

"If the negligent acts of two or more persons, all being culpable and responsible in law for their acts, do not concur in point of time, and the negligence of one only exposes the injured person to risk of injury in case the other should also be negligent, the liability of the person first in fault will depend upon the question whether the negligent act of the other was one which a man of ordinary experience and sagacity, acquainted with all the circumstances, could reasonably anticipate or not. If such a person could have anticipated that the intervening act of negligence might, in a natural and ordinary sequence, follow the original act of negligence, the person first in fault is not released from liability by reason of the intervening negligence of another."

Hartford Ins., supra, 335 Md. at 160 (quoting Kenney, supra, 323 Md. at 131).⁸ Essentially, the intervening negligence is not a superseding cause if it is reasonably foreseeable. Kenney, supra, 323 Md. at 129-32; Little v. Woodall, 244 Md. 620, 626, 224 A.2d 852 (1966); Penn. Steel Co. v. Wilkinson, 107 Md. 574, 581-82, 69 A. 412 (1908).

This foreseeability inquiry is ordinarily a question of fact to be decided by the finder of fact. In this regard, we have said: "The true rule is that what is proximate cause of an injury is

⁸ In cases involving intervening crimes or intentional torts, we have applied a two part standard under which the intervening act is not a superseding cause if 1) it was a foreseeable result of the defendant's negligence and 2) a reasonable person would have recognized the enhanced risk created by the defendant's negligence. Scott, supra, 278 Md. at 172-73. Normally, we apply this standard when the third party commits the tort or crime against the plaintiff, not against the defendant or some third party as may have happened in this case when the children moved the spool. See id. (applying the standard in wrongful death and survivor's actions where a third party had killed the plaintiff's decedent).

ordinarily a question for the jury. It is only when the facts are undisputed, and are susceptible of but one inference, that the question is one of law for the court...." Lashley v. Dawson, 162 Md. 549, 563, 160 A. 738 (1932). See also Little, supra, 244 Md. at 626; Texas Company v. Pecora, 208 Md. 281, 293-94, 118 A.2d 377 (1955); Restatement § 453.

In light of these cases, the granting of summary judgment on the proximate cause issue was not appropriate. 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 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.

BGE has attempted to analogize the facts before us to those involved in Hartford Ins., supra. In that case, a defendant was alleged to be negligent in leaving keys in the ignition of a van, with the doors unlocked. Wewer, the plaintiff's insured, was injured when a third party stole the van and then negligently drove it into Wewer's car. We concluded that it was reasonably foreseeable that a thief would take a van with keys left in the ignition, but that it was not so clear "that the thief would drive negligently, and even more unclear that, in doing so, he or she would injure the plaintiff." Id. at 160. The sequence of events in the present case, however, was more foreseeable. We think that

children moving a spool left in a neighborhood, and another child riding it down a hill and getting injured is more probable than a thief stealing a car, driving negligently and injuring someone. Accordingly, the matter of foreseeability is one of fact, and not of law, and is not appropriate for resolution by summary judgment in the circumstances of this case.

JUDGMENT OF THE COURT OF SPECIAL
APPEALS AFFIRMED, WITH COSTS.

Judge Eldridge concurs in the result only.