BOGART V. HESTER, 1959-NMSC-098, 66 N.M. 311, 347 P.2d 327 (S. Ct. 1959)

Harold L. BOGART, Plaintiff-Appellant,
vs.
Evelyn HESTER, Administratrix of the Estate of E. L. Hester, deceased, d/b/a Hester Mud Company and American Tank and Steel Company and James C. Engelbrecht, Defendants-Appellees

No. 6439

SUPREME COURT OF NEW MEXICO

1959-NMSC-098, 66 N.M. 311, 347 P.2d 327

November 25, 1959

Motion for Rehearing Denied December 23, 1959

Action against mud company and steel company for injuries sustained when tank in mud company's yard was being loaded on truck for delivery to steel company and became disengaged and fell on plaintiff. The District Court, San Juan County, C. C. McCulloh, D.J., granted summary judgment for defendants and dismissed complaint, and plaintiff appealed. The Supreme Court, John R. Brand, D.J., held that where mud company's foreman, who lived on company yard, was visited by plaintiff who sought to borrow tool and plaintiff at request of foreman assisted in loading tank on truck and was injured when tank dropped and pinned him, plaintiff was a volunteer and in absence of authority of foreman to put plaintiff to work or an emergency which would have given foreman authority to do so, plaintiff was not entitled to recover from defendants for injuries sustained.

COUNSEL

McAtee, Toulouse & Marchiondo, B. J. Stephens, Albuquerque, for appellant.

Brown & Wood, Farmington, for American Tank & Steel and Engelbrecht.

Seth Montgomery, Federici & Andrews, Santa Fe, for Hester Mud Co.

JUDGES

John R. Brand, District Judge. McGhee, Compton, and Carmody, JJ., concur. Lujan, C.J., dissenting.

AUTHOR: BRAND

OPINION

*{*312}* **{1}** Plaintiff Harold L. (Louie) Bogart lived at Farmington about a block from the premises of Hester Mud Company, for whom he had formerly worked. His uncle, Carl Rucker, was employed by Hester Mud Company as a foreman, and lived on the *{*313}* Mud Company yard. On the day of the accident, Bogart, who often visited his uncle, to the knowledge of Mr. Hester, went to the mud yard to borrow a tool from his uncle with which to repair an air-conditioner at his house. While there talking to the uncle, the defendant James Engelbrecht, a truck driver for defendant American Tank & Steel Company, entered the shop where they were and asked Rucker if he would help him load the tank, for which be had been sent onto the truck. The tank belonged to Hester and was to be returned to American Tank to have skids attached to it. Rucker, agreeing to assist in the loading, went with Engelbrecht, and plaintiff and several others followed and sat down near the tank to watch the loading operation. Among the spectators was one Lobato, another of Hester's employees.

{2} Sometime previously, Rucker had built a chain hoist to be used in the mud yard for lifting heavy objects, and it had been used in loading tanks such as was to be done in this case. The hoist was hung on rollers and was not level, being lower at one end, so that when an object was lifted it would move or travel to the low end unless prevented.

{3} Rucker prepared to lift the tank by placing a steel crossarm attached to the hoist through the manhole in the top of the tank and then climbed onto an adjacent tank and commenced raising the one to be loaded. Engelbrecht started his truck motor and prepared to back under the tank when it was lifted high enough to allow his truck to be placed beneath it. Before the tank was in proper position, however, it started to travel to the low end of the hoist and toward Rucker. He, seeing that unless stopped it would move so close to him as to prevent him from controlling it, cried, "Louie, give me a hand]", whereupon plaintiff (Louie) sprang to help. He grasped the tank to steady it, and at that instant the crossarm by which it was suspended disengaged, the tank dropped and pinned plaintiff against a nearby parked truck, causing him bodily injuries.

{4} Plaintiff brought this action for damages claiming that he was invited onto the premises; that Rucker, in the scope of his employment for Hester, requested his assistance in loading the tank; that Engelbrecht also requested his assistance, and that he volunteered to assist; that Hester Mud Company was negligent in the method by which the tank was rigged to be hoisted, and that its employee Rucker negligently operated the hoist; that Engelbrecht was negligent in backing his truck into the tank and causing it to fall while it was being hoisted, and that American Tank is liable for his negligence. Plaintiff later filed an affidavit in which be asserted that he knew that the hoist being used had been faultily installed, in that one end was lower than the other; and that the bar to be inserted in the opening in the tank was too short for such purpose, *{*314}* and was inadequate. Bogart had previously used this hoist in loading tanks while working for Hester.

{5} Sometime previously, Rucker had built a chain hoist to be used in the mud yard for lifting heavy objects, and it had been used in loading tanks such as was to be done in this case. The hoist was hung on rollers and was not level, being lower at one end, so that when an object was lifted it would move or travel to the low end unless prevented.

DISSENT

{6} In addition, some courts which do not make a distinction between injuries resulting *{*323}* from a condition of the premises and those resulting from active operations, and which may even purport to follow the "wilful-wanton" rule, actually reach the same result in a circuitous manner. They simply hold that to be actively negligent in the presence of a known trespasser or licensee amounts to willfulness and wantonness. See Cox v. Terminal R. Ass'n of St. Louis, 331 Mo. 910, 55 S.W.2d 685; James, Tort Liability of Occupiers of Land, 63 Yale L.J. 144, 177 (1953); Prosser on Torts, note 95, p. 630 (1941) 2 Harper and James, The Law of Torts 27.6 (1956); Bohlen, Fifty Years of Torts, 50 Harvard L. Rev. 725, 737.

{7} Assuming the majority opinion is correct in holding that when a licensee or invitee volunteers aid to a land occupier or his employee upon request, he loses his licensee or invitee status, what category does he then fall in? For the purpose of determining the standard of care which the occupier owes to him he is classified as a trespasser. The following quotation from 38 Am. Jur., Negligence, p. 767, a text which the majority cite frequently, recognizes this principle:

"A licensee who exceeds the permission given him becomes a trespasser."

{8} In 4 Thompson, Negligence, 4680, written in 1904, the author recognizes that a person who volunteers to assist the servant of another without being employed to do so can recover for injuries received only if a trespasser or "bare" licensee could recover. Marshall & E. T. Ry. Co. v. Sirman, Tex. Civ. App., 153 S.W. 401; Reaves v. Catawba Mfg. & Electric Power Co., 206 N.C., 523, 174 S.E. 413; Southern Ry. Co. v. Duke, 16 Ga. App. 673, 85 S.E. 974.

{9} What then is the duty owed by a land occupier to a known trespasser in the conduct of active operations as distinguished from a condition of the premises? The majority rule in this country holds land occupiers liable for injuries caused by active negligence to known trespassers. Prosser on Torts, p. 436, (1955 Ed.) states this enlightened principle as follows:

"The great majority have discarded wilful or wanton' entirely as a limitation, and have said outright that once the presence of the trespasser is discovered, or the owner is otherwise notified of his danger, there is a duty to use ordinary care to avoid injuring him, as in the case of any other human being. The defendant is required to govern his **active** conduct, such as running a train, conducting a circus, or operating an elevator, with the caution of a reasonable man for the trespasser's safety." (Emphasis added)

{10} In 2 Harper and James, The Law of Torts, p. 1464, (1956), the authors state that under one form or another, the above rule has been adopted by a vast majority of American jurisdictions. Peaslee, Duty to *{*324}* Seen Trespassers, 27 Harv.L. Rev. 403, (1914); Eldredge, Tort Liability to Trespassers, 12 Temple L.Q. 32 (1937); Herrick v. Wixom, 121 Mich. 384, 80 N.W. 117, 81 N.W. 333; Krause v. Watson Bros. Transp. Co., 119 Colo. 73, 200 P.2d 387. Ryan v. State, 13 Misc.2d 282, 177 N.Y.S.2d 922; Friedman's Estate v. Texas & Pac. Ry. Co., 209 La. 540, 25 So.2d 88, 163 A.L.R. 1228.

{11} So we see that even if the appellant was transformed into a trespasser when he came to Rucker's aid, the majority opinion is still incorrect.

{12} Most of the reported cases which either support, or appear at first glance to support, the position taken by the majority of this court have turned on principles of law governing master and servant. A person, by merely volunteering his services to another, or by assisting the servants of another when such servants have no authority to employ assistance, cannot establish the relation of master and servant, and thereby create liability for injuries **under the rules of law governing master and servant**. Houston, E. & W. T. Ry. Co. v. Jackman, Tex. Civ. App., 217 S.W. 410.

{13} But the legal question in this case does not involve master-servant law. The issue is the duty owed by a landowner or occupier to a licensee, or perhaps to a known trespasser, in the conduct of active operations on the premises. In this regard the following statement by the court in Daugherty v. Spuck Iron & Foundry Co., Mo. App., 175 S.W.2d 45, 55, seems quite appropriate:

"* * * while a volunteer may not recover on the basis of being a servant, 'he yet may be entitled to the exercise of that degree of care owed to persons rightfully on the premises of the employer and may found his right of recovery on the general principles of negligence.'" Rook v. Schultz, 100 Or. 482, 198 P. 234.

{14} The conclusion reached by the majority that appellant assumed the risk **as a matter of law** is not only erroneous, it is quite superfluous under the majority's rationale of this case. If, as held by the majority, appellant is precluded from recovery regardless of whether appellees were negligent, the defense of assumption of risk has no bearing on the case whatsoever.

{15} The majority of the court have purported to ground their decision on the "volunteer" aspect and have stated that appellant's status as a trespasser, licensee or invitee is of "no consequence". Under such circumstances, I strongly feel that neither Chavez v. Torlina, 15 N.M. 53, 99 P. 690, nor Snider v. Town of Silver City, 56 N.M. 603, 247 P.2d 178, should be cited with approval. Neither case involved any so-called "volunteer" question.

*{*325}* **{16}** Being convinced that the majority opinion is retrogressive, wrong in law, and wrong in principle, I herewith register an emphatic dissent.