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Negligence--Last Clear Chance--Application of Doctrine Where Plaintiff Inattentive and Defendant Sees Plaintiff Killed and Had Opportunity to Realize Danger

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lief from the lease; and the majority doctrine permits it even under such leases. *Lilly v. National Sewer Pipe Co.*, 196 Iowa 1320, 195 N. W. 746 (1923); *Fritzler v. Robinson*, 70 Iowa 500, 31 N. W. 61 (1886); *Boyer v. Fulner*, 176 Pa. 282, 35 Atl. 235 (1896) (distinguishing *Timlin v. Brown*, *supra*). For a collection of cases, see 40 C. J. (1926) 1035. While the decision may work a hardship on the lessor, it is in line with the prior state of West Virginia authorities which it does not purport to extend to other types of leases.

J. H.

NEGLIGENCE—LAST CLEAR CHANCE—APPLICATION OF DOCTRINE WHERE PLAINTIFF INATTENTIVE AND DEFENDANT SEES PLAINTIFF AND HAD OPPORTUNITY TO REALIZE DANGER.—Decedent was killed by defendant's car at a point on defendant's tracks not a public crossing. Decedent was oblivious to the approach of the car, but was discovered by defendant's conductor before the accident, the evidence being conflicting as to whether the conductor could have avoided the accident by the use of due care after discovery of decedent's dangerous position. Verdict was given for defendant, but a new trial was granted because of refusal to give the instruction that if defendant knew or in the exercise of reasonable care should have realized decedent's danger and that he was oblivious thereto in time that defendant could have prevented injury to decedent, then decedent's negligence will not relieve defendant from liability. On appeal by plaintiff, *held*, that defendant's duty to use reasonable care to avert injury arises only after actual discovery and realization of decedent's position of peril. *Hall v. Monongahela West Penn Public Service Co.*, 37 S. E. (2d) 471 (W. Va. 1946).

If under these circumstances defendant realizes plaintiff's position of imminent peril and his apparent obliviousness to the approaching danger, and is then negligent, the majority of courts hold that plaintiff may recover. *Girdner v. Union Oil Co. of California*, 216 Cal. 197, 13 P. (2d) 915 (1932); *Pilmer v. Boise Traction Co.*, 14 Idaho 327, 94 Pac. 432 (1908); *Oklahoma R. R. v. Overton*, 158 Okla. 96, 12 P. (2d) 537 (1932). But as to what it is necessary for defendant to have discovered the authorities are in conflict. Some courts using the reasoning of the instant case hold that defendant must actually realize plaintiff's danger and that he was oblivious thereto, *Young v. Woodward Iron Co.*, 113 Ala. 330, 113 So. 223 (1927); *Pamarese v. Union Ry. of N. Y.*, 261 N. Y. 233, 185 N. E. 84 (1933), but the greater number apply an objective standard and require only that defendant have knowledge of the facts

creating the danger, and that plaintiff's peril and inattention be apparent to a reasonable man. *Pennsylvania R. R. v. Ressar*, 183 Ind. 287, 108 N. E. 938 (1915); *Virginia Ry. & Power Co. v. Smith Hicks, Inc.*, 129 Va. 269, 105 S. E. 532 (1921); see RESTATEMENT, TORTS (1934) §480.

In West Virginia, the decisions on this point are not clear. In *Bralley Adm'r v. Norfolk & Western Ry.*, 66 W. Va. 462, 66 S. E. 654 (1909), the court held it error to instruct the jury that defendant is liable for injuries to a trespasser when after the negligence in going upon the tracks the engineer by the exercise of ordinary care could have avoided injury to him, in that it ignores the element of knowledge on the part of the engineer of the drunkenness of the trespasser. Did the court mean by this that the engineer must actually have realized decedent's peril and inattentiveness, or only that the engineer have knowledge of the facts which made decedent's situation dangerous and that it be apparent to a reasonable man? It seems the courts applied the latter test since it was said that defendant should only be held liable if the engineer knew, or had reason to believe decedent to be intoxicated, thus distinctly intimating that defendant would have been liable if the engineer had actual knowledge of facts from which a reasonable man would have realized plaintiff's danger and inattentiveness. In *Raines v. Chesapeake & Ohio Ry.*, 39 W. Va. 50, 19 S. E. 565 (1894), it was held that if the engineer omits no duty after becoming aware of the trespasser's danger the company will not be liable for such injury. Here again the holding is ambiguous, since it is not clear whether the engineer must become aware only of the facts which create the danger, or whether he must in fact realize plaintiff's danger and his obliviousness to peril. Where plaintiff is not a trespasser the court has adopted the objective standard. It was held, in *Meyn v. Dulaney-Miller Auto Co.*, 118 W. Va. 545, 191 S. E. 558 (1937), that a negligent plaintiff oblivious to the impending danger may nevertheless recover where defendant knew of plaintiff's situation and under the circumstances in the exercise of reasonable care should have realized plaintiff's peril. This decision clearly indicates that defendant's liability should be determined by an objective standard, and other West Virginia decisions have extended the doctrine of last clear chance, where defendant is engaged in a dangerous activity, to permit plaintiff to recover even though his peril is not discovered by defendant, if by the exercise of ordinary care plaintiff's danger could have been discovered and the injury avoided. *Emery v. Monongahela West Penn Public Service Co.*, 111 W. Va. 699, 163 S. E. 620 (1932); *Smith v. Gould*, 110 W. Va. 579, 159 S. E. 53, 92 A. L. R. 28 (1931); *McLeod, Adm'r v. Charleston Laundry Co.*, 106 W. Va. 361, 145 S. E. 756 (1929). In none of these

cases was plaintiff a trespasser, so it would seem that it is only when plaintiff is a trespasser that the court abandons the objective test and measures liability by inquiring into the mental state of defendant, this being true even after plaintiff's dangerous situation actually has been perceived by defendant.

To stress actual knowledge of the plaintiff's peril on the part of defendant is to impose a standard other than negligence. Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. RESTATEMENT, TORTS (1934) §282. It is not a state of mind and the standard imposed by society is an external one which is not necessarily based on any moral fault of the individual. *Hamrick v. McCutcheon*, 101 W. Va. 485, 133 S. E. 127 (1926); *Sebrell v. Barrow*, 36 W. Va. 212, 14 S. E. 996 (1892). The test then is objective rather than subjective and the question, as to whether defendant took precautions a reasonable man would have been able to take under the circumstances is properly for determination by a jury. See Donley, *Observations of Last Clear Chance in West Virginia* (1931) 32 W. VA. L. Q. 362, 368; Donley, *Last Clear Chance—Some Further Observations* (1942) 49 W. VA. L. Q. 51.

C. W. W.