ADLER POLLOCK & SHEEHAN P.C.

FAST FIVE

RHODE ISLAND APPELLATE PRACTICE

PREMISES LIABILITY UPDATE: RHODE ISLAND SUPREME COURT HOLDS THAT 17-YEAR-OLD TRESPASSER CANNOT INVOKE THE ATTRACTIVE-NUISANCE DOCTRINE

In *Burton v. Rhode Island*, No. 2012-213-Appeal; 2012-268-Appeal, the Rhode Island Supreme Court held that a 17-year-old trespasser could not invoke the attractive-nuisance doctrine because he could not establish that he did not realize the risk of coming in contact with sulfuric acid. While the Court stopped short of holding that the attractive-nuisance doctrine can never be invoked by a 17-year-old, it devoted a significant portion of its decision to discussion of the origins of the doctrine and its application to "young children." *Id*. at 9. In the wake of *Burton*, it will be difficult for a 17-year-old trespasser to establish that he or she is "too young to appreciate the risk" that caused his or her injury and thereby invoke the attractive-nuisance doctrine.

In 1908, the Rhode Island School for the Feeble-Minded was founded as a small farm colony in rural Exeter, Rhode Island. *See* http://www.theladdschool.com. The school, which was later renamed the Ladd School, occupied nearly one square mile known as the Ladd Center consisting of 30 buildings, including dormitories, hospitals, a power plant and a fire station. *Id*. Since its closure in 1994, the Ladd Center has developed a reputation as being haunted. *Burton*, at 1.

In November 2005, after consuming several beers, 17-year-old Steven Burton and his four friends set out to explore the Ladd Center property. *Id.* Burton and his friends entered onto the property notwithstanding the posted "No Trespassing" signs and approached an abandoned hospital building secured by plywood over the first and second floor windows, chains on the doors and metal grates that had been welded shut. *Id*. at 2-3. Burton and his friends shimmied up a pipe and entered the building through a third-story window. *Id*. at 3. While inside exploring the building, the group discovered a Styrofoam box inside an unlocked locker. *Id*. Inside the box were four clear gallon-sized glass bottles, each of which was filled with a clear liquid. *Id*. To examine the bottles' contents, one of Burton's friends poured a small amount of the liquid onto a table. *Id*. When they did so Burton and his friends realized the liquid was not water and had a syrup-like consistency. *Id*. The group took three of the bottles, made their way to the first floor of the hospital and searched for an exit. *Id*. When they were unable to find a passable exit, the group kicked out a portion of the plywood that covered the exterior door and, one by one, exited the building through the opening. *Id*. As they slipped through the opening Burton's friend dropped one of the three bottles. *Id*. at 3-4. When the bottle broke, the liquid, which was later determined to be sulfuric acid, splattered on Burton and his friend. *Id*. Seconds later, Burton felt a burning sensation on his legs. *Id*. at 4. He tore off his clothes and ran screaming for his friend's truck. *Id*.

Nearly a year later, Burton filed suit against the State of Rhode Island, among others, alleging that it "negligently failed to inspect, repair and/or maintain its premises free from defect and/or dangerous condition." *Id*. After a bench trial, the Superior Court entered judgment in favor of the State, finding that Burton was a trespasser to whom the State owed no duty of care.

Id. at 4-5. Additionally, the trial justice ruled that the attractive-nuisance doctrine did not apply to the facts of Burton's case. *Id*. at 5.

On appeal, Burton conceded his status as a trespasser but argued that the trial justice erred in finding that the attractive-nuisance doctrine did not apply. *Id*. at 1, 5. Burton argued that he "did not fully realize the risk in taking the bottles of sulfuric acid." *Id*. at 5-6.

It has long been the law in Rhode Island that a landowner owes no duty of care to a trespasser except to refrain from injuring him wantonly or willfully after discovering his peril. *Tantimonico v. Allendale Mutual Insurance Co.*, 637 A.2d 1056, 1057 (R.I. 1994) (citing *Previte v. Wanskuck Co*., 90 A.2d 769, 770 (R.I. 1952)); *see also Hill v. National Grid*, 11 A.3d 110, 113 (R.I. 2011); *Cain v. Johnson*, 755 A.2d 156, 160 (R.I. 2000); *Bennett v. Napolitano*, 746 A.2d 138 (R.I. 2000); *Wolf v. Nat'l R.R. Passenger Corp.*, 697 A.2d 1082, 1085 (R.I. 1997). Consistent with Rhode Island law, other courts have made it clear that a trespasser "cannot hold the owner to liability based upon negligence in failing to make the premises safe." *Firfer v. United States*, 208 F.2d 524, 528 (D.C. Cir. 1953); *see also Bonney v. Canadian N.R. Co.*, 800 F.2d 274, 276 (1st Cir. 1986); *Young v. Burton*, 567 F. Supp. 2d 121, 133 n.7 (D.D.C. 2008). Rather, a trespasser takes the premises as he or she finds it and assumes all risks inherent therein. *Bonney*, 800 F.2d at 277. This rule is consistent with the common law's recognition that "[p]roperty owners have a basic right to be free from liability to those who engage in self-destructive activity on their premises without permission." *Tantimonico*, 637 A.2d at 1062.

Although as a general matter a landowner owes no duty of care to a trespasser, Rhode Island recognizes one exception to that general rule. In *Haddad v. First National Stores*, 280 A.2d 93 (R.I. 1971), the Rhode Island Supreme Court adopted the doctrine of attractive nuisance as set forth in Restatement (Second) Torts § 339 (1965), which recognizes that in certain

instances a landowner will owe a duty of care to trespassing children. In adopting the doctrine, the Court reasoned that "[t]here must and should be an accommodation between the landowner's unrestricted right to use of his land and society's interest in the protection of the life and limb of its young." *Id.* at 96. The Rhode Island Supreme Court later reaffirmed its holding in *Kurczy v. Saint Joseph Veterans Ass'n*, 820 A.2d 929, 945 (R.I. 2003).

To establish a duty of care on the part of a landowner, a trespassing child must prove, *inter alia*, that "because of [his] youth" he "[did] not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it." *Burton*, at 8 (citing Restatement (Second) Torts, § 339(c) at 197). Both the trial justice and the Supreme Court concluded that Burton "was old enough to appreciate the risk of breaking into an abandoned building and of transporting a substance he had reason to believe was hazardous." *Id.* at 10. Therefore, the State owed no duty of care to Burton when he trespassed on the Ladd Center property. *Id.*

While the Supreme Court did not hold that the attractive-nuisance doctrine could never be invoked by a 17-year-old, it noted in its decision that "in no case have we applied the attractive-nuisance doctrine to a child older than twelve years old." *Id.* at 7. Burton's age was plainly significant to the Court's holding that Burton "failed to establish that he was *too young* to appreciate the risk." *Id.* at 10 (emphasis added). Following *Burton*, it will be difficult for a 17-year-old trespasser to demonstrate that he or she was "too young to appreciate the risk" of a dangerous condition and, without such a demonstration, the 17-year-old will be treated as a trespasser to whom a landowner owes no duty of care.

For more updates on Rhode Island appellate law, pointers for practice before the Rhode Island Supreme Court and past editions of the Fast Five on Rhode Island Appellate Practice, please visit my blog site http://www.RIAppeals.com.

Nicole J. Benjamin
Counsel

nbenjamin@apslaw.com
www.apslaw.com

APS | ADLER POLLOCK & SHEEHAN P.C.

One Citizens Plaza, 8th Floor
Providence RI 02903
401.274.7200
fax 401.751.0604

175 Federal Street
Boston MA 02110
617.482.0600
fax 617.482.0604