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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001872-MR

CARROLL PYLES — APPELLANT

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
CIVIL ACTION NO. 02-CI-00288

JUDY LYNN DOLL WOODS;
RANDALL DOLL;
CYNTHIA DOLL;
DAVID DOLL;
JENNIFER HESSE;
AND JILL TINGLE; — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

MINTON, JUDGE: Carroll Pyles appeals from a summary judgment granted to the Doll family in a civil action stemming from injuries Pyles received when he fell through a decayed hayloft floor in the Doll family's barn. Because the Doll family did not breach any duty owed to Pyles, we affirm.

I. BACKGROUND.

In the summer or fall of 1996, Pyles contracted to rent the house on William Doll's farm. Since Doll was elderly and in declining health at the time, Pyles made the agreement with Doll's son, Charles M. Doll. The agreement was entirely oral and a month-to-month tenancy.

In addition to the farmhouse, Pyles was also allowed use of the outbuildings on the Doll farm, which included a large barn located some distance behind the house. He used the outbuildings and the barn for his part-time business of fabricating wrought iron into ornamental designs that he sold at flea markets and county fairs. Pyles used the barn primarily to store his raw materials.

Charles M. Doll died on May 1, 1998. Pyles continued to rent the farmhouse and outbuildings under the same terms. Following Charles's death, Pyles's primary contact with the Doll family became Doll's daughter, Judy Lynn Doll Woods, who lived nearby and who was caring for Doll in her home.

William Doll died testate on July 29, 2001. Doll's will devised the farm one-third to Judy; one-third to Jill Tingle, the daughter of Doll's deceased son Charles; and one-third to Randall W. Doll, Cynthia Doll, David Doll, and Jennifer Hesse, the four children of Doll's deceased son William Thomas Doll.

Judy was named executrix of the estate. And Pyles continued the rental arrangement unchanged. Judy continued to be the person with whom Pyles had direct contact concerning his continuing rental of the farm.

According to Pyles, during the time he lived on the farm, in addition to occupying the house and using the outbuildings, he occasionally helped on the farm. He occasionally tended cattle, mended fences, and bush-hogged the fields. Pyles was in and out of the barn on many occasions on his own business, helping with farm chores, and occasionally helping members of the Doll family with things they might be doing around the barn.

On December 23, 2001, Pyles went to the barn to inspect materials he stored there and to search for his missing cat. He went up in the hayloft and was walking on the north side of the loft when he fell through the floor. The loft floor was covered with loose hay or straw to a depth of several inches such that a decayed section of the floor was not observable. From the stall below, the decayed boards could not be seen because someone had nailed tin to the floor joists, covering up the area where the floor was decayed. When Pyles fell, he was flipped upside down and landed on his right arm and shoulder on the floor of the stall below. Pyles broke his right arm.

Doll's will was probated in district court; and the estate was still open when Pyles sued in the circuit court for damages resulting from the fall. The complaint named the Estate of William Doll and Judy Doll Woods as Executrix of the Estate of William Doll. The defendants moved for summary judgment. They argued that the estate was not a proper party to the action because, at the time of Pyles's fall, William Doll was dead; and his children and grandchildren succeeded as owners of the farm immediately upon Doll's death. The estate and the executrix argued, therefore, that the proper defendants were the owners on the date of the fall. The circuit court granted summary judgment to the estate and the executrix.

In the meantime, Pyles filed a motion to amend his complaint for the purpose of naming Judy Doll Woods, individually. The motion to amend was granted. Then, Pyles moved for leave to file a second amended complaint naming the remaining devisees under the will. This motion was also granted. The newly-named defendants' motion for summary judgment, based upon the absence of a legal duty to Pyles, was granted and this appeal followed.

II. STANDARD OF REVIEW.

Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[1] The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[2] But, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."[3] This Court has previously stated that "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue."[4]

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[1] Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citing Paintsville Hospital Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)).

[2] Steelvest, 807 S.W.2d at 480 (citing Dossett v. New York Mining & Manufacturing Co., 451 S.W.2d 843 (Ky. 1970)).

[3] Hubble v. Johnson, 841 S.W.2d 169, 171 (Ky. 1992) (citing Steelvest, 807 S.W.2d at 480).

[4] Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996) (citations omitted).

III. DISCUSSION.

A negligence action requires proof of: (1) a duty on the part of the defendant; (2) a breach of that duty; and (3) a consequent injury, which consists of actual injury or harm and legal causation between the defendant's breach and the plaintiff's injury.[5] Duty presents a question of law. "If no duty is owed by the defendant to the plaintiff, there can be no breach thereof, and therefore no actionable negligence."[6] "Breach and injury[] are questions of fact for the jury to decide."[7]

While general negligence law requires the existence of a duty, premises liability law supplies the nature and scope of that duty when dealing with injuries on realty.[8] Thus, the duty the Doll family owed to Pyles is dependent upon the status Pyles occupied—invitee, licensee, or tenant[9]—at the time he climbed into the hayloft on December 23, 2001. Accordingly, much of the

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[5] Mullins v. Commonwealth Life Insurance Co., 839 S.W.2d 245, 247 (Ky. 1992) (citing Illinois Central R.R. v. Vincent, 412 S.W.2d 874, 876 (Ky. 1967)). *See also* Pathways, Inc. v. Hammons, 113 S.W.3d 85, 89 (Ky. 2003).

[6] Ashcraft v. Peoples Liberty Bank & Trust Co., Inc., 724 S.W.2d 228, 229 (Ky.App. 1986).

[7] Pathways, Inc., 113 S.W.3d at 89 (citations omitted).

[8] Lewis v. B & R Corporation, 56 S.W.3d 432 (Ky.App. 2001).

[9] The Doll family does not argue that Pyles was a trespasser into the barn loft.

litigation below and the arguments made on appeal concern Pyles's status at the time of the accident. Pyles argues that he was an invitee at the time of the accident, whereas the Doll family contends that, at best, Pyles was a licensee or a tenant.

A. Invitee Issues.

A person is an invitee if "(1) he enters by invitation, express or implied, (2) his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land[,] and (3) there is mutuality of benefit or benefit to the owner."[10] "[T]he invitee . . . is placed upon a higher footing than a licensee."[11]

Under common law premises liability principles, the duty owed by the premises owner to an invitee is a general duty to exercise ordinary care to keep the premises in a reasonably safe condition and to warn invitees of dangers that are latent, unknown, or not obvious.[12] The owner's duty to invitees is to discover the existence of dangerous conditions on premises and either correct them or warn of them.[13]

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[10] Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc., 997 S.W.2d 490, 491-492 (Ky.App. 1999) (quoting BLACK'S LAW DICTIONARY, 827 (6th ed. 1990)).

[11] PROSSER AND KEATON, *THE LAW OF TORTS*, § 61 (5th ed., 1984).

[12] Lewis v. B & R Corporation, 56 S.W.3d at 438.

[13] Lone Star Steakhouse, 997 S.W.2d at 492.

So if Pyles was an invitee at the time he climbed into the hayloft on December 23, 2001, the Doll family, as owners of the property, had a duty to discover the existence of the decayed flooring and either correct the dangerous condition or warn Pyles of the peril. But, based upon admissions made in his deposition testimony, Pyles was not an invitee at the time of the fall.

In his deposition, Pyles testified that he had gone to the hayloft on the day of the accident for the purpose of inspecting materials he had stored in the loft to ascertain whether he had properly covered them with plastic to protect them from dust and rain. Having made the inspection, he then proceeded to the north side of the loft to look for his lost cat.

Based upon this testimony, Pyles's purpose for being in the hayloft at the time of the accident was for his personal benefit. There was no mutuality of benefit in connection with his visit to the loft. The defendants did not stand to gain anything from Pyles's errand in the loft.[14] It follows that

[14] In his brief, Pyles attempts to argue that he was conferring a benefit upon the property owners in that he thought that his cat may have died in the barn loft; and the property owners would, thus, benefit by removal of the carcass. However, Pyles's suspicion that the cat carcass would be in that particular location on the 75-acre farm was pure speculation; and, in any event, the removal of the carcass would be of such a *de minimis* benefit to the appellees that this marginal advantage to the property owners, alone, could not reasonably qualify Pyles as an invitee.

Pyles was not an invitee at the time he fell through the hayloft floor. As such, the defendants had no duty to discover the unsafe condition of the flooring.

B. Licensee Issues.

A person is a licensee if his presence on the property is as a matter of privilege by virtue of the possessor's consent.[15] A person is a gratuitous licensee if his presence is for his own convenience, pleasure, or benefit with permission or with acquiescence—express or implied—and without interest, profit, or benefit to the possessor of the place.[16] A possessor of land owes a licensee the duty of reasonable care either to make the land as safe as it appears, or to disclose the fact that it is as dangerous as he knows it to be.[17] Whereas, the possessor owes an invitee the duty of discovering a dangerous condition, he owes a licensee only the duty to warn him of a dangerous condition already known.[18]

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[15] Hardin v. Harris, 507 S.W.2d 172 (Ky. 1974).

[16] RESTATEMENT (SECOND) OF TORTS, §§ 330, 331; Kentucky & West Virginia Power Co. v. Stacy, 291 Ky. 325, 164 S.W.2d 537 (1942); Shoffner v. Pilkerton, 292 Ky. 407, 166 S.W.2d 870 (1942); City of Madisonville v. Poole, 249 S.W.2d 133, 134-135 (Ky. 1952).

[17] Perry v. Williamson, 824 S.W.2d 869, 874 (Ky. 1992), citing RESTATEMENT (SECOND) OF TORTS, § 342, Comment e.

[18] Lloyd v. Lloyd, 479 S.W.2d 623, 625 (Ky. 1972).

As previously discussed, Pyles was in the barn loft at the time of the accident for his own benefit. As such, he was a licensee. In contrast to the duty a landowner owes to an invitee, however, the landowner does not owe the duty to a licensee to discover latent dangers; his duty is only to warn of or to rectify those dangers of which he has actual knowledge.

In support of their motion for summary judgment, each of the Doll family defendants filed affidavits stating that he or she had no actual knowledge of the condition of the barn loft floor or that it was in an unsafe condition. In their respective affidavits, David Doll and Jennifer Hesse both stated that they had not been in the state of Kentucky for over twenty-five years and had no recollection of ever being in the barn or hayloft. Randall Doll and Cynthia Doll stated that they have lived in Germany since 1963 and have never been in the barn or hayloft on the Doll farm. Jill Tingle stated in her affidavit that she had no knowledge of the condition of the hayloft and that she had not been in the barn since she was a small child. In his deposition testimony, Pyles admitted that Judy Doll Woods had specifically told him that she had no knowledge concerning the condition of any of the outbuildings located on the farm.

In the face of the affidavits, the burden shifted to Pyles to produce affirmative evidence sufficient to demonstrate that there is a genuine issue of material fact concerning

whether the defendants had such knowledge of the condition of the hayloft floor.[19]

In opposition to the Doll family's affidavits disclaiming knowledge of the condition of the hayloft flooring, Pyles argues that following the accident, in about the summer of 2002, Jonathan Turner, a grandson of William Doll and the son of Judy Doll Woods, stated to him that "when he was younger his grandpa warned him not to play in that area of the loft because the floor wasn't any good." Pyles also claims that there is evidence that the defendants knew about the condition of the floor because of the tin under the floor where he fell.

The evidence cited by Pyles is insufficient to create a jury question concerning whether the Doll family defendants knew about the condition of the hayloft floor. First, the evidence does not directly show that any of the defendants had knowledge of the floor. Second, while William Doll's statement to Jonathan Turner may establish that this particular grandson had notice of the dangerous condition of the hayloft floor, he is neither an owner of the property nor a defendant in the case. Moreover, the statement does not, by inference or otherwise, establish that any of the defendants in the case had actual knowledge of the condition of the floor, nor is there any

[19] Hubble v. Johnson, 841 S.W.2d at 171.

evidence that Jonathan ever relayed his grandfather's cautionary statement to any of the defendants in the case.

With regard to the tin nailed underneath the hayloft floor, that evidence does not establish who put it there, why it was placed there, or even if it had anything to do with the condition of the floor. There is no evidence linking the presence of the tin with knowledge of the condition of the hayloft floor by the defendants.

Finally, the affidavits of the defendants establish that they have had no, or little, contact with the farm. Four of the defendants (David Doll, Jennifer Hesse, Randall Doll, and Cynthia Doll) stated that he or she had never been in the barn; one (Jill Tingle) had not been in the barn since she was a child; and Pyles testified that Judy Woods had told him directly that she had no knowledge concerning the conditions of the out-buildings.

In summary, Pyles was a licensee when he went into the barn; the Doll family's duty was to warn him only of latent dangers they knew about; Pyles has failed to produce affirmative evidence showing that the defendants knew about the condition of the loft floor; there are no genuine issues of material fact regarding the defendants' knowledge of the condition of the floor; and the defendants were entitled to summary judgment.

C. Landlord-Tenant Issues.

As a final matter, we note that while Pyles, based upon negligence principles, was a licensee at the time of the accident, because of his status as a renter who was given "free reign" to use the outbuildings, the duties of a landlord to warn a tenant of known hazards is also applicable to the case. The duty of a landlord to warn a tenant is similar to the duty of a property owner to warn a licensee. The duty of the landlord is to warn the tenant only of known latent defects at the time the tenant leases the premises.[20] It has been a longstanding rule in Kentucky that a tenant takes the premises as he finds them.[21] The landlord need not exercise even ordinary care to furnish reasonably safe premises, and he is not generally liable for injuries caused by defects therein.[22] Nevertheless, it is an established principle that a landlord has a duty to disclose a known defective condition which is unknown to the tenant and not discoverable through reasonable inspection.[23]

As we have said, Pyles has failed to present affirmative evidence that the defendants had knowledge of the condition of the hayloft floor. The defendants had a duty to

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[20] Carver v. Howard, 280 S.W.2d 708, 711 (Ky. 1955).

[21] Milby v. Mears, 580 S.W.2d 724, 728 (Ky.App. 1979).

[22] *Id.* (citing Dice's Adm'r v. Zweigart's Adm'r, 161 Ky. 646, 171 S.W. 195 (1914)).

[23] *Id.*

warn Pyles about the condition of the floor if they knew about it. As such, the defendants were also entitled to summary judgment based upon Pyles's status as a tenant because they did not breach any duty owed to him.

For the foregoing reasons, the judgment of the Henry Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Perry R. Arnold
Bedford, Kentucky

BRIEF FOR APPELLEES:

James M. Crawford
Carrollton, Kentucky