

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2006-CA-001672-MR

YEVONDA MARSH, MOTHER AND NEXT  
FRIEND TO JOSHUA POLLACK, A MINOR

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 2004-CI-001515

TERRY KESSINGER, ET AL.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

MOORE, JUDGE: Yevonda Marsh appeals the Jefferson Circuit Court's order granting Terry and Leighann Kessinger's motion for summary judgment in this action in which Marsh sought damages for her minor son, Joshua, who was injured on property owned by the Kessingers. After a careful review of the record, we affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Yevonda Marsh and Ralph Pollack rented a home from Terry and Leighann Kessinger. At the time the events leading to this case occurred, Yevonda and Ralph lived in the home with their preschool-aged son, Joshua, and Yevonda's teenage daughter, Katrina.

Yevonda and Ralph lived next to David and Shawn Speed, who also rented a home from the Kessingers. The Speeds lived with their two children.

The neighborhood children often played in the backyard of the home rented by the Speeds. One day, Joshua and two other neighborhood children were playing in the Speeds' backyard when the ball they were playing with hit the back door of the Speeds' home, causing a break in the lower part of a glass portion of the storm door.<sup>1</sup>

Wanting to inform the Kessingers of the break in the glass, Shawn Speed testified during her deposition that she located a telephone number that she believed to be the Kessingers' work number and called it. However, no one answered the phone, and the call was sent to an answering machine. Shawn left a message on the machine, stating that a window had a crack in it as a result of some children playing, but that she and her husband were going to try and replace it themselves. After leaving the message, Shawn told David that she did not think she had called the correct telephone number because the voice on the answering machine did not sound like Terry Kessinger's. Her husband told her not to worry about it, because they were going to fix the door themselves. The Speeds did not want the cost of fixing the door to come out of their rental deposit.

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<sup>1</sup> The testimony concerning the size of the break in the glass differed during the parties' and witnesses' depositions. One person thought the break was approximately one inch long, while others estimated that it was several inches long.

Shawn Speed further attested during her deposition that she informed Joshua's parents, Yevonda and Ralph, about the broken door. Shawn told them to keep Joshua out of the Speeds' backyard, so that he would not get hurt.

Approximately a week after the glass was broken, Yevonda, Ralph, and Joshua went to the Speeds' home.<sup>2</sup> Shawn and Yevonda then went to the store, but before leaving, they reminded Ralph and David to ensure that Joshua stayed away from the backyard.<sup>3</sup> Nevertheless, Joshua managed to get in the backyard and injured his left hand on the broken glass door. As a result, a finger on Joshua's left hand was almost severed and his wrist was cut. He was taken to the hospital and, by the time of Yevonda's deposition, Joshua had undergone three surgeries.

David Speed testified in accord with his wife at his deposition regarding that when the door was initially broken, he and Shawn planned to fix it themselves so that the cost of repairing it would not be taken out of their deposit. Accordingly, he did not want to inform the Kessingers of the breakage. He further attested that the first time he and Shawn notified the Kessingers about the broken door was after Joshua injured himself on the door. David testified that after the Kessingers were notified, the Kessingers promptly came over to the house and took down the door.

The Kessingers both attested in their depositions that they were not aware of the break in the door until after Joshua was injured. However, Yevonda and Ralph

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<sup>2</sup> Yevonda, Ralph, and Shawn Speed testified during their depositions about the amount of time that passed between the door being broken and the day that Joshua injured himself. Shawn Speed testified that one to one-and-a-half weeks passed between the break and the injury. However, Yevonda and Ralph attested during their depositions that two to three weeks had passed. We do not find this discrepancy to be a material fact in light of the law governing this dispute, as will be explained *infra*.

<sup>3</sup> The Speeds, Yevonda and Ralph all acknowledge that they were aware the door was broken before Joshua injured himself on it.

both testified that the Speeds informed them that the Speeds had notified the Kessingers about the crack in the glass door weeks before Joshua was injured.

After Yevonda filed this lawsuit on Joshua's behalf and the aforementioned depositions were taken, the Kessingers moved for summary judgment, and Yevonda opposed their motion. The circuit court granted the Kessingers' motion for summary judgment, finding that "the Speeds were in full and complete control of the premises." Additionally, the court noted that the Kessingers and the Speeds had testified that the Kessingers were not notified about the broken door until the day Joshua was injured. The court found Yevonda and Ralph's testimony to the contrary to be based on hearsay. The court held that there was overwhelming evidence in the record showing that the Kessingers did not have notice of the broken door before the date of injury. Further, the court found that even if there was proof that the Kessingers were notified of the break before Joshua was injured, "Shawn Speed clearly relayed to the answering machine that they (the Speeds) would repair the door themselves."

Yevonda now appeals, arguing that the circuit court erred in granting summary judgment because her testimony, as well as Ralph's, that the Speeds told them that the Speeds had informed the Kessingers of the break in the door weeks before Joshua's injury was not inadmissible hearsay. In their brief in opposition, the Kessingers assert that the testimony of Yevonda and Ralph "is unclear and uncertain," and that it amounts to supposition or conjecture, which is insufficient to withstand a motion for summary judgment.

## **II. STANDARD OF REVIEW**

"The 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Further, "the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact." *Id.* at 482.

### III. ANALYSIS

The law on the issue at hand is clear.

At common law, a tenant in full and complete control of premises which he occupies owes the same duty to persons coming there upon his invitation, express or implied, to keep such premises in a reasonably safe condition as he would if he were the owner, and is prima facie liable for damages proximately caused by defects in or dangers on the premises that reasonably could have been avoided by appropriate care taken by him, irrespective of whose duty it was, as between landlord and tenant, to make such repairs. Such invitees, when seeking redress for injuries sustained by them by reason of defects in the premises, must seek such redress from the tenant and not from the landlord, at least in the absence of any statutory provision making the landlord liable.

*Starns v. Lancaster*, 553 S.W.2d 696, 697 (Ky. App. 1977) (quoting 49 *Am.Jur.2d*

Landlord and Tenant § 982, at 954-55 (1970)) (internal quotation marks omitted); see

*Rogers v. Redmond*, 727 S.W.2d 874, 875 (Ky. App. 1987).

In the present case, the circuit court found that the Speeds, as tenants of the home, “were in full and complete control of the premises.” This finding is undisputed by the parties. Therefore, any challenge that the parties may have made to this finding is deemed waived. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004). Furthermore, the parties do not cite any statutory provision that would make the landlords liable for the injuries to Joshua, who was an “invitee” of the Speeds. Thus, pursuant to *Starns*, Yevonda was required to seek redress of Joshua’s injuries against the Speeds, and she could not seek redress from the Kessingers. Accordingly, the circuit court properly granted summary judgment.

Despite the clear duty on the Speeds in this case, Yevonda contends that the Kessingers are liable because the Speeds had informed Ralph and her that the Speeds told the Kessingers about the broken glass door weeks before Joshua was injured. The circuit court found this testimony from Yevonda and Ralph to be inadmissible hearsay. Whether or not this testimony may have been properly relied on to defend against summary judgment under an exception to the hearsay rule is irrelevant. Pursuant to *Starns*, the Speeds, not the Kessingers, owed the duty to Joshua to keep their tenant property in a reasonably safe condition. Having failed to name the Speeds as defendants, summary judgment to the Kessingers was proper and we may affirm a circuit court on any grounds when it has reached the correct result. *See Wright v. Sales*, 257 K. 338, 78 S.W.2d 23, 24-25 (Ky. 1935).

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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