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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000824-MR

TERRA E. MATHIS, AS ADMINISTRATRIX
AND PERSONAL REPRESENTATIVE FOR
THE ESTATE OF JAMIE DALE MATHIS

AND

TERRA E. MATHIS, AS GUARDIAN AND
NEXT FRIEND OF JACOB DAMIEN
MATHIS, AN UNMARRIED INFANT — APPELLANTS

v.

APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 05-CI-00092

ALTON H. LOHDEN;
ANDY LOHDEN; and
ANGIE LOHDEN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

KNOPF, SENIOR JUDGE: Terra Mathis appeals the February 10, 2007 and April 6, 2007, opinions and orders of the Spencer Circuit Court granting summary judgment to Alton Lohden, Andy Lohden and Angie Lohden in a wrongful death action.

On October 18, 2003, Terra and her husband Jamie Mathis, attended a party at the residence of Andy and Angie. Andy and Angie lived in a basement apartment in the home of Andy's father, Alton. The home was situated on approximately 8.8 acres, also owned by Alton. Andy and Angie do not have any property interest in the home or adjoining real property, but do assist in the payment of bills, including utilities and a second mortgage on the property. Jamie, while riding an all-terrain vehicle ("ATV") owned by Alton, attempted to jump a "hump" on the property and was thrown from the vehicle, suffering fatal injuries.

Terra, who was appointed as administratrix of Jamie's estate, filed a complaint in the Spencer Circuit Court on May 17, 2005. Terra named Alton, Andy and Angie as defendants and sought compensation for the mental and physical anguish and personal injury of Jamie; funeral expenses; wrongful death damages; and present and future lost wages. Terra also sought compensation on behalf of her minor son for loss of parental love and affection; loss of parental society and consortium; funeral expenses of parent; mental and physical pain and anguish; lost wages of parent; and pain and suffering. In her complaint, Terra specifically sought a trial by jury. Over the next several months, answers were filed and depositions of the parties were taken. On October 6, 2006, Terra moved to set the case for a jury trial. On November 22, 2006, the appellees moved for a summary judgment. On February 10, 2007, the circuit court entered an opinion and order in which summary judgment was granted to the appellees.

Terra moved the court to alter, amend or vacate the summary judgment order and her motion was denied in an order and opinion entered April 6, 2007. This appeal followed.

The standard of review of a trial court's grant of 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). Summary judgment is proper when it appears to be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire Marine Ins.* Co., 814 S.W.2d 273, 276 (Ky.1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991).

On appeal, Terra makes the following arguments: 1) whether or not the "hump", over which decedent rode, was open and obvious is a question of fact for a jury to decide; 2) jumping ATVs is a dangerous activity, giving rise to enhanced duties of care; and 3) ATVs are dangerous devices, requiring a greater duty of care.

Alton's property, on which Jamie was riding the ATV, is approximately 8.8 acres which contains a natural "hump" of earth which runs through the property. Terra maintains that the openness and obviousness of this "hump" is a question for the jury to decide. In its order granting summary judgment, the circuit court found Jamie to be a social guest, or licensee, and concluded:

> [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 dangerous as he knows it to be. There is no duty to warn a licensee of any danger or condition

> which is open and obvious or which should or could be observed by the licensee in the exercise of ordinary care.

Citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996) (internal citation omitted by circuit court). The circuit court determined the relevant issue to be whether the "hump" was a hidden danger that would require a warning from the property owner or whether it was open and obvious.

Terra's testimony posits that Jamie had ridden ATVs on the Lohden property a minimum of 3 or 4 times before the date of the incident and had been riding the ATV for some period of time on the day of the accident. Terra further testified that she had witnessed Jamie jump the ATV shortly before his accident. "[N]atural outdoor hazards which are as obvious to an invitee as to the owner of the premises do not constitute unreasonable risks to the former which the landowner has a duty to remove or warn against" *Standard Oil Co. v. Manis*, 433 S.W.2d 856 (Ky. 1968). Relying upon this precedent as well as precedent from *Rogers v. Professional Golfers Association of America*, 28 S.W.3d 869 (Ky.App. 2000),[2] Terra's testimony was sufficient for the trial court to conclude that Jamie was aware of the "hump" and therefore did not require a warning. We do not find error in the trial court's reasoning or conclusion.

Terra next argues that jumping ATVs is a dangerous activity, giving rise to enhanced duties of care. In support of this argument, Terra references two cases: *Hardin v. Harris*, 507 S.W.2d 172 (Ky. 1974) and *Gross v. Bloom*, 411 S.W.2d 326 (Ky. 1967). In *Hardin*, a nine-year-old boy was injured on a farm when someone operating a large piece of machinery backed over him. The Kentucky Supreme Court held:

[2] A panel of this court held that a wet grassy hillside located on a golf course was an open and obvious condition of which a spectator, who was an invitee, would have been aware if she had exercised ordinary prudence, and thus no duty was owed to a spectator who chose to proceed across it.

> This case involves an injury to a person known to be upon the premises at a place made dangerous by activities being conducted upon the premises. In such a case whether the person injured was an invitee or a licensee should not have any bearing upon the standard of care required of the possessor of the premises. His duty in either event was to conduct his activities with reasonable care for the safety of the appellant. . . . In any given case whether the conduct of the possessor of the premises constitutes reasonable care depends upon the circumstances of that case. In this case important factors to be considered are the facts that the visitor was known to be upon the premises at or near a place made dangerous by the activity and that the visitor was a nine-year-old infant.

Hardin, 507 S.W.2d at 175-76.

The facts in *Gross* involve a child who fell through a laundry chute opening in a closet while playing hide and seek. Although the Kentucky Supreme Court found that social guests are expected to take the premises as the possessor himself uses them, they found a heightened duty of care in the presence of *children*. *Gross*, 411 S.W.2d at 327-28. The circumstances of the case before us are distinguishable from these two cases, in that Jamie was an adult; had consciously made the decision to perform the alleged dangerous activity; was familiar with the property; and was familiar with "jumping" ATVs on the property. Terra fails to show how these facts require an enhanced duty of care.

Terra's final argument is that ATVs are dangerous devices, requiring a greater duty of care. There is no precedent in this Commonwealth which determines an ATV to be a dangerous device requiring a greater duty of care and we will not determine as much now. Nor do we believe an ATV to be equivalent to a gun, as Terra suggests in her brief and supporting sources. Furthermore, even if we were to determine that ATVs were dangerous devices, it would not change the outcome of this particular case. Jamie

was in control of the ATV at the time of the accident and was familiar with its operations according to Terra's testimony. No argument or evidence has been offered that the ATV malfunctioned or was in need of repair. Jamie voluntarily chose to drive the ATV, was familiar with the ATV, was in control of the ATV and was familiar with the land. There is nothing to suggest that the Lohdens should be held to a different duty of care nor that Terra would be successful in producing evidence at trial supporting a judgment in his favor.

For the foregoing reasons, the February 10, 2007 and April 6, 2007, opinions and orders of the Spencer Circuit Court are affirmed.

ALL CONCUR.

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