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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000548-MR

THE ESTATE OF DAVID AVANT,
BY AND THROUGH ITS ADMINISTRATRIX,
MARIE MILLER;
BENJAMIN DAVID THOMAS AVANT,
ACTING BY AND THROUGH HIS NATURAL
MOTHER AND GUARDIAN,
MARIE MILLER;
LINDA ABLES HAYNES HATFIELD;
AND ORVILLE DEWAYNE HATFIELD — APPELLANTS

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 07-CI-00259

KENTUCKY UTILITIES COMPANY;
AND THE BOARD OF EDUCATION OF
BELL COUNTY, KENTUCKY — APPELLEES

AND NO. 2009-CA-000784-MR

KENTUCKY UTILITIES COMPANY CROSS-APPELLANT

v. CROSS-APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 07-CI-00259

THE ESTATE OF DAVID AVANT,
BY AND THROUGH ITS ADMINISTRATRIX,
MARIE MILLER;
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ACTING BY AND THROUGH HIS NATURAL
MOTHER AND GUARDIAN,
MARIE MILLER;
LINDA ABLES HAYNES HATFIELD;
AND ORVILLE DEWAYNE HATFIELD CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, THOMPSON, AND TAYLOR, JUDGES.

MOORE, JUDGE: Dewayne Hatfield and Linda Hatfield, and the surviving son of David Avant and the estate of David Avant, appeal from a judgment of the Bell Circuit Court dismissing their claims against Kentucky Utilities (KU). KU cross-

appeals, alleging alternate grounds for affirming summary judgment. We affirm the result of the circuit court.

This is a most unfortunate case resulting in the death of David Avant and injuries to Dewayne Hatfield and Linda Hatfield. The trial court succinctly stated the general facts of this case in the light most favorable to the appellants:

> On the morning of Sunday, May 1st, 2006, Orville Dewayne Hatfield, Linda Hatfield and David Avant were at home trying to decide how they would spend the day. They departed their home along with Sherrie Barnett in a car driven by David. David suggested that they stop at the Ward Chapel School to play basketball. In Mr. Hatfield's description of the school, he stated, "you could tell it was closed down. There wasn't a window left in it, there wasn't a door on the place. I mean it had been completely vandalized." Sherrie Barnett noticed "trash and just things throwed everywhere" behind the school. The group attempted to take the car behind the abandoned school. However, they had to stop since there was an electrical pole that had been cut down with wires dangling from it and the transformer on the ground. Mr. Hatfield decided against walking under the power lines because they looked dangerous. Mr. Hatfield nevertheless proceeded to walk toward the pole and felt a humming under his feet and remembers nothing further until he awoke in the Vanderbilt Hospital. Linda Hatfield and David Avant made contact with Mr. Hatfield. Tragically, David died as a result of his injuries. No allegation has been made that either KU or the BCBE [Bell County Board of Education] had specific knowledge that this particular pole had been cut down.

(Citations to the record omitted; grammatical errors not corrected).

Following this incident, Linda and Dewayne, as well as David's estate and surviving son, brought suit against BCBE[1] and KU. KU and BCBE subsequently

moved for summary judgment, which the trial court granted.

When this Court reviews a summary judgment, it must determine whether the evidence of record discloses a genuine issue of fact. *See* Kentucky Rule(s) of Civil Procedure (CR) 56.03. In determining this, the Court is to view the record in the light most favorable to the party opposing the motion and all doubts are to be resolved in that party's favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is only proper when it would be impossible for the plaintiff to produce any evidence at trial warranting a judgment in his favor. *Id*.

However, "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." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992) (citing *Steelvest*); *see also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004). Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review

[1] The details regarding the resolution of the appellants' claims against BCBE are not germane to this appeal because those claims were voluntarily dismissed.

the issue *de novo*. *Lewis v. B& R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Both parties submit numerous issues and case law supporting their respective arguments. However, an appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result. *See, e.g., McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n.19 (Ky. 2009) ("[I]t is well-settled that an appellate court may affirm a lower court for any reason supported by the record.") (citing *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991)).

Regardless of the multiple theories argued by the parties, the bottom line is that even if we go as far as considering this case under a strict liability theory, "[t]here is no duty to warn against obvious risks." *Edwards v. Hop Sin, Inc.*, 140 S.W.3d 13, 16 (Ky. App. 2003); *see also Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 368-69 (Ky. 2005); *McCabe Powers Body Co. v. Sharp*, 594 S.W.2d. 592 (Ky. 1980). Where a party admits that a hazard was both known and obvious to him, this admission pertains not only to the issue of contributory fault, but also to whether the hazard was so known and obvious as to obviate any duty on the part of the owner who caused the hazard to warn or even protect the party against the hazard. *Horne*, 170 S.W.3d at 368-69.

While *Horne* is a premise liability case and it can certainly be argued that the present case is not a premise liability case,[2] we find *Horne* insightful in deciding this case in regard to what is known and obvious.

> "[K]nown" means "not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves." "Obvious" denotes that "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." Concerning the last clause of section 343A(1) [of the Restatement], i.e., when the possessor should anticipate the harm, comment f to section 343A explains:
>
> > There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. . . .
> >
> > Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. . . .

Id. at 367 (citing Restatement (Second) of Torts, § 343A (1965)).

[2] Even if we were to consider this as a premise liability case, appellants cannot prevail. *Horne* involved an invitee. In the case at hand, at best the appellants were licensees. The duty to an invitee is higher than the duty to a licensee. So, even using the higher standard, the appellants cannot survive summary judgment.

Horne further states that the case of *Bonn v. Sears*, *Roebuck & Co.*, 440 S.W.2d 526 (Ky. 1969), best exemplifies this rule. *Id*. at 368. In *Bonn*, a customer of an automobile service center fell into a "grease pit," an open basement in which employees stand while servicing the undersides of customers' vehicles. The customer admitted that he "just wasn't looking where [he] was going" and he was familiar with such businesses and knew they commonly contained grease pits. Noting that the risk was inherent in the nature of the activity itself and that the pit was neither unusual nor hidden, the former Court of Appeals held that the owner "breached no duty to [the plaintiff] which was causative of the harm he suffered." *Bonn*, 440 S.W.2d. at 529.

In the case before us, the undisputed evidence in the record demonstrates that each of the appellants recognized the condition of the downed utility pole and uninsulated power lines and further understood this condition to be hazardous prior to approaching it. In his deposition, Dewayne testified that:

> Q: All right. Now, you said earlier in your deposition that you knew those wires could be hot, right?
>
> Dewayne: Okay.
>
> Q: Is that right?
>
> Dewayne: Yeah, they could have been, yeah.
>
> Q: I don't want to put words in your mouth, but that's what you said here. Do you agree that's—
>
> Dewayne: Okay, yeah.
>
> Q: Okay. And you knew that could be dangerous?

Dewayne: Yeah.

Q: You knew that the transformer sitting over there could be hot, right?

Dewayne: Yeah.

Both Dewayne and Linda testified that they recognized the condition of the lines and utility pole before they, as well as David, exited the car. Linda testified that she did not know if the wires were on or off, but was aware of the possibility that the power in the wires might still be on. She testified that she did not want the car to stop near the power lines, and instructed David, who was driving, to stop the car away from the power lines in part because she recognized the possibility that they might still be energized. The evidence of record demonstrates that, following Linda's instruction, David did stop the car between fifteen- and twenty-five feet from the power lines. Thus, it cannot be disputed that David appreciated the dangerous situation created by the downed power lines. Any reasonable person would have recognized the obvious danger in approaching the lines. *See Goetz v. Green River Rural Electric Cooperative Corp*., 398 S.W.2d 712, 713 (Ky. App. 1966) ("The danger inherent in power lines and electric lines generally needs no elaboration.").

Where the undisputed evidence demonstrates that a hazard was known and obvious to those it injured prior to the injury and could easily have been avoided, there is no duty to warn or even protect. And because the undisputed evidence of record clearly demonstrates that Dewayne, Linda and David

recognized yet chose to approach this danger, the unfortunate circumstances of this case-- however tragic-- do not change this result. Because this issue is dispositive, there is no utility in reviewing the remaining issues presented by the parties.

For these reasons, the decision of the Bell Circuit Court is affirmed.

ALL CONCUR.

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