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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1996-CA-003453-MR

BRUCE A. YUNGMAN — APPELLANT

v.

APPEAL FROM LARUE CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 95-CI-00090

MICHAEL HOWELL and VONNA HOWELL — APPELLEES

AND

MELVA HANEY and OVA HANEY

OPINION
AFFIRMING

* * * * * * *

BEFORE: ABRAMSON, DYCHE, and HUDDLESTON, Judges.

ABRAMSON, JUDGE: Bruce Yungman appeals from a November 27, 1996, summary judgment of LaRue Circuit Court dismissing with prejudice his complaint against Michael and Vonna Howell and Melva and Ova Haney. Yungman's complaint alleged that in August 1994 he was injured during a party at the Howells' residence when a wooden sundeck on which he and about ten other guests were standing collapsed. He claimed that the Howells, as possessors of the property, and the Haneys, as owners and lessors thereof, had

breached their duty either to make the deck safe or to warn him that it posed a hazard. The trial court ruled that the collapse, by itself, was not sufficient evidence (under the doctrine of res ipsa loquitur) to impose liability on the defendants. The court also found that Yungman had failed to proffer sufficient additional evidence to warrant a finding of liability. Yungman contends that the trial court understated the defendants' duty of care in these circumstances. He also contends that, even if the court correctly stated the law, it erred by summarily dismissing his complaint because there is a factual issue concerning the defendants' awareness of the deck's unsafe condition. Having concluded that the trial court correctly stated and properly applied the law, we affirm.

As Yungman notes, this Court reviews summary judgments de novo, asking, as did the trial court, whether there exists any genuine issue of material fact, and, if not, whether the movant is entitled to judgment as a matter of law. All reasonable doubts are to be resolved in favor of the non-movant. Summary judgment is inappropriate unless it appears impossible for the non-movant to prove facts at trial which would justify a verdict in his or her favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

In Perry v. Williamson, Ky., 824 S.W.2d 869, 875 (1992), our Supreme Court reviewed the law concerning "[t]he duty owed by the person in possession of land to others whose presence might reasonably be anticipated . . . ." Acknowledging the

traditional distinction between those present on the premises as business invitees and those licensees whose presence is permitted for other purposes, the Court described as follows the possessor's duty to licensees with respect to unsafe conditions on the land of which the possessor has knowledge:

> If such condition exists and is known to the person in possession, it is his duty to a licensee to forewarn of the danger if he has not corrected it. . . .
>
> [T]he possessor has no duty to provide safe premises for a licensee. Making the premises safe is merely an option on his part as a means to obviate what otherwise is . . . the duty to warn. . . .
>
> [I]f the possessor of premises has knowledge of a condition that a properly instructed jury finds unreasonably hazardous to a licensee exercising ordinary care for is own safety, then it does not make any difference whether the possessor had actual cognizance of the danger. It is enough that he was aware of the condition itself. The law holds him to that which an ordinarily prudent person with the same knowledge would have anticipated.

824 S.W.2d at 873 (internal quotation marks and citation omitted).

Contrasted with this is the somewhat broader duty a possessor of premises owes to a business invitee:

> the only difference between the duty which would have been owed to [the plaintiff] had she been a business invitee . . . [instead of] a licensee, is that [the defendants] were under no duty of reasonable care to discover the existence on their premises of a dangerous condition as would be the case with a business invitee.

824 S.W.2d at 875. (Emphasis supplied.)

Yungman concedes that as a social guest of the Howells he was a licensee for purposes of the rules just summarized. Under Perry, therefore, the Howells owed him a duty either to eliminate or to warn against hazards on the premises of which they were aware but which were apt not to be apparent to others. The trial court found that the defendants were not aware of the deck's latent hazard and thus that no duty to Yungman arose.

Yungman advances three objections to the trial court's ruling. He argues that the trial court should have disregarded as outmoded the distinction observed in Perry between licensees and invitees and should have applied instead the more general principle that the defendants owed Yungman "the duty to exercise reasonable care in the circumstances." 834 S.W.2d at 875. He claims that because the deck was nearly twenty years old and had shown signs of deterioration (wooden stairs had partially rotted and required replacing), reasonable care required the defendants to look for further decay. Had they done so, he maintains, they would have discovered the deck's susceptibility to collapse. Neither the trial court nor this Court, however, has the authority to disregard Perry. Thus, even were we inclined to adopt the approach Yungman recommends we could not do so. As the Perry Court noted, moreover, the traditional distinction between invitees and licensees incorporates and helps to clarify important aspects of the circumstances presented by this type of case. 824 S.W.2d at 875. We disagree, therefore, that these

distinctions have grown outmoded or are at odds with the general principle on which Yungman relies.

Yungman next argues that the collapse of the deck itself so strongly entails negligence as to invoke the doctrine of res ipsa loquitur. According to that doctrine the defendant's negligence may be presumed whenever the following elements are shown:

> 1) the instrumentality [causing the injury] must be under the control or management of the [defendant]; 2) the circumstances, according to common knowledge and experience, must create a clear inference that the accident would not have happened if the defendant had not been negligent; and 3) the [plaintiff's] injury must have resulted from the accident.

Helton v. Forest Park Baptist Church, Ky. App., 589 S.W.2d 219 (1979) (citation omitted).

The trial court observed that the deck had not been under the defendants' exclusive control. It had been built years prior to the defendants' involvement, and its location outdoors meant that any number of people could have had access to it. The trial court also noted that reasons other than the defendants' negligence, including poor construction, could account for the deck's collapse. Res ipsa loquitur, therefore, does not apply.

Yungman also argues that a jury question exists concerning the defendants' awareness of a hazardous condition. This argument has some force. The deck's age, the fact that a set of partially decayed steps had been replaced, photographs showing what may have been signs of decay along the wall from

which the deck detached, and the fact that more people than usual were to be on the deck during the party is sufficient evidence, Yungman insists, to permit a jury to infer that the defendants were aware of conditions that an ordinarily prudent person would have regarded as dangerous and would either have corrected or made known to the defendants' guests.[1]

The trial court disagreed. It found that Yungman had failed to present evidence showing that the defendants were aware of conditions they should have recognized as dangerous. The court observed that the deck's only defect, apparently, had been its manner of attachment to the house; it had been nailed but not bolted. The defendants all disclaimed any knowledge of this fact until after the collapse. Because neither the need for bolts nor the lack of bolts would have been obvious to the defendants, because there was no evidence that any of them had discovered this fact prior to the accident, and because otherwise the deck appeared to be sound to everyone involved, including Yungman, who has advanced training in structural and mechanical engineering, the trial court ruled that no duty to repair or to warn had arisen.

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[1]Yungman also complains that the defendants' dismanteling of the deck within about a month of the accident prevented him from discovering additional signs of the deck's defectiveness and amounts to spoliation of evidence. Such misconduct, he insists, should at least give rise to a presumption in his favor on this question of an apparent hazard. Yungman failed to address this issue to the trial court, however, and that failure precludes this Court's review. CR 59.06; Payne v. Hall, Ky., 423 S.W.2d 530 (1968).

Given our strict summary judgment standard, this question is a close one, but we are persuaded that the trial court did not err by refusing to submit this case to a jury. The circumstantial evidence Yungman relies upon as implying the defendants' awareness of a hazardous condition is not sufficient. It permits no more than speculation on this issue. As a matter of law, therefore, it does not provide an adequate basis for a judgment in Yungman's favor. Gross v. Barrett, Ky., 350 S.W.2d 457 (1961).

For these reasons, we affirm the November 27, 1996, summary judgment of LaRue Circuit Court.

ALL CONCUR.

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