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# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-001042-MR

TONYA FARMER DEROSSETT, LEGAL GUARDIAN AND NATURAL MOTHER OF CODY TYLER FARMER — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 03-CI-01228

GERTRUDE TYSON — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Tonya Farmer DeRossett, legal guardian and natural mother of Cody Tyler Farmer, appeals from a judgment of the Floyd Circuit Court in favor of Gertrude Tyson. The judgment stems from a jury verdict which found that Tyson, Farmer's neighbor, was not negligent in failing to remove a rotting tree that later fell and damaged Farmer's house. We reverse and remand.

Farmer, a minor, has owned a house in Floyd County since 1999. He and his mother, DeRossett, were residing there when the tree fell. The adjoining property is

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

owned by Gertrude Tyson, who inherited the land from her sister, who died intestate. Tyson, who was over 80 years old at the time of the trial, claims she did not welcome the inheritance and on occasion has denied ownership of the land. She contends that she in no way took over the property for her own use, beyond paying the necessary property taxes. Tyson's own home is located about a mile and a half away from the property upon which the tree was located.

On May 20, 2003, a dead pine tree fell from the Tyson property onto the Farmer house. Its branches struck several rooms in the house and triggered a fire. DeRossett, as Farmer's legal guardian and natural mother, filed suit against Tyson in the Floyd Circuit Court, claiming that Tyson had been warned on numerous occasions that the tree was in a dangerous condition, yet had failed to act to have it removed. According to DeRossett, damages to the home exceeded $25,000.

At trial, DeRossett testified that she had first called Tyson to complain about the tree two years before it fell. DeRossett characterized this call as a "mild" complaint. About six months before the fall, DeRossett drove to Tyson's home and told her she was afraid that the tree was going to fall and damage the house and possibly injure her son. Tyson assured DeRossett that she would come out and look at the tree and do her best to take care of the problem.

At various times, various persons were called to the location. These persons included a city police officer, a representative from the electric company, Tyson's pastor, and several persons who gave estimates to have the tree removed. Tyson acknowledged that DeRossett had called her several times about the tree. In her brief, she characterized the calls as "harassing". The last call came the day before the tree fell.

Tyson contends that she had not known how rotten and dangerous the tree was and that, in any event, she had taken substantial steps to have it removed. She claims that she contacted several persons about having the tree cut down, but their estimates were either too high or they did not have the proper equipment to do the job. During this period of time, Tyson was nursing her ill son who eventually died. Tyson states in her brief that she "had not been to the property and seen the supposed dangerousness of the tree." She also states that she "had not been to the land and had not seen the tree except at a distance."

At the conclusion of the evidence, DeRossett made a motion for a directed verdict, arguing that Tyson had been forewarned and had done nothing and that plenty of time had passed for her to remove the tree. Tyson responded that she had taken reasonable and substantial steps to remove the tree. In a conference following the close of evidence, the trial court stated that the evidence showed Tyson had knowledge of the dangerous condition of the tree. The court referred to *Lemon v. Edwards*, 344 S.W.2d 822 (Ky. 1961), for the proposition that a landowner who has notice of a defect in a tree is legally liable for damages caused by it. Nevertheless, the court denied DeRossett's directed verdict motion. Apparently, the court added a requirement that DeRossett must also prove that Tyson had failed to take reasonable steps to cure the problem.

The pertinent jury instruction stated as follows:

> If you believe from the evidence that the Defendant, Gertrude Tyson, in the exercise of ordinary care, knew or should have known that the tree on her property presented a serious threat of falling onto adjoining property and causing damage but failed to take reasonable steps to remove that tree or to allow others to remove the tree and that that tree fell and caused damage to the Plaintiff's property, then you will find for the Plaintiff and award her such a sum in money as will fairly and reasonably compensate her for the reasonable costs of repairing such damage as the falling of

> that tree caused, not to exceed $25,094.91. Unless you so find, you will find for the Defendant.

"Ordinary care" was defined as follows:

> "Ordinary Care" means such care as the jury would expect an ordinarily prudent person to exercise under similar circumstances.

Nine of the jurors found in Tyson's favor. DeRossett filed a motion for a new trial or judgment notwithstanding the verdict. The court denied the motion, and this appeal by DeRossett followed the entry of a final judgment.

DeRossett's first argument is that a landowner having actual knowledge of a tree's dangerous condition is liable for damages stemming from the fall of that tree. In her view, such a landowner is liable notwithstanding he or she may have taken some steps to correct the situation. Therefore, she contends that the court should have awarded her a directed verdict on the liability issue.

DeRossett maintains that the language in the instructions requiring the jury to find the additional element that Tyson "failed to take reasonable steps to remove that tree or to allow others to remove the tree" was not supported in law. DeRossett has relied on several cases which indirectly address the liability of a landowner in similar situations. None add an element of failure to take reasonable or substantial steps to address the problem, thus supporting DeRossett's argument.

In the *Lemon* case[2], the court held:

> The question of the duty of the owner of land along a highway with respect to taking precautions to prevent injury to travelers on the highway from the falling of dead trees or limbs has not previously reached this court but it has received consideration in the courts of a number of other

[2] In the *Lemon* case, the owner of the land from which a tree fell upon a car on a highway was held not liable for damages to the car and injuries to the driver because there was no evidence that the land owner knew of the damaged and defective tree. *Id*. at 823. Further, the court held that the land owner had no duty to inspect because the area was sparsely-settled and wooded and the road was seldom traveled. *Id*.

> jurisdictions. *See* Annotations, 72 A.L.R. 615, 11 A.L.R.2d 626.
>
> Substantially all of the cases recognize the liability of the landowner if he knows the tree is defective.

*Id*. at 823. In *Schwalbach v. Forest Lawn Memorial Park*, 687 S.W.2d 551 (Ky.App. 1985)[3], also cited by DeRossett, the court stated:

> Imposing liability upon a landowner for damage resulting from the natural dropping of leaves and other ordinary debris would result in innumerable lawsuits and impose liability upon a landowner for the natural processes and cycles of trees. We are not confronted with a dead tree which is likely to fall and cause serious injury. A claim for damages or removal of such a tree might be based on the theory of negligence for damages or nuisance for removal. Although the landowner may have the right to cut back overhanging branches to the boundary line, in the case of a dead and dangerous tree, it may be more sensible to require the owner of the tree to remove it in its entirety, or be liable for damages. It would be futile to require the neighbor to remove a portion of the tree to the boundary line leaving the hazard of a large portion of the total tree to remain in a threatening position.

*Id*. at 552.

DeRossett also cites *Morris v. Wal-Mart Stores, Inc.*, 330 F.3d 854 (6th Cir. 2003), a premises liability case that held:

> In the context of a premises liability case, the Tennessee courts have stated that a business owner breaches the duty of care owed to its customers when it allows a dangerous condition or defect to exist on the premises if that condition or defect was created by the owner, operator or his agent; or, if the condition is created by someone else, when the business owner had actual or constructive notice that the dangerous condition or defect existed prior to the injury.

*Id. at* 858.

[3] The *Schwalbach* case dealt with the normal dropping of leaves, twigs, and seeds from the branches of a land owner's tree onto a neighbor's roof. The court held the land owner was not liable for damages and that the neighbor could have removed the offending branches back to the boundary line to eliminate the problem. *Id*. at 552.

Surprisingly, there is no case authority in Kentucky directly addressing this issue. We have only cases such as *Lemon* and *Schwalbach* to guide us. We believe the Georgia Court of Appeals, in *Klein v. Weaver*, 265 Ga.App. 390, 593 S.E.2d 913 (2004), succinctly stated the matter as follows:

> In regard to liability for a defective tree the ordinary rules of negligence apply. The owner of a tree is liable for injuries from a falling tree only if he knew or reasonably should have known the tree was diseased, decayed or otherwise constituted a dangerous condition.

*Id*. at 914, *quoting Willis v. Maloof*, 184 Ga.App. 349, 350, 361 S.E.2d 512, 513 (1987). The *Klein* court further stated:

> A landowner who knows that a tree on his property is decayed and may fall and damage the property of an adjoining landowner is under a duty to eliminate the danger.

*Id*., *quoting Cornett v. Agee*, 143 Ga.App. 55, 56, 237 S.E.2d 522, 523 (1977).

DeRossett was required to prove that Tyson knew that the tree was in a dangerous condition and that she failed to cure the problem before the tree fell and damaged the Farmer house. There do not appear to be any Kentucky cases or other authority that add the requirement that a plaintiff must also prove that the defendant failed to take reasonable steps to correct the problem.

Concerning directed verdicts, this court stated in *Taylor v. Kennedy*, 700 S.W.2d 415 (Ky.App. 1985):

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the

> action, or if no disputed issue of fact exists upon which reasonable men could differ.

*Id*. at 416.

There was no disputed issue of fact concerning Tyson's knowledge of the tree's defective condition and the danger it presented to the Farmer house. Tyson argues in her brief that "[n]o one stressed to the Appellee how dangerous this tree was, or that it was rotten and going to fall." She also states in her brief that she "had not been to the property and seen the supposed dangerousness of the tree." Additionally, she states that she "had gone above her duty of ordinary care in making calls and trying to get someone to help the Appellant take care of **her supposed problems**." (Emphasis added.)

We conclude that there was no disputed issue of fact upon which reasonable men could differ concerning whether Tyson had notice that the tree was in a dangerous condition and could fall on Farmer's house. In fact, the trial court stated at the bench when the parties were arguing DeRossett's directed verdict motion that Tyson knew of the dangerous condition of the tree. She had been told that and had even talked with DeRossett several times about having the tree removed. She may not escape a finding that she had notice of the problem by claiming that she had not seen the tree up close and that no one had stressed to her how dangerous it was.[4] Further, as we have noted above, DeRossett was not required to also prove that Tyson had failed to take reasonable steps to have the tree removed. DeRossett was entitled to a directed verdict against Tyson on the issue of liability, and the trial court erred in not granting DeRossett's motion.

[4] We disagree with Tyson's statements in her brief that the dangerous tree was DeRossett's problem.

The judgment of the Floyd Circuit Court is reversed, and this matter is remanded for the entry of a judgment in DeRossett's favor on the liability issue and a new trial on the issue of damages.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Lawrence R. Webster
Pikeville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Jerry A. Patton
Prestonsburg, Kentucky