STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

David Lee Milhorn, II.,
Plaintiff Below, Petitioner

vs) No. 11-1130 (Mason County 07-C-36-N)

West Virginia Department of
Agriculture and Gus R. Douglass,
in his official capacity as Commissioner
of Department of Agriculture,
Defendants Below, Respondents

FILED
June 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner David Lee Milhorn II, by counsel J. Robert Leslie, appeals the Mason County Circuit Court's "Order Granting Defendants' Motion for Summary Judgment" entered on June 29, 2011, in this action for personal injuries. Respondents, the West Virginia Department of Agriculture and Gus R. Douglass, Commissioner of the Department of Agriculture (hereinafter referred to jointly as the "WVDA," unless otherwise indicated), appear by counsel Justin C. Taylor and Jason S. Hammond.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On April 13, 2005, petitioner, then nearly twenty-three years old, traveled from a party in Putnam County to the former "Lakin Industrial School for Colored Boys," also referred to as the "Lakin Industrial School"(hereinafter the "Lakin building"), an abandoned building in Mason County on state-owned property. Petitioner and his companions had been consuming beer and smoking marijuana on the evening in question. Per the deposition testimony of one of petitioner's companions, the trio went onto the roof of the three-story Lakin building where they consumed more beer and, at some point, petitioner moved down the slope of the roof toward its edge and fell off the roof. An incident report from the Mason County Sheriff's Department indicates that petitioner fell at approximately 2:38 a.m. Petitioner sustained severe injuries and has no memory of the night in question. The appendix record contains a toxicology report from the hospital following petitioner's fall that reflects a blood alcohol level of .164 and a positive test for marijuana.

Petitioner instituted this litigation asserting a claim for premises liability. He alleged in count one of his complaint that he was an "invitee" on the premises or, in the alternative, an "expected trespasser." In count two he alleged that the Lakin building was an "attractive nuisance." Both counts referenced claims of negligence against the WVDA.

The WVDA states that for numerous years and during April of 2005, it operated a farm that raised livestock on the property surrounding the building. The WVDA states that deposition testimony revealed that there was a "No Trespassing" sign on a utility pole on the road leading to the Lakin building; that "No Trespassing" signs were erected by the farm workers; that trespassers who arrived at the property during operating hours were told by the farm workers to leave; and that the Mason County Sheriff's Department and the West Virginia State Police were utilized to evict trespassers from the property. Petitioner contends that there were not any "No Trespassing" signs posted on the property on the date he fell.

Petitioner cites to two letters in the appendix record, written by the Mason County Protection Agency after the subject incident, for his contention that Commissioner Douglass promised the Mason County Commission in June of 2004, that the WVDA would place a fence around the Lakin building. No fence was ever erected. Commissioner Douglass testified in his deposition that county officials had requested that the Lakin building be fenced off, but that he never told anyone that the WVDA would erect a fence because money was not available to cover the associated costs.[1]

The WVDA states that it is undisputed that petitioner and his two friends traveled to the Lakin building on the night in question for the purpose of "partying," exploring, and ghost hunting after consuming marijuana and alcohol. The WVDA states that there was no evidence that it invited petitioner or others onto the Lakin property for any reason. The WVDA states that a former manager of the Lakin farm testified during his deposition that he recalled three separate "No Trespassing" signs on the Lakin building itself, as well as a "No Trespassing" sign on a utility pole near the entrance to the property on the date of the accident, the latter of which was supported by the deposition testimony of a worker at the Lakin farm.

The WVDA filed a motion for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure asserting, inter alia, that petitioner was a trespasser in the Lakin building at the time of the incident and that the WVDA did not act with any willful or wanton intention toward petitioner. On February 17, 2011, the circuit court granted summary judgment in favor of the WVDA. The circuit court concluded that an owner or possessor of property need only refrain from willful or wanton injury as to trespassers, and that the evidence established that petitioner was a trespasser and that the WVDA did not act willfully or wantonly toward him.

On appeal, petitioner argues that there were genuine issues of material fact as to whether he was a trespasser at the time of the incident thereby precluding summary judgment. Petitioner

[1] Commissioner Douglass also testified during his deposition that in 2007, the Legislature finally allocated funds to remove the Lakin building, which has since been razed.

contends that there was an implied invitation on the West Virginia Division of Tourism's website for ghost hunting at the Lakin building. The Court notes, however, that there is no evidence in the record to indicate that petitioner visited this website or that the WVDA had any control or authority over the website.

"'A trespasser is one who goes upon the property or premises of another without invitation, express or implied, and does so out of curiosity, or for his own purpose or convenience, and not in the performance of any duty to the owner.' Syl. pt. 1, *Huffman v. Appalachian Power Co.*,187 W.Va. 1, 415 S.E.2d 145 (1991)." Syl. Pt. 7, *Mallet v. Pickens*, 206 W.Va. 145, 522 S.E.2d 436 (1999). There is no genuine issue of fact that petitioner was in the Lakin building on the night in question as a trespasser as he was not there at the invitation of the WVDA nor in the performance of any duty owed to the WVDA. "The owner or possessor of property does not owe trespassers a duty of ordinary care. With regard to a trespasser, a possessor of property only need refrain from willful or wanton injury." Syl. Pt. 2, *Huffman*, 187 W.Va. 1, 415 S.E.2d 145. Petitioner did not allege willful or wanton conduct, and there is no evidence that the WVDA acted willfully or wantonly toward petitioner.

Petitioner next argues that even if the WVDA had no duty as an owner or occupier of land to make the premises safe or to erect a fence around it, under the Restatement of Torts (Second) §323 (1965), the WVDA voluntarily assumed that duty by promising county officials that it would erect a fence around the Lakin building. Citing West Virginia Code §7-1-3ff and §55-7-9, petitioner also argues that the circuit court failed to recognize that a prima facie case of negligence had been shown due to the WVDA's violation of a "lawful order" of the Mason County Commission in failing to either raze the Lakin building or make it safe.

Again, Commissioner Douglass testified in his deposition that he never told anyone that the WVDA would erect a fence because money was not available to cover the costs associated with erecting a fence.[2] Further, whether a fence was erected would not change the fact that petitioner was a trespasser on the night in question. As for the Restatement of Torts (Second) §323 (1965), it appears that the only time this section has only been mentioned by the Court has been in footnotes in opinions in medical malpractice cases. Also, petitioner does not cite to anything in the appendix record that shows that the Mason County Commission ever entered an order, such as that contemplated in West Virginia Code § 7-1-3ff(f)(7), directing the WVDA to take any action.

Lastly, petitioner cites the Restatement of Torts (Second) §335 (1965) for his argument that he was a known or reasonably anticipated trespasser, therefore, he was owed the same duty as a licensee, which is a general duty of due care. In *Huffman*, we discussed this Restatement section, which provides as follows:

A possessor of land who knows, or from facts within his knowledge should know,

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[2] The Court can only speculate as to whether petitioner and his companions would have been deterred by a fence on the night in question, even if one had been erected.

> that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if
>
> (a) the condition
>
> > (i) is one which the possessor has created or maintains and
> >
> > (ii) is, to his knowledge, likely to cause death or seriously [sic] bodily harm to such trespassers and
> >
> > (iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and
>
> (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

Id. at 7, 415 S.E.2d 145, 151. It appears that this Restatement section would not apply to the facts of this case. Petitioner does not cite to any evidence in the appendix record that the WVDA had knowledge that there were constantly intruding trespassers on the rooftop of the Lakin building, let alone trespassers under the influence of drugs and alcohol, or that there was a likelihood of death or serious bodily harm to a trespasser. The WVDA indicates that there had been no prior injuries or accidents on the property. Further, as the "condition" in this instance is a rooftop, there was certainly nothing hidden about it, as required by §335(a)(iii).

The circuit court's award of summary judgment in favor of respondent is reviewed de novo. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Having reviewed the briefs of the parties and the appendix record under this standard, this Court affirms the decision of the circuit court for the reasons set forth above and for the reasons stated in the circuit court's summary judgment order.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh