RENDERED: MAY 18, 2007; 10:00 A.M.

ORDERED NOT PUBLISHED BY KENTUCKY SUPREME COURT:
MARCH 12, 2008
(FILE NO. 2007-SC-0429-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001100-MR

JAMES HACK — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 05-CI-006615

RAY BAKER, SUSAN BAKER
INSIGHT COMMUNICATIONS COMPANY, AND
G & C COMMUNICATIONS, INC. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant James Hack (hereinafter referred to as "Hack") appeals from the Jefferson Circuit Court's Opinion and Order granting Appellees Ray and Susan Baker's (hereinafter referred to as "the Bakers") motion for Summary Judgment holding that Hack was a trespasser on the Bakers' property. The circuit court determined neither

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

the Bakers, nor Appellee Insight Communication/G&C Communication, (hereinafter referred to as "Insight"), owed Hack any duty to keep the premises safe from a television cable that remained unburied on the property, and thus, were not responsible for the injuries Hack sustained when he tripped and fell over the exposed cable. Because we find that genuine issues of material fact exist, we reverse.

In the summer of 2004, Hack resided with his family in a residence located in a cul-de-sac in Louisville, Kentucky. In June of that year, the Bakers moved into a home across the street from Hack. The relationship was cordial, and the Hacks visited with the Bakers in their home several times upon invitation. On the evening of August 13, 2004, many of the families that lived in the cul-de-sac were out with their children playing in their various yards. However, the Bakers were not out that night.

Apparently, while playing with a neighbor's child on a property that was immediately adjacent to the Bakers' residence, Hack ran through the Bakers' yard and tripped over an unburied television coaxial wire. He then fell onto another neighbor's driveway and shattered his right arm near the elbow. The proof established that Insight had installed cable at the Bakers' residence on July 1, 2004, but had failed to bury the black coaxial video cable from the side of the residence to a cable box along the street in the Bakers' front yard. The Bakers had placed three separate calls to Insight requesting that the cable be buried, but the company had failed to do so.

After his injury, Hack filed suit in Jefferson Circuit Court alleging the Bakers were negligent by allowing a dangerous condition to exist on their property without marking the cable's location for the safety of others, including Hack. He further claimed that Insight had been negligent by creating the dangerous condition. The Bakers

and Insight claimed that Hack was a trespasser to whom they owed no duty. Hack however, contended that he was an "implied invitee" (licensee), and therefore, the Bakers (and Insight) owed him a duty to exercise reasonable care under the circumstances, which they failed to do. The circuit court agreed with the Bakers, and granted the Motion for Summary Judgment finding that Hack was no more than a trespasser on their property. The circuit court further found that Insight stood in the same shoes as the landowner, and thus owed no duty to Hack for his safety. It is from this order that Hack appeals.

STANDARD OF REVIEW ON APPEAL

Our review of a grant of summary judgment is *de novo*. *Deaton v. Connecticut General Life Ins. Co.*, 17 S.W.3d 896, 898 (Ky. App. 2000). A motion for summary judgment may only be granted if the pleadings, depositions, answers to interrogatories, stipulations and admissions on file, together with the affidavits, if any, shall leave no genuine issue of any material fact and that the moving party was entitled to judgment as a matter of law. CR 56.03.

This rule clearly places the burden on the moving party to show the non-existence of any genuine issue of material fact. *Roberts v. Davis*, 422 S.W.2d 890 (Ky.1968). All factual inferences are to be drawn in favor of the non-movant, *Fischer v. Jeffries,* 697 S.W.2d 159 (Ky. App.1985), particularly when the non-movant is the Plaintiff. *Conley v. Hall*, 395 S.W.2d 575 (Ky. 1965). Summary judgment should be cautiously applied and is not a substitute for trial. It is appropriate only when it appears, as a matter of law, it would be impossible for the respondent to produce evidence at trial warranting a favorable judgment. *Steelvest, Inc. v. Scansteel Service Center*, 807 S.W.2d 476 (Ky. 1991).

HACK'S LEGAL STATUS ON THE PROPERTY

The law concerning the facts of this case are controlled by traditional property law distinctions of entrant classifications,

> Historically visitors upon property have been placed in one of three categories, *viz.*, trespassers, licensees or invitees. A trespasser is one who comes upon the land without any legal right to do so, a licensee is one who comes upon the land with the consent of the possessor of the land and an invitee is generally defined as one who comes upon the land in some capacity connected with the business of the possessor.

Hardin v. Harris, 507 S.W. 2d 172, 174 (Ky. 1974).

Because this is a review of a summary judgment, all facts must be viewed in a light most favorable to Hack. Consequently, we will focus on the facts as Hack has alleged them, which we believe create a genuine issue of material fact as to whether Hack was a trespasser or licensee.

Hack claims that he had the implied permission or invitation of the Bakers to be briefly on their property. He contends that it is the custom of those living in the neighborhood to allow, and even expect, their neighbors to cross each other's properties. Hack argues that it is common for adults and children to roam freely through neighbor's yards socializing and playing. Apparently, there are no sidewalks in the cul-de-sac. While the Bakers had only lived in the neighborhood for approximately two months, they had never voiced their objection to these activities, although Mrs. Baker testified by deposition after suit was filed that Hack had no permission to be on the property.

As stated by our highest court in *Scuddy Coal Co. v. Couch*, 274 S.W.2d 388, 390 (Ky. 1955),

> We have written that the distinction between an invitee and a licensee is oftentimes shadowy and indistinct . . . . An invitee

> enters upon the premises at the express or implied invitation of the owner or occupant on business of mutual interest to them both, or in connection with business of the owner or occupant. A licensee enters by express invitation or implied acquiescence of the owner or occupant, solely on the licensee's own business, pleasure or convenience. (citations omitted).

Moreover, customary use of property, without objection from the owner, "may give rise to an implication of consent to such use to the extent that the users have the status of licensees, where such habitual use or custom has existed to the knowledge of the owner . . . and has been accepted or acquiesced by him." *Bradford v. Clifton*, 379 S.W.2d 249, 250 (Ky. 1964).

Here, it is clear that Hack has established facts which create a genuine issue as to his status as a licensee. The custom of the neighborhood of brief entry onto each other's yards coupled with the Bakers failure to voice objection creates a genuine issue of their acquiescence to such conduct. This Court cannot say that Hack was a trespasser as a matter of law.

LANDOWNER'S DUTY TO LICENSEE

Our decision that a jury question has been presented as to Hack's status vis-a-vis the property does not end our analysis of the circuit court's ruling. The question now becomes what duty the Bakers owe to Hack if he was, in fact, a licensee.

On this issue the law in Kentucky has changed somewhat over the years. Early law indicates that a landowner owed almost no duty to a licensee. For example, in *Tennessee Valley Authority v. Stratton*, 306 Ky. 753, 209 S.W.2d 318 (1948), the plaintiff

was fox hunting with his prize foxhound on TVA property with permission. He sued TVA after the dog fell into an open well which had been obscured by vegetation. The court found the law to be well established and that "[s]uch established law recognizes that an owner of premises owes no duty to licensees except the duty of refraining from any wilful act of injury." (citations omitted). *Id.* at 753, 209 S.W.2d at 755. *See also*, *Kentucky Power Co. v. Bayes*, 423 S.W.2d 249 (Ky. 1968); *Brauner v. Leutz*, 293 Ky. 406, 169 S.W.2d 4 (1943); *Sage's Adm'r v. Creech Coal Co.*, 194 Ky. 415, 240 S.W. 42 (1922) .

Thereafter, the courts in Kentucky added another facet to the analysis. The court in *Hardin, supra*, elaborated upon this development,

> The liability of the possessor of land for injuries sustained by visitors upon the land depends in some degree upon whether the injury arises from a defect in the condition of the premises or from an activity conducted upon the premises. Though it has been said frequently that the possessor of land owes no duty to a licensee except to refrain from willful or wanton injury and to warn of known defects this rule has been gradually eroded with respect to injuries caused by activities conducted upon the premises. (citations omitted). This erosion began in Kentucky with a distinction between active and passive negligence.

Id. at 174-175. For example, while the court in *Sage's Adm'r, supra*, noted that there was little difference between the duties owed by a landowner to a trespasser or a licensee, it went on to conclude,

> [T]he only essential difference is that the owner need not anticipate the presence of the trespasser, but often must anticipate the presence of the licensee. This duty of anticipating the presence of the licensee does not, however, impose any affirmative duty upon the owner of providing him a safe place, and he may revoke the license at any time; but it does place upon him the negative duty, so long as he permits the licensee to continue, of not doing any positive act that

> suddenly increases the hazard to the licensee of exercising his license, without reasonable notice to him of the increased hazard. . . .
>
> Whether you call the exposure of the licensee, to such an unexpected and sudden peril active negligence, or wilful or wanton negligence, is unimportant, for the two rules agree in holding the owner liable to the licensee for injuries thus inflicted; the only difference being that one calls it active negligence, while the other calls it wilful or wanton negligence.

Id. at 415, 240 S.W.2d at 44. The court in *Hardin*, *supra*, found however,

> [T]he terms 'active' and 'passive' negligence are misnomers when applied to the standard of care owed to licensees. The terms have in fact been used to designate a distinction between injuries which resulted from defects in premises in which case the failure to discover and warn of the defects was denominated 'passive negligence' and injuries which resulted from negligence in conducting a business activity upon the premises in which case the negligence was denominated 'active negligence.'

Id. at 175.

In the particular facts of *Hardin*, a child who was known to be on the premises was injured when a piece of farm machinery backed over him. The court concluded that where a person who is known to be on the premises is injured by dangerous activities being conducted on the premises, it does not matter whether the person injured is an "invitee" or "licensee." The standard of care required by the possessor of the property is to conduct the activities "with reasonable care for the safety of the Appellant." *Id*. This view is now the accepted duty in Kentucky of possessors of land to licensees. *See Linn v. United States*, 979 F.Supp. 521 (E.D.Ky. 1997); *Dixon v. CSX Transp., Inc.*, 947 F.Supp. 296 (E.D.Ky. 1996); *Perry v. Williamson*, 824 S.W.2d 869 (Ky. 1992); *Mackey v. Allen*, 396 S.W.2d 55 (Ky. 1965).

The law further states that a landowner owes no duty to warn a licensee about known or obvious conditions. *Dixon*, *supra*, at 297. But where the licensee is unaware of the condition, the court in *Perry*, *supra,* stated,

> The key to the land occupier's liability to the licensee lies in the knowledge of a condition which a reasonably prudent person would realize is dangerous to an unsuspecting licensee, should one come upon the premises. It is not necessary that the land occupier admit that he knew the condition was unsafe because if he knows of the condition and it is unsafe, the law requires him to know it is unsafe. . . . It is the duty of the possessor to foresee that a condition known to himself presents an unreasonable risk of danger to an expected user of the premises exercising ordinary care for his own safety. (citations omitted).

Id. at 873.

Here, it is without question that the Bakers were aware of the unburied coaxial cable, but Hack was not. We believe that a genuine issue of material fact exists as to whether the cable's location constituted an unsafe condition on the premises which created an unreasonable risk of danger to those living in this neighborhood. We also believe a genuine issue of material fact exists as to whether Hack was an "expected" user of the premises that the Bakers should have foreseen. Therefore, it is appropriate that a trier of fact make these determinations and summary judgment is inappropriate.

INSIGHT'S LIABILITY

Finally, we address Insight's potential liability. The circuit court held that, pursuant to the Supreme Court's decision in *Bradford, supra*, Insight stands in the shoes of the landowner in determining it's duty to third parties injured by alleged negligence. Upon review of this case as well as others in this area we are inclined to agree with the circuit court.

In a similar case, our highest court held in *Bayes, supra,* that where a guy wire was located on private property, the defendant utility company was charged with the same duty as the landowner would have been had he created the allegedly negligent condition. *Id.* at 250. While not expressly referring to the *Bayes'* decision, the court in *Bradford, supra*, reached the same result. While we believe this is not necessarily a just result, we are constrained by precedent to agree with the circuit court's conclusion on this point. However, because we have determined that the trial court incorrectly granted summary judgment for the Bakers, it thus follows that the circuit court's grant of summary judgment for Insight must also be reversed for the same reasons.

Accordingly, we reverse the Jefferson Circuit Court and remand this case with directions to vacate its summary judgment and grant Appellant a trial by jury on the allegations of his complaint.

THOMPSON, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Matthew J. Schad
New Albany, Indiana

BRIEF FOR APPELLEE:

Beth Lochmiller
Elizabethtown, Kentucky

Robert J. Rosing
Louisville, Kentucky