

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001121-MR

ADRIAN S. BALLOU

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JUDY D. VANCE, JUDGE
ACTION NO. 12-CI-00167

HOBBY, DYE & READ, INC.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: CLAYTON; JONES; AND NICKELL, JUDGES.

JONES, JUDGE: The Appellant, Adrian Ballou, appeals from the June 19, 2015, order of the Adair Circuit Court granting summary judgment in favor of Appellees, Hobby, Dye, & Read, Inc. (“Hobby”). After a careful review of the record and applicable law, we REVERSE and REMAND.

I. BACKGROUND

On July 27, 2011, Adrian Ballou accompanied his friend, Timothy S. VanArsdale, to the retail premises of Hobby, a lawn equipment dealership located in Adair County, Kentucky. VanArsdale worked for Sign America. Terry Goodin, the manager of the Hobby store, had requested Sign America to visit the store to provide a quote for the installation of an electric sign. Ballou was not employed by Sign America; he was just riding along with VanArsdale that day.

After arriving at Hobby, Ballou and VanArsdale met briefly with Goodin. Goodin assumed both men were Sign America employees, but noted that “it was apparent that VanArsdale was the person in charge.” Goodin spoke briefly with the men inside the showroom. Goodin maintains that during this conversation, he pointed out the drop ceiling to VanArsdale. He recalls Ballou was in the immediate vicinity when this conversation took place. Thereafter, Goodin led the two men outside to show them where he wanted the electric sign to be installed. Goodin advised that electricity would need to be run from the middle of the building outside through conduit as the drop ceiling would prevent electricity from being run from the inside of the building.

All three men then went back inside the Hobby store. Goodin took VanArsdale upstairs and showed him where the electricity would need to be run outside of the store. Ballou remained downstairs and was joined by Goodin a short time later. The two began conversing. VanArsdale then called down to Ballou and requested him to come upstairs. Ballou testified that Goodin told him that he

“better go up there because he needs you.” Ballou then proceeded up the stairs.

When he reached the attic at the top of the stairs, Ballou found himself standing on a wooden deck in an unlit area. Noticing a shimmer of light ahead of him, Ballou walked forward, thinking what he saw was VanArsdale’s flashlight. Unbeknownst to Ballou, the deck floor ended a short distance from where he was standing. As a result, Ballou walked off the wooden deck and fell through the drop ceiling injuring himself in the process.

On July 23, 2012, Ballou filed suit against Hobby, alleging that as an invitee or licensee Hobby had a duty to warn him of the dangers that existed in the unlit attic, or in the alternative, had a duty to protect him from that condition by guarding the edge of the deck so as to prevent him from walking off the deck and through the drop ceiling. After a period of discovery, Hobby filed a motion for summary judgment on the basis that Ballou was a trespasser to whom it owed no duty of care. The trial court granted summary judgment in favor of Hobby after determining that it was undisputed that Ballou was a trespasser. This appeal followed.

II. STANDARD OF REVIEW

Summary judgment serves to terminate litigation where “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rule of Civil Procedure (“CR”) 56.03. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment “is proper where the movant shows that the adverse party could not prevail under any circumstances.” *Id.* (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

On appeal, we must consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Because summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the circuit court’s decision. *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Our review is *de novo*. *Cumberland Valley Contrs., Inc. v. Bell Cty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

III. ANALYSIS

On appeal, Ballou contends the trial court erred when it granted summary judgment in favor of Hobby. Ballou maintains that he was not a trespasser at the time that his injuries occurred on the Hobby premises. Specifically, he argues whether he was an employee of VanArsdale is irrelevant because he had Goodin’s invitation to go up to attic area to assist VanArsdale, making him an invitee or a

licensee to whom Hobby owed a duty of care. Hobby asserts that any invitation Goodin issued was invalid because it was issued under Goodin's mistaken belief that Ballou was employed by Sign America.

In order for a party "[t]o recover under a claim of negligence in Kentucky, a plaintiff must establish that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached its duty, and (3) the breach proximately caused the plaintiff's damages." *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209, 211–12 (Ky. App. 2007). "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 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).

KRS¹ 381.232 provides that "[t]he owner of real estate shall not be liable to any trespasser for injuries sustained by the trespasser on the real estate of the owner, except for injuries which are intentionally inflicted by the owner or someone acting for the owner." KRS 381.231(1) defines trespasser as "any person who enters or goes upon the real estate of another without any right, lawful authority or invitation, either expressed or implied, but does not include persons who come within the scope of the 'attractive nuisance' doctrine."

¹ Kentucky Revised Statutes.

Here, it is undisputed that Goodin gave both VanArsdale and Ballou permission to enter the Hobby attic area. More specifically, Goodin gave Ballou permission to go upstairs for purpose of helping VanArsdale, who called out to Ballou for him to come upstairs. There is no evidence that Ballou went upstairs to do anything other than to respond to VanArsdale's call. Likewise, there is no evidence that he strayed from that purpose once he entered the attic area.

It would appear, based on the record, Goodin simply believed Ballou was an employee of VanArsdale because the two arrived at the Hobby showroom together. Goodin did not investigate Ballou's status as an employee of VanArsdale any further, and it would appear that the burden to define his exact relationship with VanArsdale was improperly placed on Ballou. If Ballou's status as an employee, or any information as to why the two arrived at the Hobby showroom together, was important to Goodin he could have investigated Ballou's relationship with VanArsdale further and even gone so far as to confirm whether Ballou and VanArsdale were both employees of Sign America. Moreover, it does not appear that Ballou made any affirmative misrepresentation about his status.

Goodin's incorrect assumption and/or belief that Ballou was an employee of VanArsdale does not negate the fact that Goodin gave Ballou permission to enter the attic area of Hobby. Based on these facts, when viewed in a light most favorable to Ballou, we believe the jury could reasonably conclude that Ballou was a licensee or invitee and not a trespasser. As such, we hold that sufficient factual uncertainties exist in this matter and the question of Ballou's status is one for the

jury to determine. Therefore, we hold that the trial court erred when it granted summary judgment in favor of Hobby.

IV. CONCLUSION

For the reasons set forth above, we reverse the June 19, 2015, order of the Adair Circuit Court and remand this matter for further proceedings consistent with this Opinion.

NICKELL, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Joseph H. Mattingly III
Lebanon, Kentucky

Hunter Durham
Columbia, Kentucky

BRIEF FOR APPELLEE:

David A. Nunery
Campbellsville, Kentucky