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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001189-MR

RAYMOND HAYES and DENA HAYES,
individually and as parent and natural
guardian of ALEX HAYES, a minor — APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE V, JUDGE
ACTION NO. 15-CI-00287

D.C.I. PROPERTIES - DKY, LLC
and THE NELSON STARK COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT AND NICKELL, JUDGES.

COMBS, JUDGE: In this action for personal injury arising out of alleged negligence, Raymond and Dena Hayes, individually, and as the parents of Alex Hayes, a minor, appeal from the summary judgment of the Campbell Circuit Court entered in favor of D.C.I. Properties – DKY LLC ("DCI") and The Nelson Stark

Company ("Nelson Stark)." The Hayeses filed a negligence action against DCI and Nelson Stark after their son, Alex, overturned a piece of heavy equipment parked at a residential construction site. The circuit court determined that the defendants did not owe a duty of care to Alex under the circumstances and concluded that they were, therefore, entitled to judgment as a matter of law. Following our review, we affirm.

At 1:30 a.m. on Sunday, September 14, 2014, Alex climbed into a sheepsfoot roller – a piece of heavy equipment used to compact soil for site development projects. The roller belonged to Nelson Stark, who was preparing the construction site on property owned by DCI. The construction site bordered the Ohio River at Dayton, Kentucky. Alex started the roller's ignition, and he then scaled the north side of a flood wall adjacent to the construction site. As he descended the south side of the flood wall, the roller flipped, ejected Alex, and pinned his right leg beneath it.

In the hours before the incident, Alex had been drinking whiskey and smoking marijuana with his friends on the riverbank. At the time of the incident, Alex was sixteen years and seven months of age. The paramedic who treated Alex at the scene testified that he was completely lucid following his injury. However, at the time of his own deposition, Alex indicated that he had no recollection of the events that immediately preceded the incident.

On April 1, 2015, the Hayeses filed the personal injury action underlying this appeal. They alleged that despite the circumstances, DCI and Nelson Stark

were responsible -- at least in part -- for Alex's injury. The Hayeses' theory of liability was based upon the attractive nuisance doctrine.

Following a period of discovery, DCI and Nelson Stark filed motions for summary judgment. The Hayeses resisted the motions.

The circuit court's summary judgment in favor of the defendants was entered on July 22, 2016. The court concluded that the Hayeses could not establish that the defendants owed Alex a duty of care under the attractive nuisance doctrine, holding that, at 16 ½ years of age, Alex was beyond the protection afforded by the tender-years element of the doctrine. Consequently, the court concluded that DCI and Nelson Stark were entitled to judgment as a matter of law. This appeal followed.

Summary judgment is appropriate 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." CR[1] 56.03. In order to prevail in a negligence action, a plaintiff "must prove the existence of a duty, breach thereof, causation, and damages." *Boland-Maloney Lumber Co., Inc., v. Burnett,* 302 SW.3d 680, 686 (Ky. App. 2009). Whether a duty of care exists is a question of law for the court. Therefore, it is reviewed *de novo*. *Id.*

"While general negligence law requires the existence of a duty, premises liability law supplies the nature and scope of that duty when dealing with . . .

[1] Kentucky Rules of Civil Procedure.

injuries on realty." *Lewis v. B & R Corp.,* 56 S.W.3d 432, 437-38 (Ky. App. 2001). Ordinarily, "[t]he status of the person coming onto the land determines the degree of care required by the land possessor." *Miracle v. Wal-Mart Stores East, LP,* 659 F.Supp.2d 821, 825 (E.D.Ky. 2009).

Kentucky classifies a visitor upon property as one of the following: trespasser, licensee, or invitee. *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996). A person who comes upon the property without any legal right to do so is a trespasser. *Hardin v. Harris*, 507 S.W.2d 172 (Ky. 1974). Pursuant to the provisions of KRS[2] 381.232, "[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." Interpreting this provision, the Supreme Court of Kentucky has construed the phrase "injuries which are intentionally inflicted" to mean injuries inflicted by "willful, wanton, or reckless conduct." *Kirschner by Kirschner v. Louisville Gas & Elec. Co.,* 743 S.W.2d 840, 842 (Ky. 1988) (emphasis omitted). Thus, an owner or occupant of land owes no duty to a "trespasser to keep the premises safe for [the trespasser's] use, but [the owner or occupant] must refrain from inflicting or exposing him to wanton or willful injury or from setting a trap for him." *Id.* at 844 (citation omitted). However our courts have historically recognized a landowner's duty of care to children of tender years. The statute expressly exempts those "persons who come within the scope of the 'attractive

[2] Kentucky Revised Statutes.

nuisance' doctrine" from the statutory rule that no duty generally is owed to a trespasser. KRS 381.231(1).

The attractive nuisance doctrine provides that a possessor of land may be subject to liability for physical harm to a child -- even where the child is a trespasser -- where it is unlikely that the child will appreciate the risk involved in his presence or intermeddling upon the property. *Mason v. City of Mt. Sterling*, 122 S.W.3d 500 (Ky. 2003). Our case law establishes that a child of fourteen is presumptively beyond the protection afforded by the tender-years element of the attractive nuisance doctrine. *Helton v. Montgomery*, 595 S.W.2d 257 (Ky. App. 1980).

Even if we were to disregard the doctrine's presumption, there is still no evidence to suggest that Alex, a licensed driver, could not appreciate the risk involved in his operation of heavy construction equipment. The presence of the roller on the construction site posed an unreasonable risk of harm to Alex, which he should have been able to appreciate. In light of his age or status as a licensed driver, no reasonable argument could be made to the contrary. Through his own wrongful conduct, Alex could not conjure up a duty of care for his safety that did not otherwise exist. Consequently, the trial court did not err by concluding -- as a matter of law -- that neither DCI nor Nelson Stark owed Alex a duty of care under the attractive nuisance doctrine.

We affirm the judgment of the Campbell Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bruce B. McIntosh
Cincinnati, Ohio

A. Brian McIntosh
Cincinnati, Ohio

BRIEF FOR APPELLEE:

Mark A. MacDonald, Esq.
Cincinnati, Ohio

James M. West, Esq.
Fort Mitchell, Kentucky