[Cite as *Hensley v. Salomone*, 2005-Ohio-187.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84456

JAMES ROBERT HENSLEY, ET AL.

Plaintiff-appellant

vs.

RAYMOND SALOMONE, ET AL.

Defendant-appellee

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT OF DECISION:	JANUARY 20, 2005
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court, Case No. CV-492478
JUDGMENT:	AFFIRMED.
DATE OF JOURNALIZATION:	
APPEARANCES:	
For plaintiff-appellant:	THOMAS G. REPICKY, ESQ. Thomas Repicky Co., LPA 526 Superior Avenue 530 The Leader Building Cleveland, Ohio 44114 ANTHONY A. BAUCCO, ESQ. Repicky & Knott Leader Building, Suite 530 526 Superior Avenue Cleveland, Ohio 44114
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KARPINSKI, J.:

{¶ 1} Plaintiff, James Robert Hensley ("Hensley"), appeals the trial court's grant of summary judgment in favor of defendant, the estate of Alfred Salamone ("decedent") in Hensley's suit against decedent for injuries incurred when Hensley fell from the loft of decedent's barn.

{¶ 2} Hensley and decedent were friends and neighbors on Route 306 in Chesterland for many years. Decedent lived four houses away from Hensley and lived three houses away from decedent's next-door neighbor, John Mascella ("the neighbor"), one of the witnesses in this case. The neighbors routinely helped each other with tasks like splitting wood and various home improvements. They also lent each other tools and equipment regularly.

{¶ 3} Decedent lived on his property with his wife and adult son. He had sold his property to Chesterland Township and, although he had been in a nursing home recently after being run over by a tractor, he was in his home on the day of the incident. There is no evidence decedent was aware of Hensley's presence in the barn that day.

{¶ 4} Decedent's son was in the process of cleaning out the barn on the property to prepare for the property transferring to the township. The neighbor, who had a friend who was a carpenter, asked the son whether he and his friend could take the wood from the second floor loft area of the barn. Receiving permission, the

neighbor and his friend entered the loft, opened the upper door of the barn, and removed the wood.

{¶ 5} The neighbor had been in the loft of the barn several times previously when he had helped decedent bail hay there. At that time, the loft had consisted of a wooden floor or platform with a large middle area open to the ground. There were two 2" X 10" planks (actually, former diving boards) which ran over the open area from one side of the loft to the other. These planks were used to walk from one side of the loft to the other and had been in place as long as any of the witnesses could remember.

{¶ 6} Years after the neighbor had been in the loft to bale hay, and nearly ten years before the incident which is the subject of this case, the son decided to use the first floor of the barn to work on equipment during the winter, so he built a ceiling to close off the open area.[1] This ceiling consisted of a material called Celotex, which is a brown fiberboard insulating material intended for use in walls and ceilings. All parties testified that it is not strong enough to support a man's weight and was never intended to serve as additional flooring for the loft. The son had covered the Celotex with clear plastic on top to increase its insulation ability and to prevent leaks. The neighbor testified that it was clearly apparent to anyone entering the loft that the wooden flooring and the planks over the Celotex were the only safe areas

[1] At this point, decedent was no longer using the loft for hay.

to walk in the loft. He also testified that the Celotex was at least six inches and probably closer to two feet below the planks and the wooden floor which ran along the sides of the barn.

{¶ 7} On the day of the incident, after the neighbor and his friend had finished loading the wood into the friend's pickup truck, Hensley approached the neighbor to ask to borrow a piece of the neighbor's equipment. When Hensley saw what the neighbor and his friend were doing, according to his and the neighbor's depositions, he decided to go into the barn to see whether there was any wood he could use for his hobby of making birdhouses. According to the neighbor's testimony, the neighbor told Hensley to be careful but never told him that he could enter the barn or go into the loft.

{¶ 8} Shortly after Hensley entered the barn, the neighbor and his friend heard a thud and heard Hensley calling out for help. They went part way into the barn and noted Hensley lying on the concrete floor of the barn and a hole in the ceiling above where he was lying. The neighbor ran to call 911 from his own house and the friend stayed near Hensley.

{¶ 9} Hensley claims serious injuries, including injuries to his back. He sued the decedent and decedent's brother, a co-owner of the property, for his injuries. The brother, who is a resident of Cuyahoga County, was later dismissed from the suit.

{¶ 10} Decedent's estate filed for summary judgment and the trial court granted it. This appeal follows, stating three

assignments of error. The first two assignments of error are related and will be addressed together:

I. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF-APPELLANT JAMES ROBERT HENSLEY WS A TRESPASSER AS A MATTER OF LAW.

II. THE TRIAL COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT PLAINTIFF-APPELLANT JAMES ROBERT HENSLEY WAS NOT A DISCOVERED TRESPASSER ON THE DEFENDANT-APPELLEE'S PROPERTY.

{¶ 11} Hensley claims that he and decedent had an agreement which constituted an open invitation to enter each other's barn or garage and help themselves to whatever tools they needed to borrow. He says he was, therefore, an invitee or at least a licensee when he was on decedent's property.

{¶ 12} The appellate court reviews a summary judgment de novo. *Hillyer v. State Farm Mut. Auto Ins. Co.* (1996), 131 Ohio App.3d 172, 175. The appropriate test for that review is found in Civ.R. 56(C), which states that summary judgment may be granted under the following conditions: first, there is no genuine issue of material fact which remains to be litigated; second, as a matter of law, the moving party is entitled to judgment; and, third, a review of the evidence shows that reasonable minds can reach only one conclusion, which, when that evidence is viewed most favorably to the party against whom the motion was made, is adverse to the nonmoving party. *Temple v. Wean* (1977), 50 Ohio St.2d 317, 327.

{¶ 13} Initially, the party who seeks summary judgment has the burden of demonstrating the absence of any issue of material fact

for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330. Once the moving party has satisfied that initial burden, however, the nonmoving party then has a similar burden of showing that a genuine issue of fact remains for trial. *Dresher v. Burt* (1996), 75 Ohio St.2d 280. If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-59.

{¶ 14} In its order and decision, the trial court clearly and concisely summarized the law concerning premises liability:

{¶ 15} It is well settled in Ohio "that, under the common law of premises liability, the status of the person who enters upon the land of another (*i.e.*, trespasser, licensee, or invitee) defines the scope of the legal duty that the responsible party owes the entrant." *Shump v. First Continental-Robinwood Assoc.* (1994), 71 Ohio St.3d 414,417. The Supreme Court of Ohio has defined a trespasser as "one who, without express or implied authorization, invitation or inducement, enters private premises purely for his own purposes or convenience." *McKinney v. Hart & Restle Realtors, Inc.* (1987), 31 Ohio St.3d 244, 246, citing *Allstate Fire Ins. Co. V. Singler* (1968), 14 Ohio St.2d 27, 29. "Ordinarily, a landowner owes no duty to undiscovered trespassers other than to refrain from injuring such trespassers by willful or wanton conduct." *Elliot v. Nagy* (1986), 22 Ohio St.3d 58, 60. A licensee is "a person who enters the premises of another by

permission or acquiescence, for his own pleasure or benefit, and not by invitation ***. A licensee takes his license subject to its attendant perils and risks. The licensor is not liable for ordinary negligence and owes the licensee no duty except to refrain from wantonly and willfully causing injury." *Light v. Ohio University* (1986), 28 Ohio St.3d 66, 68 citing *Hannan v. Ehrlich* (1921), 102 Ohio St. 176. "Invitees are persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner." *Gladon v. Greater Cleveland Regional Transit Authority* (1996), 75 Ohio St.3d 312, 315. "It is the duty of the owner of the premises to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition." *Light*, supra citing *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 31. Order and Decision, March 9, 2004 ¶7.

A. Invitee

{¶ 16} Hensley also argues that he was an invitee because he and decedent were on each other's property regularly with each other's unspoken permission. In his affidavit, he states that decedent and he "often went on each other's property including our garages and his barn, which were not locked unless he were [sic] out of town; we could borrow each other's tools whenever we needed them; visit together, help each other on our work projects and drive to work together." Hensley's affidavit, November 10, 2003 ¶3. Because

decedent's son was emptying the barn in preparation for the transfer of the property to the township, Hensley states he was helping decedent by taking things out of the barn that decedent or his son would otherwise have to dispose of. He states, "[d]ue to the close personal relationship between [Hensley] and [decedent], [Hensley] was surely justified in believing that [decedent] permitted him on the property, welcomed him, and desired his entry." Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment at 7. Hensley admits in his affidavit, however, that although he "had been in [decedent]'s barn hundreds of times before the accident," he had never been "in the second floor loft." Hensley's affidavit ¶3.

{¶ 17} Nothing in the evidence shows that Hensley was ever asked to help empty the barn. Rather, he took it upon himself to look in the barn to see what might be of use to him once he learned that the neighbor and his friend were taking wood and that decedent's son was emptying the barn. Hensley states in his affidavit that after he spoke with the neighbor and his friend and learned that any wood the two did not remove would be thrown away, he "proceeded up to the loft and after walking across some planks which covered some plastic over a brown wood flooring." Hensley's affidavit ¶4. Because he was in the barn for his own purposes, Hensley failed to refute defendant's statement that Hensley was not an invitee to the loft of the barn. Nor can he argue that the pattern and practice he cites in his affidavit provide an implicit invitation to enter

the loft. He admits that he had never been up there, either with or without decedent. He does not allege that decedent ever implied or explicitly stated that he had permission to go up into the loft. Hensley has failed to provide evidence, therefore, to support his allegation that he was an invitee into the loft.

B. Licensee

{¶ 18} Hensley claims, in the alternative, that he was a licensee at the time he was in the barn. He argues that even if decedent had not invited him into the loft, by allowing Hensley to enter the barn at will, decedent had acquiesced to his presence. As noted above, "the licensor is not liable for ordinary negligence and owes the licensee no duty except to refrain from wantonly or willfully causing injury." *Light v. Ohio University* (1966), 28 Ohio St.3d 66, 68. Even if Hensley had been a licensee, he presents no evidence that decedent wantonly or willfully caused him injury.

C. Trespasser

{¶ 19} Finally, Hensley disputes decedent's claim that he was a trespasser. He claims that his frequent visits to the barn, all with the implied consent of decedent, prevent classifying him as a trespasser. Defining a trespasser as "one who, without express or implied authorization, invitation or inducement, enters private premises purely for his own purposes or convenience," he claims that he had at least implied authorization to enter the barn because he had frequently entered the barn over the years.

{¶ 20} Hensley does not claim, however, that this alleged open invitation was unlimited in scope.

{¶ 21} The status of an invitee is not absolute but is limited by the landowner's invitation. " *** The visitor has the status of an invitee only while he is on part of the land to which his invitation extends -- or in other words, the part of the land upon which the possessor gives him reason to believe that his presence is desired for the purpose for which he has come ***. If the invitee goes outside of the area of his invitation, he becomes a trespasser or a licensee, depending upon whether he goes there without the consent of the possessor, or with such consent." 2 Restatement of the Law 2d, Torts (1965) 181-182, Section 332, Comment l.

{¶ 22} *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St. 3d 312, 315. See also, *Aponte v. Castor* (2003), 155 Ohio App. 3d 553 ¶9. A land owner may give permission to another to enter part of his property at will, therefore, without giving the person free reign to enter all parts of the property. When guests are invited into one’s home, they are not necessarily invited to rummage through the attic of the home without a separate and express invitation. The loft of a barn is a storage area. Hensley admitted that he had never been up there. Whether he had not because he never had reason to or because he had never been invited to, he has presented no evidence that decedent or his son ever extended any implied or express invitation to him

to go up into the loft. Nor can he claim that decedent or his son ever told him he could take something from the loft of the barn to keep for his own, rather than to borrow and return. Even if Hensley had permission to enter the barn at will to borrow tools or equipment, that permission does not translate into permission to enter the loft, a part of the barn where he had never gone, and remove items he did not intend to return. Because he lacked permission to go into the loft of the barn, Hensley can only qualify as a trespasser, at least in terms of the loft.

{¶ 23} As the trial court correctly explained: "[Hensley] claims he had an implied invitation to enter [decedent]'s barn based on prior interactions with the [decedent]. However, [Hensley] admits he had never been on the loft prior to the accident. Therefore, even if reasonable minds could conclude that [Hensley] was an invitee in the [decedent]'s barn, they could not conclude that the invitation extended to the loft from which he fell." Opinion and Decision ¶15.

D. Discovered Trespasser

{¶ 24} Finally, Hensley argues that even if he were to be considered a trespasser, he was a discovered trespasser who was owed the same standard of care as an invitee. If the injured party has the status of "a discovered trespasser, then [defendant] owed him a higher duty, one of ordinary care ***." *Phillips v. Dayton Power & Light* (1994), 93 Ohio App.3d 111, 117. Nonetheless,

> *** [w]hile notice of prior trespasses is required to elevate the landowner's duty to a trespasser, that factor standing alone is not enough. According to 2 Restatement of the Law 2d, Torts (1965), 184-207, Sections 333 to 339, a trespasser's status can be elevated to that of "discovered" trespasser in situations involving the following facts: (1) constant trespassers and a latent active or artificial danger, (2) known trespassers, and (3) trespassing children.

Fath v. Mutual Oil and Gas co. (Sept. 6, 2000), Summit App. Nos. 19851, 19856, 2000 Ohio App. LEXIS 3990 at *7.

{¶ 25} As the trial court noted, defendant was not a "known trespasser" in the loft of decedent's barn. To qualify as a known trespasser, he would have had to have regularly entered the loft without permission and the landowner would had to have known about these regular trespasses into the loft. Hensley has provided no evidence, however, that anyone but the neighbor and his friend knew he was in the barn or had entered the loft of the barn, where, by his on admission, he had never been, with or without permission.

{¶ 26} There is insufficient evidence to establish Hensley as a "known trespasser" especially of the loft. Moreover, Hensley does not fit the third category under Restatement, because he is not a child. Another possible category is that of a "constant trespasser" in an area with a "latent active or artificial danger."

{¶ 27} "A landowner will owe a duty of ordinary care when he knows or has reason to know that trespassers 'constantly' intrude upon a limited area of the property where the owner either carries on a dangerous activity or has created or maintained an artificial condition that he has reason to know is dangerous and that the danger will not be discovered or appreciated by the intruders." *Fath* at *8, citations omitted. Hensley himself admitted that he had never been in the loft before, and he did not present any evidence to show that other trespassers were "constantly" entering the loft. Hence he has not shown that decedent should have known that trespassers were in danger from the ceiling he and his son had installed under the loft. Hensley has failed, therefore, to show that he was a discovered trespasser.

{¶ 28} Hensley has failed to prove that he was not a trespasser or that he was a discovered trespasser. Accordingly, these two assignments of error are without merit.

{¶ 29} For his third assignment of error, Hensley states:

"III. THE TRIAL COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE STANDARD OF CARE APPELLEE OWED PLAINTIFF-APPELLANT JAMES ROBERT HENSLEY WAS ONLY TO REFRAIN FROM WILLFUL, WANTON OR RECKLESS CONDUCT.

{¶ 30} Hensley relies on his arguments that he was either an invitee or a licensee to support his claim that decedent owed him a greater standard of care than that owed to a trespasser: that is, to refrain from willful, wanton, or reckless conduct. We have

already determined that Hensley failed to provide any evidence that he was a discovered trespasser. Without such evidence, he cannot claim a greater standard of care. This assignment of error, therefore, is without merit.

Affirmed.

It is ordered that appellee recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES D. SWEENEY, P.J.*, AND

JAMES J. SWEENEY, J., CONCUR.

DIANE KARPINSKI
JUDGE

*SITTING BY ASSIGNMENT: JUDGE JAMES D. SWEENEY, RETIRED, OF THE EIGHTH DISTRICT COURT OF APPEALS.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the

court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).