IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1997 Term

No. 23941

ROBERT LEE BROWN, ADMINISTRATOR
OF THE ESTATE OF MICHAEL LEE BROWN,
Appellant

v.

JOHN L. CARVILL,
Appellee

Appeal from the Circuit Court of Kanawha County
Honorable Irene C. Berger, Judge
Civil Action No. 94-C-2198

AFFIRMED

Submitted: October 7, 1997
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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed *de novo.*" Syllabus Point 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Company v. Federal Insurance Company of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963).

3. "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 for the performance of any duty to the owner." Syllabus Point 1, *Huffman v. Appalachian Power Company,* 187 W.Va. 1, 415 S.E.2d 145 (1991). 4. "For a trespasser to establish liability against the possessor of property who has created or maintains a highly dangerous condition or instrumentality upon the property, the following conditions must be met: (1) the possessor must know, or from facts within his knowledge should know, that trespassers

constantly intrude in the area where the dangerous condition is located; (2) the possessor must be aware that the condition is likely to cause serious bodily injury or death to such trespassers; (3) the condition must be such that the possessor has reason to believe trespassers will not discover it; and, (4), in that event, the possessor must have failed to exercise reasonable care to adequately warn the trespassers of the condition." Syllabus Point 4, *Huffman v. Appalachian Power Company,* 187 W.Va. 1, 415 S.E.2d 145 (1991).

Per Curiam:[1]

This is an appeal by Robert Lee Brown, the Administrator of the Estate of Michael Lee Brown, from a summary judgment order of the Circuit Court of Kanawha County in a wrongful death action. On appeal the appellant claims that the circuit court erred in entering summary judgment. After reviewing the issues presented and the facts of this case, this Court disagrees. The judgment of the Circuit Court of Kanawha County is, therefore, affirmed.

On December 2, 1994, the appellant's decedent, thirteen-year-old, Michael Lee Brown, who was riding a motorcycle, struck a chain which was strung between two posts across a private road which ran

[1]We point out that a per curiam opinion is not legal precedent. *See Lieving v. Hadley,* 188 W.Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4 (1992) ("Per curiam opinions . . . are used to decide only the specific case before the Court; everything in a per curiam opinion beyond the syllabus point is merely obiter dicta. . . . Other courts, such as many of the United States Circuit Courts of Appeals, have gone to non-published (not-to-be-cited) opinions to deal with similar cases. We do not have such a specific practice, but instead use published per curiam opinions. However, if rules of law or accepted ways of doing things are to be changed,

through property owned by John L. Carvill. Michael Lee Brown was thrown off his motorcycle and killed.

As a result of the accident, the appellant, Robert Lee Brown, Michael Lee Brown's father, acting as Administrator of the Estate of Michael Lee Brown, instituted this action in the Circuit Court of Kanawha County. In the first count of the complaint he alleged that Mr. Carvill knew or should have known that individuals used the road across his property, and he charged that Mr. Carvill had acted negligently in placing the chain across the road. In the second count of the complaint he alleged that Mr. Carvill had acted in willful, wanton and reckless disregard for the safety of persons he knew used the road.

During discovery, information was developed showing that Mr. Carvill did not reside on the property where the chain was located and that the chain and the posts on which it was strung had been placed across the road many years before Mr. Carvill bought the property by an individual

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then this Court will do so in a signed opinion, not a per curiam opinion.").

named Gerald Adkins. Although originally at one time a "no trespassing" sign had been placed on a post to which the chain was attached, the sign had been torn down. Also, reflectors which were on the posts had been torn off. Other information clearly showed that the chain was usually and normally kept in place and was kept locked except during the period around Memorial Day and Labor Day. The information was somewhat conflicting as to the appearance of the chain. Certain of the parties who gave depositions indicated that the chain was painted bright orange; others indicated that it was rusty. Still others indicated that the chain had some orange paint on it and some rust.

The information developed during discovery also showed that on April 17, 1994, the decedent, Michael Lee Brown, desired to visit a girlfriend, Alisha Cain, and his parents gave him permission to visit her. To visit her the decedent drove his dirt bike to the Cain house over the road which ran through the property of Mr. Carvill. At that time the chain which normally blocked the road was apparently down. While at the Cain house Michael Lee Brown took various children who were playing there on rides on his motorcycle. At a certain point during the day Michael Lee

Brown returned home to fill his gas tank and then returned to the Cain house. Both times he apparently used the road across Mr. Carvill's property. Later in the afternoon Michael Lee Brown and a friend went riding on the Carvill property again. This time they encountered Mr. Carvill who apparently had not been on his property when Michael Lee Brown had previously crossed it, but who was then on the property attempting to dig up a dogwood tree for a friend. When Mr. Carvill noticed Michael Lee Brown at a distance, he attempted to wave him down, but Michael Lee Brown turned without speaking to Mr. Carvill and without Mr. Carvill being able to ascertain his identity.

It appears that Mr. Carvill left his property before Michael Lee Brown attempted to return home, sometime between 4:00 and 5:10 p.m. Thereafter, Michael Lee Brown left the Cain home to return to his own home. When he did not return home, a search later that evening revealed his body and motorcycle near the chain on the Carvill property. All the evidence indicated that Michael Lee Brown had struck the chain and had been killed in the encounter.

After extensive discovery was conducted, John L. Carvill, moved for summary judgment, and by order entered August 20, 1996, the circuit court granted his motion. In granting the motion the circuit court found that it was undisputed that Michael Lee Brown was a trespasser on the property of John L. Carvill at the time of his death. The court also found that the duty owed by Mr. Carvill as the owner of property to a trespasser such as Michael Lee Brown was to refrain from willful or wanton injury, and that there was no evidence of willful or wanton conduct on the part of John L. Carvill. The court also recognized that there was an exception with respect to the duty owed to an infant trespasser where there was a dangerous instrumentality present upon the landowner's premises. The court, however, ruled that the chain on Mr. Carvill's property did not constitute such a dangerous instrumentality. Upon such findings, the court granted the motion for summary judgment and ordered that the action be dismissed with prejudice. It is from that order that the appellant now appeals.

In Syllabus Point 1 of *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994), the Court stated:

> A circuit court's entry of summary judgment is reviewed *de novo*.

The Court has also stated that:

> A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.

Syllabus Point 3, *Aetna Casualty & Surety Company v. Federal Insurance Company of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963).

West Virginia's rules relating to premises liability are well settled and clearly established and set out the duty owed a trespasser by a landowner. As stated in Syllabus Point 1 of *Huffman v. Appalachian Power Company,* 187 W.Va. 1, 415 S.E.2d 145 (1991):

> 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 for the performance of any duty to the owner.

In this Court's view, the circuit court in the present case properly ruled that Michael Lee Brown was a trespasser. Mr. Carvill had in no way invited

him onto the premises, and he was there for his own purposes and not for the performance of any duty to Mr. Carvill. Syllabus Point 4 of *Huffman v. Appalachian Power Company, id.,* goes on to state:

> For a trespasser to establish liability against the possessor of property who has created or maintains a highly dangerous condition or instrumentality upon the property, the following conditions must be met: (1) the possessor must know, or from facts within his knowledge should know, that trespassers constantly intrude in the area where the dangerous condition is located; (2) the possessor must be aware that the condition is likely to cause serious bodily injury or death to such trespassers; (3) the condition must be such that the possessor has reason to believe trespassers will not discover it; and, (4), in that event, the possessor must have failed to exercise reasonable care to adequately warn the trespassers of the condition.

In the case presently before the Court, we cannot find from anything adduced during discovery that it can be shown that Mr. Carvill knew or should have known from the facts within his knowledge that trespassers *constantly* intruded on the road traversing his property. As previously indicated, he did not live on the property and thus was not in touch with what was constantly occurring there. Further, the undisputed evidence shows

that he, and others in the neighborhood, knew that the chain was up virtually all of the time, a fact from which it reasonably may be inferred that he did not know or have reason to know that trespassers were constantly intruding on the road. Secondly, in the present case there is nothing to show that Mr. Carvill was aware that the chain strung across the road traversing his property was likely to cause serious bodily injury or death to trespassers. The undisputed evidence that the chain had been in place for many years, and nothing was adduced to show that it had ever previously caused any injury, much less serious bodily injury or death, to anyone. There was further evidence that the chain had been painted bright orange, and Mr. Carvill and other deponents believed that there was still orange paint on it at the time his deposition was taken. This fact, and the fact that no individual had previously been injured, were both circumstances which in this Court's view would defeat a conclusion that Mr. Carvill had a reason to believe that trespassers would not discover the chain. As previously indicated, the third point which a trespasser must show under Syllabus Point 4 of *Huffman v. Appalachian Power Company, id.,* is that "[t]he condition must be such that the possessor has reason to believe trespassers will not discover it."

Although an argument can be made that Michael Lee Brown would not have discovered the chain, the bulk of the evidence on discovery suggested that the chain was plainly and clearly visible. Lastly, there was testimony that on Mr. Carvill's encounter with Michael Lee Brown and his partner, he attempted to warn them to keep off the property, but when he approached to speak to them, Michael Lee Brown turned and rode away.

In this Court's view, given the nature of the evidence developed during discovery, we believe that it would have been impossible for the appellant to establish to a jury's satisfaction all the requirements set forth in Syllabus Point 4 of *Huffman v. Appalachian Power Company, id.,* which must be shown in order to hold the possessor of property liable to a trespasser, and under the circumstances of the case, this Court cannot conclude that the trial court erred in entering summary judgment for Mr. Carvill.

After going through this analysis the Court notes that courts of other jurisdictions have reached similar conclusions. For instance,

in *Doehring v. Wagner,* 80 Md. App. 237, 562 A.2d 762 (1989), the personal representative of a motorcycle rider brought suit against a premises owner after the cyclist struck a chain used to block access to a driveway. The premises' owners were aware that motorcyclists frequently traversed the driveway in applying the standard that the property owner had a duty to refrain from willful and wanton injury to others, the *Doehring* court rejected the plaintiff's argument that the erection of the chain was willful and wanton. The court stated:

> [W]e will not hold that they [owners of the premises] must anticipate the manner in which a trespasser will choose to enter their right-of-way. . . . The sole fact that the chain was erected is not evidence that the Doehrings intended to injure the decedent or to cause his death. . . .

80 Md. App. at 248-9, 562 A.2d 762 at 768.

The Court also notes that the appellant in the present case argues that the chain strung across the road traversing Mr. Carvill's property was a "dangerous instrumentality" and that because it was a dangerous instrumentality, Michael Lee Brown in the present case fell in the exception to the trespasser liability rule set forth in Syllabus Point 1 of *Adams*

v. Virginia Gasoline & Oil Co., 109 W.Va. 631, 156 S.E. 63 (1930). That exception states:

> An owner or proprietor of a dangerous instrumentality must exercise reasonable care to avoid injury to a trespassing child whose presence at the time and place of danger was either known to the proprietor or might reasonably have been anticipated.

The Court notes, however, that in *Waddell v. New River Company,* 141 W.Va. 880, 93 S.E.2d 473 (1956), the Court discussed this and indicated that a dangerous instrumentality, to bring this into play, had to be something which the injured party was too young to understand and to avoid. During discovery in the present case, the appellant himself testified in his deposition that his son, Michael Lee Brown, had been taught to be careful of obstacles in or across roads when riding his motorbike, and the overall great weight of the testimony was that he was a careful rider and aware of the hazards created by obstacles. The Court also notes that elsewhere, in *Gaboury v. Ireland Road Grace Brethren, Inc.,* 446 N.E.2d 1310 (Ind., 1983), another court recognized that the closing of a driveway by a cable, gate or other form of obstruction is not "so unusual a situation in our

society that it can be considered a dangerous or hazardous condition." 446 N.E.2d at 1315.

While the Court feels that the death involved in the present case was tragic, it is not the Judiciary's role to decide legal issues on sympathy. Rather, courts are required to apply the law, and under the overall circumstances this Court cannot conclude that there was a genuine issue of fact to be tried, or that inquiry concerning the facts was desirable to clarify the application of the law. Therefore, the Court cannot conclude that the circuit court erred in granting summary judgment under Syllabus Point 3 of *Aetna Casualty and Surety Company v. Federal Insurance Company of New York, supra.* Further, the Court does not believe that the trial court applied incorrect law in assessing the legal impact of the facts or erred in granting Mr. Carvill summary judgment.

The judgment of the Circuit Court of Kanawha County, therefore, is affirmed.

Affirmed.