IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LOUIS STEPPE JR. and CAROLYN STEPPE, h/w, Guardians for TRAVIS STEPPE, a minor,	:	**No. 00-00347**
Plaintiffs	:	
vs.	:	**Civil Action - Law**
MARLIN STEPPE,	:	
Defendant	:	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Order entered July 9, 2001, wherein the Court granted the defendant's motion for summary judgment.

The relevant facts are as follows: Travis Steppe (hereinafter the plaintiff) would visit Marlin Steppe (hereinafter the defendant) two or three times per week. Dep. of Travis Steppe, p.7. On November 28, 1998, the plaintiff, age fourteen, went to the defendant's house to ride four-wheelers. Id at p. 9. The plaintiff left the house in the morning and returned to put the four-wheelers away in the afternoon. Id. When he returned the following individuals were present: the defendant; the defendant's father, Jim Steppe; the defendant's brother, Ben Steppe; Joel Lukens; Dale Merrill; and Eric Anderson. Id. at pp. 9-10.

The plaintiff and Dale were joking around and pushing each other. Id. at 10. Joel thought it was funny, so the plaintiff and Dale started picked on him. Id. Joel acted like he was going to chase the plaintiff, so the plaintiff ran around the tractor and went to go

from the garage into the basement. Id. at p.11.

There was an approximately one inch step down from the garage floor to the basement floor. Id. at p.13 These areas were also separated by a wooden door with a three pane glass top. Id. at 12, 28. The door would swing freely from one foot open until it reached a 90 degree angle and back. Id. at pp.15-16. It would not close completely on its own; it had to be pulled shut. Id. at p.31. Earlier in the day, the door was propped open with a sledgehammer to let some air in the basement, because the door wouldn't stay open by itself. Id. at p.30.

In the basement behind the door were numerous items including a lawn mower, and containers of oil and washer fluid. Id. at p.33; Defendant's Motion for Summary Judgment, Exhibit B. The plaintiff knew the lawn mower was behind the door on November 28, 1998. He stated in his deposition that his cousin put it there a day or two before, but he forgot about it being there. Dep. of Travis Steppe, at p.29.

As the plaintiff approached the basement door, it was open approximately one foot. Id. at p. 12. He pushed the door open with his right hand on the wood just above the handle. Id. at pp. 14, 18. He did not push the door real hard because he didn't hear Joel following him anymore. Id. at p.17. When he usually opened the door, the plaintiff would push the door open hard. Id. at pp. 48-49. He may have pushed it a little harder than usual on November 28, but not a whole lot. Id.

The plaintiff paused and glanced over his shoulder to see if Joel was chasing him. Id. at p.17. The door went back about two feet, hit the mower and started to come back toward the plaintiff. Id. at pp. 14-15. The plaintiff heard the door creak and

turned back toward the door. Id. at p.17. He saw the door start coming back at him, so he put his hands up to stop it. Id. at p.14. The door came back about one foot before his left hand hit the glass and went through it. Id. at p.16. The plaintiff's left hand and arm were cut badly and he was taken to the hospital. Id. at pp. 18-24.

The defendant called his insurance company to make a claim and he gave them the plaintiff's name, address and phone number. The insurance company called the plaintiff and asked him what happened. The plaintiff said he tripped, fell and put his hand through the glass pane of the door. In his deposition, the plaintiff said he did not trip or fall and he only told the insurance company that because that is what the defendant told him to say. Id. at p. 25-26.

The plaintiff, through his parents, filed suit against the defendant. Although the plaintiff asserts in his complaint that he was an invitee, upon review of the plaintiff's deposition and the other materials submitted regarding the defendant's motion for summary judgment it is clear that the plaintiff was a licensee and the plaintiff is pursuing this case under section 342 of the Restatement (Second) of Torts. The defendant filed a motion for summary judgment asserting that the plaintiff could not meet his burden of proof under the Restatement (Second) of Torts §342 and that the accident occurred as a result of the plaintiff's horseplay. The Court agreed with the defendant and granted summary judgment on both grounds.

Rule 1035.2 governing summary judgment states:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may more for summary judgment in whole or in part as a matter of law

> (1)whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.Civ.P. 1035.2. In his response to the defendant's motion for summary judgment, the plaintiff focuses on paragraph (1) of this rule and ignores paragraph (2). The motion, however, was based on paragraph (2) in that the defendant contended the plaintiff could not prove the defendant was subject to liability under §342 of the Restatement (Second) of Torts.

In his response to the motion and his brief, the plaintiff concedes that the Restatement (Second) of Torts §342 sets forth the plaintiff's burden of proof. Section 342 states:

> A possessor of land is subject to liability for physical harm cause to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn other licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved.

Restatement (Second) of Torts, §342. It is the plaintiff's burden to prove all three of these elements. It is not the defendant's responsibility to show any of these elements, including whether the plaintiff knew or should have known of the condition.

With regard to subparagraph (a), the plaintiff can only show that the defendant knew of the condition, i.e., he knew there were objects behind the door. There is no testimony to show that the defendant knew that placing the objects behind the door involved an unreasonable risk of harm to others. The defendant had items behind the door, including the lawn mower, for approximately a year to a year and a half prior to the accident. Dep. of Marlin Steppe, at pp. 21-22. Even if one could infer the risk based solely on the knowledge of items behind the door, the plaintiff had the same knowledge as the defendant. According to the plaintiff's own testimony he knew the lawn mower had been behind the door for a few days and he believed the door hit the lawnmower, causing it to kick back. Dep. of Travis Steppe, at pp. 29-30. Therefore, the plaintiff has failed to produce evidence that the defendant should have expected that the plaintiff would not discover or realize the danger.

With regard to the third element, the plaintiff cannot show that he did not know or have reason to know of the condition and the risk involved. The plaintiff must be able to prove both to reach a jury. Here, it is clear the plaintiff knew of the condition. The plaintiff testified that, when he pushed the door open, it hit the lawn mower and when the door came back his hand went through the window. Dep. of Travis Steppe, pp. 14, 28-30. He also knew the mower was there prior to the accident because he saw the defendant put it there a day or two earlier and the door was wedged open between a sledgehammer and the lawnmower earlier on the day of the accident. Dep. of Travis Steppe, pp. 29-30. Furthermore, the items behind the door were open and obvious as is evidenced by the photographs of the doorway and basement. The plaintiff visited the defendant's garage

and basement area a couple of times per week. Therefore, he knew or should have known the mower and the other objects were behind the door.

The Court acknowledges that the plaintiff stated he did not expect the door to come back at him; he expected it to stay open. However, the plaintiff stated that the door won't stay open by itself and that is why it was propped open with the sledgehammer earlier in the day. Dep. of Travis Steppe, p. 30. He also stated the door would swing three-quarters of the way shut. Dep. of Travis Steppe, p. 31. Therefore, although the plaintiff states he did not expect the door to swing back towards him, the plaintiff should have known the door would swing back based on the information he possessed.

In the alternative, the Court found that the accident was the result of the plaintiff's horseplay. The plaintiff was running from the garage to the basement.[1] He pushed the door open hard like he usually did or maybe a little harder. Dep. of Travis Steppe, pp. 17, 48-49. Instead of proceeding through the door as one would normally do, however, the plaintiff paused in the doorway and turned to see if Joel was still chasing him. Dep. of Travis Steppe, at p. 17. When the plaintiff turned around, the door was coming back at him. He put up his arms and his left hand hit the glass and broke it. The Court finds, as a matter of law, that it was the horseplay and the resulting inattention to the door that caused the plaintiff's hand to strike the door with sufficient force to break the glass and injure his left hand and arm.

[1]The plaintiff cites to the deposition of Joel Lukens; however, that deposition was never submitted to the Court or made part of the record.

DATE: _____ By The Court,

_____
Kenneth D. Brown, J.

cc: Scott T. Williams, Esquire
Robert Seiferth, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file
Superior Court (original & 1)