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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 86-229

DANNY COX,

PLAINTIFF,

VS:

MEMORANDUM OPINION

HOOKER INVESTMENTS,
LTD, ET AL.,

DEFENDANTS.

INTRODUCTION

By the above-styled diversity action, the plaintiff seeks damages for personal injuries received from an oil well pumping jack admittedly maintained and operated by the defendants. Currently before the undersigned is motion of the defendants for partial summary judgment.

FACTS

The plaintiff's father was owner, or partial owner, of two immediately adjoining tracts of land at Big Andy Ridge in Lee County, Kentucky. Upon one of those tracts, he maintained a house in which he lived with the plaintiff. The other 130-acre tract had been leased to the defendant oil company, under a contract, the terms of which provided:

That the lessor. . . has granted, demised leased and let. . . exclusively unto said leasee, its successors, and assigns, the land herein described, with the exclusive right for the purpose of mining, exploring by geophysical and other methods, and operating for and producing therefrom oil, gas, casing-head gas, casing-head gasoline, and the exclusive right of injecting water, brine and other fluids into subsurface strata, with rights of way and easements for laying pipe lines, telephones and telegraph lines, tanks, power houses, stations, gasoline plants, ponds and roadways and fixtures for producing, treating, caring for such products and any and all other rights and privileges necessary, incident to, or convenient for the economical operation alone or con-

jointly with neighboring lands for the production of oil, gas, casing-head gas, casing-head gasoline, and erection of structures thereon to produce, save and take care of said products, and the injecting of water, brine and other fluids into subsurface strata. . .

At the time of the accident--July 14, 1985--the lease had been in effect for more than a year, and the pumping jacks (which were set out out in the open, without protective fences) had become a familiar sight in the area. ✓

The plaintiff was a seventeen year old high school graduate who had successfully completed vocational courses in oil field technology.¹ On the date of the injury, the plaintiff and two relatives were on the tract in question for recreational purposes, as they had been on many occasions in the past with the consent of the plaintiff's father. According to the plaintiff, the truck in which they were riding overheated and the passengers climbed out to wait until the engine cooled. Sometime shortly thereafter, the plaintiff noticed that his shoe lace was untied and absent-mindedly placed his foot on the mechanism; he admitted, however, that if he had thought about it, he would have remembered that pumping jacks often run on electronic timing mechanisms. Almost immediately thereafter, of course, the jack "started up" and crushed his foot.

The plaintiff, who did not immediately inform the company of the incident, contends that the company had a duty to maintain and operate the jacks in a manner not dangerous to the landowner and others who could reasonably be expected to be on the property.

The defendant has moved for partial summary judgment, requesting that the Court limit the issue in this case to whether or not the duty owed to Cox "as a trespasser" was breached.

¹The plaintiff testified that he had received "A's" in courses where he was taught, among other things, how the jacks were put together.

APPLICABLE LAW

KRS 381.231 and 382.232 appear to codify the common law with regard to the liability of possessors of the land. KRS 381.231 provides that a trespasser is any person who enters or goes up on the real estate of another without any right, lawful authority, or invitation, either express or implied, but does not include persons who come within the scope of the attractive nuisance doctrine. ✓

Under Kentucky common law, with the exception of the "attractive nuisance" doctrine, children were generally subject to the same status/standards of care from possessors of land as were adults; however, older teenagers with normal mental resources can not normally avail themselves of the doctrine. E.g., Chesser v. Louisville County Club, 339 S.W.2d 194, 196 (Ky. 1960). Further, the doctrine has as one of its component parts that the risk involved is of the type that children would not be able to comprehend the risk, a fact which is arguably absent in this case, given the plaintiff's vocational background.

The question, then, remains as to whether the plaintiff--by placing his foot on the pump jack--is a trespasser, as maintained by the defendant, or as a "licensee" as maintained by the plaintiff. A "trespasser", under the common law, was one who entered or remained on land without the consent of the possessor of such land; a "licensee" is one privileged to enter or remain on land pursuant to the possessor's consent. Bradford v. Clifton, 379 S. W. 2d 249, 250 (Ky. 1954).³ ✓
Habitual or customary use of property for a particular purpose without objection from the owner may give rise to the implication of consent to such use, where such use or custom has existed to the knowledge of occupant and has been accepted or acquiesced in by him. Id.

in this particular case, there is no argument that the plaintiff did not have any right or the express consent of the oil company to be on one of its pieces of equipment. Further, although there is evidence that the plaintiff visited the tract of land repeatedly, there is no evidence that he had a habit of going on to the area immediately adjacent to the pump jack or onto one of the pump jacks, so that there could be a question of implied consent.

Accordingly, the plaintiff's status must be seen as that of a trespasser and the motion for summary judgment must be granted. A separate order consistent with this opinion will be entered this same date.

This the _____ day of April, 1987.

HENRY R. WILHOIT, JR.
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 86-229

DANNY COX, PLAINTIFF,

VS: ORDER

HOOKER INVESTMENTS,
LTD, ET AL., DEFENDANTS.

* * * * *

In accordance with the memorandum opinion entered this same date,
IT IS HEREBY ORDERED that the defendant's motion for partial
summary judgment is GRANTED.

This the _____ day of April, 1987.

HENRY R. WILHOIT, JR.
JUDGE

of equipment. Further, although there is evidence that the plaintiff visited the tract of land repeatedly, there is no evidence that he had a habit of going on to the area immediately adjacent to the pump jack or onto one of the pump jacks, so that there could be a question of implied consent. Accordingly, the plaintiff's status must be seen as that of a trespasser.

However, reviewing the evidence, it appears that, even should the plaintiff be characterized as a licensee, there would have been no duty to warn him of any danger thereon which is as well known to that person as to the occupant, or which is obvious or which could be observed by that person in the exercise of ordinary case. See, Keown v. Keown, 394 S. W. 2d 915 (Ky. 1965). In this case, it is clear that the plaintiff was aware of the dangers involved.

Thus, on its own motion, the Court will grant summary judgment on behalf of the defendant by separate order entered this same date.

This the _____ day of April, 1987.

HENRY R. WILHOIT, JR.
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 85-181

FRANK ROBINETTE,

PLAINTIFF,

VS:

ORDER

OTIS BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES

DEFENDANT.

* * * * *

Currently before the undersigned is the motion of the plaintiff for an extension of time in which to file its supportive brief; examination of the record, however, reveals that the plaintiff has previously filed a timely memorandum brief. The defendant has also filed a motion for an extension of time in which to submit is memorandum; no objections having been filed thereto, and this being the first such extension of time sought by the defendant,

IT IS HEREBY ORDERED that:

(1) the plaintiff's motion for an extension of time is DENIED as MOOT, said memorandum having already been timely filed; and

(2) the defendant's motion for an extension of time is GRANTED to the extent that the subsequently-tendered memorandum shall be considered to have been timely filed.

This the _____ day of April, 1987.

HENRY R. WILHOIT, JR.
JUDGE