

Affirmed and Opinion filed August 16, 2001.



In The

**Fourteenth Court of Appeals**

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NO. 14-00-00286-CV

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**J. CRAIG COWGILL AND CAROL COWGILL, Appellants**

**V.**

**JACK BURCH AND ROSE BURCH, Appellees**

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**On Appeal from the 333rd District Court  
Harris County, Texas  
Trial Court Cause No. 97-50579**

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**OPINION**

Appellants, J. Craig Cowgill, and his wife, Carol Cowgill, appeal from the trial court's summary judgment for appellees/landowners, Jack and Rose Burch, in a premises liability action filed after Mr. Cowgill was injured on appellees' land. We affirm.

**I. FACTUAL BACKGROUND**

Mr. Cowgill, a recreational hunter, was injured when the deer stand ladder he was climbing collapsed. The lessee of the property, Jerry Brandt, had invited Mr. Cowgill onto

the property. Brandt leased the property from the Burches.<sup>1</sup> The Cowgills sued the Burches and Brandt for negligence in designing, constructing, attaching, maintaining, and repairing the ladder and in failing to warn Mr. Cowgill of the dangerous condition it posed. The Cowgills also alleged that the Burches, and those acting within the course and scope of their employment with the Burches, created an extreme risk of harm to Mr. Cowgill by (1) knowingly removing and not replacing bolts from the ladder and by (2) failing to warn Mr. Cowgill by posting notices, by guarding, or by closing the deer stand, despite knowing of the deer stand's frequent use during hunting seasons.

The Burches filed a traditional motion for summary judgment against the Cowgills arguing, *inter alia*, that the evidence raised no fact question as to whether the Burches were negligent or grossly negligent because the evidence demonstrated that the Burches lacked actual knowledge of a problem with the ladder. The trial court granted the motion without stating its reasoning. The Cowgills appeal the summary judgment in two points of error.

## II. ISSUES PRESENTED FOR REVIEW

In their first and second points of error, the Cowgills assert that the trial court erred in granting the Burches' motion for summary judgment because the evidence raised fact questions as to whether the Burches breached a duty of care owed to Mr. Cowgill (1) as a social guest/licensee,<sup>2</sup> where application of a judicially created exception to the Landowners Liability Act determines Mr. Cowgill's status on the land or (2) as a trespasser, under application of the Landowners Liability Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 75 (Vernon 1995).

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<sup>1</sup> Pending the outcome of this appeal, the parties have agreed to non-suit Brandt.

<sup>2</sup> A "licensee" is a person who is privileged to enter or remain on land only by virtue of the possessor's consent, thus entering with permission of the landowner but doing so for his own convenience or on business for someone other than the owner. *Knorpp v. Hale*, 981 S.W.2d 469, 471 (Tex. App.—Texarkana 1998, no pet.). In Texas, a "social guest" is classified as a licensee. *Id.* at 472.

### **III. SUMMARY JUDGMENT STANDARD OF REVIEW**

A summary judgment functions to eliminate patently unmeritorious claims or untenable defenses. *Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952). The standards for reviewing a summary judgment are well-established:

- (1) The movant has the burden to show absence of genuine issues of material fact and to show entitlement to judgment as a matter of law;
- (2) In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and
- (3) Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in his favor.

*Nixon v. Prop. Mgm't Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985).

We affirm a summary judgment only if the summary judgment record establishes the right to summary judgment as a matter of law. *Gibbs v. Gen. Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). A defendant may obtain summary judgment by negating at least one element of the plaintiff's cause of action or by pleading and conclusively proving each element of an affirmative defense. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). Because the Burches did not base their motion for summary judgment on an affirmative defense, to prevail they had to negate at least one element of the Cowgills' negligence and gross negligence claims. *See id.*

### **IV. ANALYSIS: DUTIES OWED TO LICENSEES AND TRESPASSERS**

The Cowgills argue the Burches were not entitled to summary judgment because they failed to show the absence of a material fact as to whether the Burches breached the duty of care owed to Mr. Cowgill, regardless of whether his status was that of an invitee or a licensee. Specifically, the Cowgills argue that a judicially created exception to the Act dictates that Mr. Cowgill's status on the land was that of a licensee and that the Burches breached the duty of care owed to a licensee. Alternatively, the Cowgills assert that even if the Act applies (and, thus, the judicially created exception does not), thereby relegating

Mr. Cowgill's status on the land to that of a trespasser, the Burches breached the duty of care owed to a trespasser.

All parties to this appeal agree that (1) if the Act applies to this case, the 1995 version, and not the 1997 version, would control; (2) if the Act applies, the social guest exception does not, and the Burches would owe Mr. Cowgill the duty owed to a trespasser; and (3) if the social guest exception to the Act applies, the Burches owe Mr. Cowgill the duty owed to a social guest/licensee.

The scope of a landowner's duty depends upon a person's legal status on the land, *i.e.*, a licensee or trespasser in this case. *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1, 3 (Tex. 1996). The landowner owes his licensees a duty to warn of or to make safe hidden dangers known to the landowner and a duty not to cause injury intentionally, wilfully, or through gross negligence. *Knorpp v. Hale*, 981 S.W.2d 469, 472 (Tex. App.—Texarkana 1998, no pet.). To establish a landowner's liability, a licensee must prove (1) that a condition of the premises created an unreasonable risk of harm to him; (2) that *the owner actually knew of the condition*; (3) that the licensee did not actually know of the condition; (4) that the owner failed to exercise ordinary care to protect the licensee from danger; and (5) that the owner's failure was a proximate cause of injury to the licensee. *Id.*

Owners or occupiers of premises have a duty to refrain from injuring trespassers wilfully, wantonly, or through gross negligence. *Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 434 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citing *Tex. Utils. Elec. Co. v. Timmons*, 947 S.W.2d 191, 193 (Tex. 1997)). Gross negligence includes two elements:

- (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, *and*
- (2) the actor must have *actual, subjective awareness* of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.

*Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994) (emphasis added).

Thus, owners or occupiers of premises have a duty to refrain from injuring both licensees and trespassers willfully, wantonly, or through gross negligence. *See, e.g., Knorpp*, 981 S.W.2d at 472; *Lampasas*, 988 S.W.2d at 434. Consequently, proof of actual knowledge is essential to establish a breach of the duties owed to both licensees and trespassers.

The Cowgills argue that the following deposition testimony, offered as summary judgment proof, raises a fact issue as to whether the Burches were negligent in the design, construction, maintenance, and inspection of the deer stand ladder:

(1) Jack Burch's testimony that:

- (a) he constructed the ladder from which Mr. Cowgill fell;
- (b) in designing the ladder, he "[j]ust look[ed] at other stairs" without relying upon a tested design;
- (c) he checked the general condition of the deer stand before hunters came;<sup>3</sup>
- (d) he believes the ladder became unattached because parts of the runners attaching the ladder to the stand, with bolts, split and broke from the rest of the ladder;
- (e) he did not place the ladder in a configuration that would prevent this because he "did not think it would break through the way it did;"
- (f) he observed photographs taken after the accident which show cracks in the ladder's wood;
- (g) he knew that hunters had previously placed additional wooden bracing on the ladder; and

(2) Mr. Cowgill's deposition testimony that he saw pins, bolts, and nails on the top rung of the ladder which he had not noticed on previous trips up the ladder.

This testimony does not speak to any actual knowledge the Burches had about the ladder's condition. Other summary judgment proof highlights the absence of actual knowledge. Neither Mr. Burch nor Mrs. Burch was at the scene of Mr. Cowgill's accident.

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<sup>3</sup> This assertion in the Cowgills' appellate brief seems to imply that Mr. Burch checked the condition of the deer stand *each time* before hunters came. However, the cited testimony provides only that Mr. Burch *possibly* would "sweep the floor, check the general condition" *before hunting season began*.

Mrs. Burch had nothing to do with the design or construction of the ladder and had never inspected the deer stand or ascended its ladder. Mr. Burch had traversed the ladder many times before the accident and had found it in good working order. Mr. Burch last saw and traversed the ladder with his son, without problems, less than a week before the accident. At that time, the ladder was safely secured to the deer stand, and the bolts attaching the ladder to the stand were in place. Mr. Burch testified he was not aware that anyone had moved, altered, or tampered with the bolts attaching the ladder to the stand before the accident. In addition, no one had reported any problems with the ladder, the stand, or the bolts attaching them before the accident.

Finally, we find no merit in the Cowgills' assertion that the Burches are responsible for the Cowgills' injuries by virtue of any information their ranch employees had. The Cowgills point to Mr. Cowgill's deposition testimony "that he saw pins, bolts, and nails on the top rung of the ladder although he had not noticed them there on other trips up the ladder." The Cowgills argue that "[t]his evidence alone raises a fact issue as to whether the Appellees had actual knowledge of the in the deer stand . . . through . . . their ranch worker agents." The Cowgills further assert that "as the owner of the property, the Appellees are liable for the actions of their ranch workers . . . [and] are responsible for the conditions . . . [their] agents have created that are the direct cause of the injuries sustained by the Cowgills." However, appellant does not identify, nor are we aware, of any authority for the proposition that *actual knowledge* may be imputed to the Burches from their ranch workers. In addition to failing to argue and cite authorities for this argument, the Cowgills point to no proof even suggesting the Burches' ranch workers had any constructive, much less actual, knowledge of any problems with the deer stand. Because the Cowgills have failed to properly brief this argument, we find that it is waived. *See* TEX. R. APP. P. 38.1(h).

Affording every reasonable inference in favor of the Cowgills, the summary judgment proof reveals the absence of a genuine issue of material fact as to the Burches'

lack of actual knowledge of any dangerous condition posed by the ladder, an essential element of the Cowgills' claims. The Burches effectively negated the breach element of the Cowgills' negligence and gross negligence claims, and thus the trial court did not err in granting summary judgment for the Burches. Because we find that the Burches did not breach a duty of care owed to Mr. Cowgill as either a licensee or trespasser, we need not determine which status Mr. Cowgill occupied on the land or whether that status derives from application of the Landowners Liability Act or the social guest exception carved from it.

The two points of error asserted by the Cowgills are overruled. The judgment of the trial court is affirmed.

/s/      Kem Thompson Frost  
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.<sup>4</sup>

Do Not Publish TEX. R. APP. P. 47.3(b).

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<sup>4</sup> Senior Chief Justice Paul C. Murphy sitting by assignment.