IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

WILLIAM ROY HARWELL AND ALICE PATRICIA HARWELL,	)	
Plaintiffs/Appellants,	)	Shelby Law No. 51357
vs.	)	
RALEIGH RIDGE OWNERS ASSOCIATION, INC., PEARSON BROTHERS CRANE and ABC MANUFACTURER,	)	Appeal No. 02A01-9411-CH-00261
Defendant/Appellees.	)	

FILED

May 28, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE

THE HONORABLE GEORGE H. BROWN, JUDGE

For the Plaintiffs/Appellants:	For the Defendants/Appellees
Ira M. Thomas	J. Kimbrough Johnson
Memphis, Tennessee	Memphis, Tennessee

AFFIRMED

HOLLY KIRBY LILLARD, JUDGE

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

HEWITT P. TOMLIN, JR., SR. J.

This is a negligence case brought by William Harwell (Harwell) and his wife against Raleigh Ridge Owners Association (RROA) and two other defendants not involved in this appeal. Harwell appeals the trial court's grant of summary judgment to RROA. We affirm the trial court.

On February 1, 1992, Harwell sustained personal injuries while replacing a light on the top of a creosote telephone pole located in Raleigh Ridge Park. The pole broke and fell, resulting in Harwell's injuries. Harwell filed the Complaint in the instant case against RROA.

Harwell owned a home in Raleigh Ridge Park and was a member of RROA. In 1992, he was a member of RROA's Board of Directors. Harwell is a licensed electrician with more than thirty years' experience. Due to an injury, however, he had not climbed poles as part of his employment duties since 1972.

The pole in question was in one of the recreational common areas within the subdivision maintained by RROA. Because of his vocation, Harwell at times had assisted RROA with electrical matters. In fact, Harwell had helped install the pole and light at issue sometime in the early 1980's.

On January 30, 1992, the president of RROA contacted Harwell, told him the light on the pole was out, and asked for assistance. Harwell agreed to help. Harwell climbed up the creosote pole, determined the ballast was out, and recommended replacing the light completely due to its age, to which RROA's president agreed.

On Saturday, February 1, 1992, Harwell attempted to replace the light. He climbed the pole two times that morning in order to replace the light. When Harwell went up the pole a third time, the pole broke at or just below ground level, resulting in a fall which crushed Harwell's feet and seriously injured his knees.

In the suit which followed, the trial court granted RROA's Motion for Summary Judgment. Harwell attached five depositions, including his own, to his memorandum in opposition to RROA's Motion for Summary Judgment, but these were not filed with the clerk of the trial court. Therefore, they are not a part of the record before this Court. Harwell now appeals the granting of summary judgment in favor of RROA. Harwell argues that the trial court erred in granting summary judgment to RROA because there is a genuine issue of material fact regarding RROA's duty to inspect the creosote pole and warn Harwell of its latent defect.

A trial court should grant a Motion for summary judgment when the movant demonstrates there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Tenn.R.Civ.P. 56.03. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993). On a motion for summary judgment, the trial court and the appellate court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. ***Id.*** at 210-11. In ***Byrd***, the Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth ***specific facts*** showing that there is a genuine issue of material fact for trial. "If he does not so respond, summary judgment . . . shall be entered against him."

Id. at 211 (citations omitted). Summary judgment is only appropriate when the case can be decided on the legal issues alone. ***Id.*** at 210. Since only questions of law are involved, there is no presumption of correctness regarding a trial court's grant of summary judgment. ***Johnson v. EMPE, Inc.***, 837 S.W.2d 62, 68 (Tenn. App. 1992). Review of the entry of summary judgment is, therefore, ***de novo***, on the record before this Court.

To prevail in a negligence claim, a plaintiff must show (1) that the defendant owed him a duty, (2) that the defendant breached that duty, and (3) that the breach of that duty proximately caused the plaintiff's injury. ***Benson v. H.G. Hill Stores***, 699 S.W.2d 560, 562 (Tenn. App. 1985). The defendant must have had either actual or constructive notice of the condition giving rise to liability. ***Tedder v. Raskin***, 728 S.W.2d 343, 348 (Tenn. App. 1987). If the plaintiff fails to prove the existence of a genuine issue of material fact as to any single element in the cause of action for negligence, then summary judgment in favor of the defendant is appropriate. ***Id.*** at 349.

Generally, a landowner owes a duty to those on his land. ***See Goodman v. Memphis Park Comm'n***, 851 S.W.2d 165, 166 (Tenn. App. 1992). This duty has been described as follows:

> Possessors of property and those acting on their behalf owe a duty of reasonable care to patrons and invitees. This duty includes (1) the duty to maintain the premises in a reasonably safe condition; (2) the

> duty to inspect the premises to discover dangerous conditions reasonably recognizable by common experience and ordinary prudence; and (3) the duty either to remove or to warn of the dangerous condition the possessor knows or should reasonably know about.

Smith v. Inman Realty Co., 846 S.W.2d 819, 823 (Tenn. App. 1992) (citations omitted). A landowner has an affirmative duty to warn of latent dangers. ***Eaton v. McLain***, 891 S.W.2d 587, 593-94 (Tenn. 1994). This duty only applies to those latent dangers of which a landowner either is aware or should be aware "through the exercise of reasonable diligence." ***Id***. at 594. In the instant case, RROA argues that Harwell had a "dual role" since he was one of the owners but was also asked to assist RROA in replacing the light on top of the pole.

On appeal, Harwell points to two cases from other jurisdictions, ***Thompson-Weinman & Co. v. Brock***, 241 S.E.2d 279 (Ga. App. 1977), and ***Gifford v. Four-County Elec. Power Ass'n***, 615 So. 2d 1166 (Miss. 1992), which find a duty on the part of landowners to inspect creosote poles. In both of those cases, the existence of a duty to inspect the poles was established through expert testimony. Such evidence is not present in the record before this Court.

The record before this Court contains no evidence that RROA knew or should have known of the defect in the creosote pole. The appellant bears the burden of preparing an adequate record for review on appeal. T.R.A.P. 24(b); ***State v. Ballard***, 855 S.W.2d 557, 560 (Tenn. 1993). If evidence establishing a genuine issue of material fact as to RROA's duty to inspect and warn was presented to the trial court, it is not in the record before this Court. Consequently, the trial court's entry of summary judgment in favor of RROA must be affirmed.

The order of the trial court granting summary judgment is hereby affirmed. Costs on appeal are taxed to the Appellant, for which execution may issue if necessary.

HOLLY KIRBY LILLARD, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

HEWITT P. TOMLIN, JR., SR.J.