ROGER D. LANCASTER and CHERYL A. LANCASTER,	)	
	)	**Maury County Circuit Court**
Plaintiffs/Appellants,	)	**No. 5755**
VS.	)	
WILL C. ROBINETTE and DOROTHY ROBINETTE,	)	**Appeal No. 01A01-9607-CV-00307**
Defendants/Appellees.	)	

IN THE CIRCUIT COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF MAURY COUNTY
AT COLUMBIA, TENNESSEE

HONORABLE WILLIAM B. CAIN, JUDGE

Gene Hallworth
Harry L. Weddle III
P.O. Box 938
Columbia, TN 38402-0938
ATTORNEY FOR PLAINTIFFS/APPELLANTS

John T. Horton
BREWER, KRAUSE, BROOKS & MILLS
611 Commerce Street, Suite 2600
Nashville, TN 37203
ATTORNEY FOR DEFENDANTS/APPELLEES

AFFIRMED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

BEN H. CANTRELL, JUDGE,
WILLIAM C. KOCH, JR., JUDGE

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O P I N I O N

The plaintiffs, husband and wife, sued the defendants, brother and sister in-law, for personal injuries suffered by the plaintiff husband in a fall inside a tobacco drying barn owned by defendants. The Trial Court granted summary judgment to the defendants. The plaintiffs' appeal, presenting the following issue:

> Whether the trial court erred in granting summary judgment by concluding that a tobacco hangar's injuries from a loose, unsecured and warped, wooden tier rail were not a "reasonably foreseeable probability" where the defendant tobacco barn owner had owned the tobacco barn for 31 years, where four thousand pounds of tobacco were hung in the barn every year, where the wooden tier rails in the barn were supposed to be nailed down, where rain fell onto the wooden rails from an unrepaired leaking roof, and where the defendant barn owner never once inspected the condition or safety of the tier rails in 31 years despite inviting others to come into his barn and climb up on the tier rails.

A motion for summary judgment presents a question of law which is reviewable de novo upon appeal. *Union Carbide Corp. v. Huddleston*, Tenn. 1993, 854 S.W.2d 87, 91.

Summary judgment is appropriate only when there is no genuine issue of material fact and where the facts entitle the movant to judgment as a matter of law. T.R.C.P. Rule 56.03; *Byrd v. Hall*, Tenn. 1993, 847 S.W.2d 208; *Anderson v. Standard Register Co.*, Tenn. 1993, 857 S.W.2d 555, 559.

In ruling upon motions for summary judgment, the courts must view the evidence in the light

most favorable to the non-moving party and draw all reasonable inferences therefrom in favor of the opponent of the motion. *Byrd v. Hall, Supra.*

Summary judgment is appropriate only when the facts and inferences therefrom are such as to permit a reasonable person to reach only one conclusion. *Brookings v. The Round Table, Inc*., Tenn. 1991, 624 S.W.2d 547, 550.

The testimony of Mr. Robinette was undisputed that, when the defendants acquired the property on which the subject barn was located in 1963, the barn was already built; that Mr. Robinette had worked in tobacco on his father's farm from the age of 10 to the age 17; that he was 75 years old and had not worked in tobacco since he was 17; that since he acquired this subject property, tobacco had been grown on defendants' premises and dried in the barn by others most every year since 1963; that plaintiff, Mr. Lancaster, and his family have raised and dried tobacco in the barn for about 15 years; that concrete pillars were installed under the barn 20 or 25 years ago, that the doors were repaired about three years ago and that it was painted last year after the injury of Mr. Lancaster.

Mr. Robinette also testified without contradiction that his understanding and practice with the Lancasters' was that he furnished the land, equipment and barn, the Lancasters' furnished the labor, and they "split the expenses and proceeds half and half."

He also testified that the "tier rails" were supposed to be nailed down when the barn was built, but "lots of barns have them loose," and that he had never been on the tier rails of the barn.

Roger Lancaster testified that he and his family had raised tobacco for many years for various people and had raised tobacco for Mr. Robinette for a number of years. As to the barn, he testified verbatim as follows:

Q. How would you compare Mr. Robinette's barn, the condition of it, to the other barns that you've used raising raising tobacco?

A. Some of it is unsafe. Some of the rails are not nailed down. Some of the cross members you can see cracks in them. Best of my knowledge we've replaced -- when we didn't replace it we kindly fixed it up, you know, where it wouldn't finish falling at one time.

Q. You said, "we fixed it up." Who did that work?

A. Me and my brother.

Q. And his name would be?

A. Jeff Lancaster.

Q. And that was the work you did on Mr. Robinette's barn?

A. (Witness moves head up and down.)

Q. Do you know when that work would have been performed, what year?

A. No, I don't.

Q. Did you tell Mr. Robinette that you had done work on the barn, that there were problems?

A. No, we didn't tell him we fixed that either. The best of my knowledge, we was working over there one day and we kind of said something about it, you know, and he was going to try and find somebody, and he never did.

Q. Did you go ahead and perform the work after you told Mr. Robinette about it?

A. No, we didn't do nothing else to the barn because we are not allowed -- you know, we are not supposed to really fix anything on it.

Q. The tier rail involved in this matter, did you know of any problems with it before August of '92?

A. No, I didn't.

Q. It wasn't one of the things you mentioned to Mr. Robinette?

A. No that particular one.

Q. Exactly what did you tell him needed to be done to the barn?

We just told him some of the cross members was cracked and we was scared it was going to break. He kindly -- to the best of my knowledge, you know, he couldn't find nobody. One time -- he may have forgotten - he said if we seen anybody that done any of that kind of work just let him know, you know.

Q. Did you ever mention it to him again after?

A. No.

Q. Now, you heard Mr. Robinette say that some barns don't even have the tier rails nailed down. Do you agree with that statement?

A. I agree with it.

Q. Let's go on to the fall, Mr. Lancaster, if we could. Just describe for me everything that happened that day, starting with getting up in the morning and carrying it through if you would?

A. I got up at five o'clock in the morning and went to work. I got off at 5:00 that evening. I called my wife and asked her what they was doing. And she told me they'd went over there to finish hanging Mr. Robinette's tobacco. And I told her that I would be on, and we would go over there and help them.

So, I got over to the barn -- it was somewhere between 5:30 and quarter to 6:00. And my brother-in-law, he was on the bottom rail and he had one hung, I want to say, half or just a little more than half of it. And I asked him, did he want me to take his place because he was getting tired, and he said, "Yeah." And I told him to come on down and I would finish it, you know.

And I hung about -- I'll say I hung five sticks, And the rail -- When I went to bend down to pick the other one up it -- it just flipped out from under me, just twisted, you know, kind of like -- and my left foot, what it done, it twisted like that, my left foot and lost my balance, and there wasn't anything I could grab a hold to or anything.

Jeffrey Wayne Lancaster, brother of Roger Lancaster, testified that he participated in the raising of tobacco on defendants' farm a number of years that Mr. Robinette took no part in the raising, harvesting, or drying of the tobacco; that, about a year before Roger's injury, he (Jeffery) told

Mr. Robinette about a cross-member that needed to be replaced and Mr. Robinette said "see if you can find somebody to fix it;" but that a tier rail was not mentioned; and that he had not discussed any other condition of the barn with Mr. Robinette.

Allen Ray Lancaster, brother of Roger, testified that he helped his family hang tobacco in defendant's barn; that he was high up in the barn when Roger fell; that some of the rails were nailed and some were not, that in climbing on the rails "you always test them, make sure they aren't rotten; that, after the fall, he looked at the rail from which Roger fell and it had nails in the end of it; that about 2 years before the fall he heard Roger tell Mr. Robinette the roof was leaking and a couple of tier rails were rotten; and that Mr. Robinette's barn was "just about like all the rest of them."

The determinative issue in this appeal is whether or not, under the uncontradicted facts, the defendants were under any duty to protect the injured plaintiff from the injury he sustained.

Plaintiffs' cite authorities stating the duty of a landowner to use due care in protecting "contractors and subcontractors working on the premises." The injured plaintiff was not a "contractor or subcontractor working on the premises." The quoted verbiage refers to workmen employed in construction or repair for the owner. The injured plaintiff was not on the premises to perform work for the owners. He was a member of a group drying tobacco under a share-cropper's agreement with the owners. The owner took no part in the production and marketing of the tobacco except to furnish land, equipment, seed or "slips," fertilizer, barn and marketing allotment The sharecroppers made all the decisions as to where and when and what they would plant and cultivate, and when, where and how they would dry and market the tobacco.

It is clear from the evidence that the land to be tilled and the barn to be used were in the exclusive possession and control of the sharecroppers, that defendants exercised no control over the barn and that the knowledge of the injured plaintiff as to the condition of the barn was superior to

that of the defendants'.

Plaintiffs' cite authorities requiring the person in control of a premises to exercise reasonable care to prevent injury to persons rightfully on the premises. The present situation is not controlled by such authorities. The barn in this case was used only for the storage and drying of tobacco. Defendants had never used it, but permitted those who raised tobacco on shares to use it. The injured plaintiff was a member of a group who had used the barn for a number of years. He had adequate opportunity to know the condition of the tier rails in the barn, whereas the defendants' had no occasion to see or test the rails. There is evidence that one member of the injured plaintiffs' family had mentioned defective rails to one of the defendants "a few years ago," but was told to "find someone to fix them,"

It is difficult to categorize the relationship of the injured plaintiff to the defendants. He was not an employee of defendants or of a contractor doing work for the defendants. He was a member of a joint enterprise group who were licensed to use the barn pursuant to a sharecropper's agreement with the owner.

Possessors of property are not insurers of the safety of the property, but are required to use due care under the circumstances. *Smith v. Inman Realty Co.*, Tenn. App. 1992, 846 S.W.2d 819, 822; *Roberts v. Roberts,* Tenn. App. 1992, 845 S.W.2d 225, 227.

The duty of ordinary care of the owner or occupier of land arises from position of control, of knowledge and ability to prevent harm to others. See *McCormick v. Waters*, Tenn. 1980, 594 S.W.2d 385, 387. These elements are not present in this case, where the injured party had superior knowledge and opportunity to learn of the danger and prevent danger.

The owner of a premises is not required to keep the premises absolutely safe, but his duty is

determined from the nature of the property, the use for which it is intended, and the particular circumstances of the case. *Toole v. Levitt*, Tenn. 1972, 492 S.W.2d 230, 233.

Under the peculiar circumstances, defendants had no duty to inspect the barn for safety before permitting the injured plaintiff to work in it.

To rule otherwise would require every owner of a tobacco drying shed to inspect every one of the poles in the shed for safety before allowing its use by tenants who had used the shed in previous years. This would be too unreasonable a rule to be imposed by the courts.

The judgment of the Trial Court is affirmed. Costs of this appeal are assessed against the plaintiffs. The cause is remanded to the Trial Court for such further proceedings, if any, as may be necessary and proper.

AFFIRMED AND REMANDED.

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HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

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BEN H. CANTRELL, JUDGE

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WILLIAM C. KOCH, JR., JUDGE