[Cite as *Sullivan v. Sullivan*, 2006-Ohio-2366.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

BRENDEN SULLIVAN, et al.	:	
Plaintiffs-Appellants	:	C.A. CASE NO. 21083
v.	:	T.C. NO. 04 CV 01587
DAVID SULLIVAN	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellee	:	
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O P I N I O N

Rendered on the 12th day of May, 2006.

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WOLFF, J.

{¶ 1} Brenden Sullivan appeals from a judgment of the Montgomery County Court of Common Pleas, which granted summary judgment in favor of his father, David Sullivan, on Brenden's personal injury claim.

{¶ 2} In July 8, 2002, Brenden seriously injured his hand in an accident at his parents' home in Centerville, Ohio. Brenden had returned to Ohio on military leave and

was staying with his wife's parents, but he had visited his parents, David and Rosaline, several times. On July 8, he went to his parents' house in the afternoon when both parents were at work. His mother returned home a short time later. At his mother's request, Brenden ascended a pull-down ladder in his parents' garage that permitted access to their attic to retrieve an empty box. When Brenden was standing on the eighth step, the step separated from its vertical supports, and Brenden fell to the floor. As he fell, the fifth finger on his left hand got caught in the handrail bracket and was partially amputated.

{¶ 3} On March 4, 2004, Brenden sued his father, claiming that David had negligently failed to inspect, repair, and properly maintain the attic ladder, creating a dangerous condition that David knew or should have known would cause substantial bodily injury, and had negligently failed to warn Brenden of this danger. On March 10, 2005, David filed a motion for summary judgment. On April 18, 2005, the trial court granted David's motion. On May 3, 2005, Brenden filed a motion for reconsideration, to which he attached "newly discovered evidence" in the form of an affidavit from his brother, Terrence. In the affidavit, Terrence suggested that two of the ladder's steps had been replaced while the family lived in the house. Because the trial court did not rule on the motion for reconsideration, it will be treated as though it was overruled. *State v. Vinzant*, Montgomery App. No. 18546, 2001-Ohio-7005, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 223, 1994-Ohio-92, 631 N.E.2d 150.

{¶ 4} Brenden raises one assignment of error on appeal, in which he asserts that the trial court erred in granting David's motion for summary judgment. He does not challenge the court's failure to consider his brother's affidavit, filed with the motion for reconsideration. Before we address the merits of Brenden's assignment, we will discuss

the evidence offered by the parties on the issue of negligence.

{¶ 5} Brenden testified that he had lived in his parents' house in Centerville for several years as a teenager and had previously been in their attic. He did not know whether either of his parents had ever been in the attic. He had never been warned by his parents about the attic ladder, was not aware of any prior incidents involving the ladder, and had never noticed any problem with the ladder himself. Brenden's mother, Rosaline, testified that she had never been in the attic, but that her children had. She stated that there had been no repairs to the ladder since they had lived in the house. David testified that he probably used the attic ladder two or three times while living in the house, but that he did not specifically recall doing so. He also stated that he had never inspected the ladder for safety. The family had lived in the home since 1992, and there were at least two previous owners.

{¶ 6} With respect to Brenden's presence at his parents' house on July 8, 2002, Brenden did not recall whether his parents knew that he was coming to their house that day. David testified that Brenden was permitted to come to their house whenever he wanted. David was not at the house with Brenden on the day of the accident.

{¶ 7} Brenden presented an affidavit from Scott A. Noll, a mechanical engineer who specialized in accident investigation and reconstruction and who had examined the ladder from which Brenden fell. Noll stated that the vertical rails of the ladder had separated from the individual steps, compromising the support mechanism. He also opined that "additional nails [had been] added to the eighth step by someone other than the manufacturer" and that this maintenance had been directed to "the specific maintenance issue that was the causal factor" in this accident.

{¶ 8} Brenden claims that his evidence created a genuine issue of material fact as to whether his father had actual or constructive knowledge of the hazard posed by the ladder and had a duty to exercise ordinary and reasonable care for a guest's protection from that hazard. He also asserts that David breached his duty by failing to warn Brenden of the danger and by failing to adequately maintain the ladder. He contends that the duty to protect a social guest depends of the foreseeability of the harm, and that summary judgment was inappropriate because reasonable minds could differ on whether his injury was foreseeable.

{¶ 9} We have held that "a host is not an insurer of a guest, and there is no implied warranty that a host's premises are in a safe condition." *Hawthorne v. Moore* (Mar. 4, 1983), Clark App. No. 1762, citing *Scheibel v. Lipton* (1951), 156 Ohio St. 308, 102 N.E.2d 453. The duty of the host is to exercise ordinary care not to cause injury to his guest by any act or activity of the host while the guest is on the premises and to warn the guest of any condition of the premises known to the host that one of ordinary prudence and foresight should reasonably consider dangerous, if the host has reason to believe that the guest does not know and will not discover the danger. *Schneibel*, 156 Ohio St. at 329.

{¶ 10} Brenden's evidence failed to create a genuine issue of material fact as to David's alleged breach of his duty. Brenden did not present any evidence establishing that David created or knew of the danger posed by the attic ladder. The evidence presented by both parties established that the ladder had been used very infrequently during the ten years that the family lived in the home. When the attic ladder had been used, the children were more likely than the parents to do so. David and Rosaline stated in their depositions that they never experienced a problem with the ladder or attempted to perform

maintenance on it. Noll's affidavit suggested that *someone* had performed maintenance on the ladder, but it did not attempt to establish when this repair occurred. Insofar as the Sullivans had not been the only owners of the house, Noll's affidavit did not create a genuine issue of material fact that David was aware of or attempted to repair any defect in the ladder. Accordingly, Brenden failed to create a genuine issue of material fact that David knew of the dangerous condition of the ladder or contributed to it in any way.

{¶ 11} Even if Brenden had created a genuine issue of material fact that David was aware of the danger posed by the ladder, which he did not, we would question whether a host of ordinary prudence and foresight could have reasonably anticipated that a guest in his home might ascend the attic ladder. After all, David was not home at the time of this accident, and there is no evidence that he had had reason to expect that Rosaline would send Brenden into the attic if he visited. We need not consider the evidence on this point, however, in light of Brenden's failure to create a genuine issue of material fact as to David's knowledge of the danger.

{¶ 12} The assignment of error is overruled.

{¶ 13} The judgment of the trial court will be affirmed.

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GRADY, P.J. and FAIN, J., concur.

Copies mailed to:

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