[Cite as *Anderson v. Snider Cannata Co.*, 2009-Ohio-4363.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91801

AARON ANDERSON

PLAINTIFF-APPELLANT

vs.

SNIDER CANNATA COMPANY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-601491

BEFORE: Jones, J., Gallagher, P.J., and Sweeney, J.

RELEASED: August 27, 2009

JOURNALIZED:

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LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, Aaron Anderson ("Anderson"), appeals the trial court's granting of summary judgment in favor of Snider Cannata Company, Hoffman Construction Company, and Bristol Court, LLC. Finding no merit to the appeal, we affirm.

{¶ 2} Snider was a general contractor in a development of single family homes in Lyndhurst known as Bristol Court Condominiums. Snider subcontracted with Interior Classics to have the interior of the houses painted. Anderson, who Interior Classics employed, was one of the painters. In October 2004, Anderson was using an extension pole to paint the hallway in one of the houses. Anderson stepped backwards to paint the lower portion of the wall and fell down an open stairway that led to the basement. The stair's permanent railing or banister had not yet been installed.[1] Anderson suffered lower back, right shoulder, and right thigh injuries and missed time from work.

{¶ 3} Anderson filed suit against Snider, the developer, and Hoffman, the carpentry subcontractor, alleging they had an affirmative duty to keep the construction site in a reasonably safe manner and were negligent in failing to keep the worksite safe. Anderson later amended his complaint to include Bristol Court, LLC, which he identified as the general contractor.

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[1]Although Anderson stated at deposition that he never saw a stair rail, Snider stated in its pretrial statement that Hoffman had, at some point, erected a temporary handrail around the stairwell.

{¶ 4} Snider and Hoffman moved for summary judgment, which the trial court granted, finding that the stairway was an "open and obvious" danger and that the defendants owed no duty to warn Anderson of the open staircase.

{¶ 5} Anderson filed his notice of appeal, but we dismissed the appeal for a lack of a final order because the trial court's journal entry did not dispose of the claims against Bristol Court. We later granted Anderson's motion to reinstate the case after the trial court issued an order granting summary judgment in favor of all three appellees.

{¶ 6} Anderson raises two assignments of error, which will be combined for review. In the first assignment of error, Anderson argues that the trial court erred in granting summary judgment in favor of the appellees. In the second assignment of error, Anderson claims that the trial court erroneously determined that he disregarded an open and obvious danger.

Standard of Review

{¶ 7} Appellate review of summary judgments is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Zemcik v. La Pine Truck Sales & Equipment* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court enunciated the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-70, 696 N.E.2d 201 as follows:

{¶ 8} "Pursuant to Civ.R. 56, summary judgment is appropriate when 1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one

conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor."

{¶ 9} *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274.

{¶ 10} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-59, 604 N.E.2d 138.

{¶ 11} In order to survive a properly supported motion for summary judgment in a negligence action, a plaintiff must establish that genuine issues of material fact remain as to whether: (1) the defendant owed him a duty of care; (2) the defendant breached the duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. See *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 680, 693 N.E.2d 271; *Menifee v. Ohio Welding Products, Inc*. (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707. Whether a duty exists is a question of law for the court to determine. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265.

{¶ 12} Anderson asserts that the appellees were negligent and/or violated Ohio's "frequenter statute," R.C. 4101.11, by failing to erect a barrier around the open stairwell. The appellees assert that they did not owe Anderson a duty to warn of a hazard of which he was aware and could have avoided.

{¶ 13} In appellees' motions for summary judgment, they argued that they did not have a duty to warn Anderson of an open and obvious danger. Likewise, the trial court based its decision solely on finding that the stairwell was an open and obvious danger. None of the parties analyzed or argued whether Ohio's frequenter statute should apply to the case at bar. Since, however, we review the case de novo we will analyze whether the appellees may be found liable under either the frequenter statute or common law negligence. Importantly, if we find that the appellees owed no duty to Anderson as a frequenter, than whether the hazard was open and obvious is moot. See *Robinson v. Leach Constr. Co.*, Cuyahoga App. No. 80534, 2003-Ohio-1949.

{¶ 14} In this case, the appellees could owe a duty to Anderson in one of two ways: 1) pursuant to R.C. 4101.11, or 2) a common law duty of ordinary care. If we find that the appellees did not owe a duty to Anderson under Ohio's frequenter statute, then his cause of action fails.

R.C. 4101.11 – Ohio's Frequenter Statute

{¶ 15} In his complaint, Anderson alleged that the appellees owed him a duty of care because he qualified as a "frequenter" under R.C. 4101.11.

{¶ 16} R.C. 4101.11, the "frequenter statute," provides:

{¶ 17} ""Every employer shall furnish employment which is safe for the employees engaged therein, and for frequenters thereof, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes, follow and obey orders, and prescribe hours of labor reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters."

{¶ 18} R.C. 4101.12 provides in part:

{¶ 19} ""No employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees or frequenters. No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe."

{¶ 20} An independent contractor who is working on the premises and is not a trespasser is a business frequenter. *Alapi v. Colony Roofing, Inc.*, Cuyahoga App. No. 83755, 2004-Ohio-3288. The parties do not dispute that Anderson qualifies as a frequenter.

{¶ 21} "The duty owed to frequenters, i.e., including employees of other companies, is no more than a codification of the common-law duty owed by an owner or occupier of premises to invitees, requiring that the premises be kept in a reasonably safe condition, and that warning be given of dangers of which he has knowledge." *Eicher v. United States Steel Corp.* (1987), 32 Ohio St.3d 248, 249, 512 N.E.2d 1165, 1167. Where the frequenter is the employee of an independent contractor as in the case at bar, the duty does not extend to hazards which are

inherently and necessarily present because of the nature of the work performed. Id.

{¶ 22} In *Wellman v. East Ohio Gas Co.* (1953), 160 Ohio St. 103, 113 N.E.2d 629, the Ohio Supreme Court found that "[w]here an independent contractor undertakes to do work for another in the very doing of which there are elements of * * * danger * * *, no liability * * * ordinarily attaches to the one who engaged the services of an independent contractor." This court has found that in order for the *Wellman* "no duty" rule to apply, the independent contractor must be performing "an inherently dangerous task." *Alapi*, at ¶32; see, also, *Solanki v. Doug Freshwater Contracting Inc., et al*., Jefferson App. No. 06-JE-39, 2007-Ohio-6703.

{¶ 23} A construction site has been found to be an inherently dangerous setting. *Bond v. Howard Corp.* 72 Ohio St.3d 332, 1995-Ohio-81, 650 N.E.2d 416. Moreover, the Ohio Supreme Court has held that "[a] subcontractor at a construction site is engaged in inherently dangerous work." *Michaels v. Ford Motor Co.* (1995), 72 Ohio St.3d 475, 479, 650 N.E.2d 1352, citing *Bond*, supra; *Solanki*. Since the house Anderson was injured in was still under construction, we find that Anderson was performing an inherently dangerous task when he was injured.

{¶ 24} In addition, generally no liability will attach to the owner or occupier of the premises when the independent contractor or its employee is aware that real or potential dangers surround the performance of the task for which he was hired. *McClary v. M/I Schottenstein Homes, Inc.*, Franklin App. No. 03AP-777,

2004-Ohio-7047, quoting, *Frost v. Dayton Power and Light Co.* (2000), 138 Ohio App.3d 182, 191, 740 N.E.2d 734, amended by *Frost v. Dayton Power and Light Co.* (July 25, 2000), Adams App. No. 98 CA 669, appeal not allowed, 90 Ohio St.3d 1452, 737 N.E.2d 55; *Abbot v. Jarret Reclamation Serv., Inc.* (1999), 132 Ohio App.3d 729. Constructive notice of a danger is sufficient, but, as discussed infra, we find that Anderson had actual knowledge of the hazard in this case, the open staircase. See *McClary*.

{¶ 25} Exceptions to this general rule exist where the general contractor actively participates in the project or has exclusive control over a critical variable in the work environment. *Hirschbach v. Cincinnati Gas & Electric* (1983), 6 Ohio St.3d 206, 208. But Anderson has failed to show any evidence that either Snider or Bristol actively participated in the painting by either directing or exercising control over Anderson's duties or had control over any variable in relation to the stairwell.[2] See *McClary*, at ¶37; cf. *Sopkovich v. Ohio Edison Co.* (1998), 81 Ohio St.3d 628, 693 N.E.2d 233.

{¶ 26} While conceivably either Snider or Bristol, who allegedly served as a general contractor and/or developer, could have retained some control over the construction site, Anderson has not shown evidence with regard to any control the companies may have had over the construction site. In his deposition, Anderson could not remember any supervisors' names or which companies they worked for,

[2] We also note that the record does not reflect what role Bristol Court LLC has in this case. Anderson stated in his complaint that Bristol Court LLC was the general contractor on the house, but was unable at deposition to identify anyone who worked for the company.

did not know who the general contractor was, and was unable to identify who had custody or control over the premises.

{¶ 27} Therefore, even in construing the evidence in Anderson's favor, we cannot conclude that Snider or Bristol undertook any duty toward Anderson.

{¶ 28} Next we consider Hoffman, the carpentry subcontractor on the project. Anderson argues that Hoffman had a duty to build the stair railing that could have protected him from his fall. In *Alapi*, we stated that the duties contemplated in the frequenters statutes do not apply unless the defendant is in custody and control of the premises. *Alapi*, quoting *Ganobcik v. Industrial First, Inc.* (1991), 72 Ohio App.3d 619, 632, 595 N.E.2d 951. Anderson has shown no evidence that Hoffman, as a subcontractor, was in custody and control of the house. Because Anderson has failed to present any evidence that Hoffman had control over the premises or any responsibility for installing the stair railing or another guard, we find that Hoffman had no duty to protect him from the stairwell and cannot be responsible for his fall and subsequent injuries. See id.

{¶ 29} It is undisputed that Anderson knew the of the location and condition of the stairwell. He testified at deposition that he had been painting the interior of the house for at least five days before the accident occurred. He had seen the open stairwell numerous times and had even painted the trim on the floor around the stairwell opening. Based on Anderson's deposition testimony and the facts presented, we find that the appellees had no duty to erect a barrier or otherwise warn Anderson about the stairwell.[3]

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[3] In his brief, Anderson argues that there were "attendant circumstances" present

{¶ 30} An employee of a subcontractor, injured as a result of the existence of an inherently dangerous condition, can only maintain an action against the property owner if the owner had actual or constructive knowledge of such condition and the subcontractor did not have such knowledge. The open stairwell was an inherently dangerous condition at the site, of which the appellees had no duty to warn. Additionally, because Anderson had actual knowledge of the condition, the appellees, as a matter of law, had no duty to inform Anderson of the hazard.

{¶ 31} Based on the foregoing, Anderson's cause of action fails and we need not analyze his claims under common law negligence. Therefore, albeit for different reasons, we find that the trial court did not err in granting summary judgment.

{¶ 32} The first and second assignments of error are overruled.

{¶ 33} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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that obviated the open and obvious condition of the stairwell. Attendant circumstances generally include any distraction that would come to the attention of an invitee in the same circumstances and reduce the degree of care an ordinary person would exercise at the time. *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 498, 693 N.E.2d 807. Because we find that the appellees are not liable pursuant to Ohio's frequenter statute, it is not necessary to consider whether attendant circumstances were present that unreasonably increased Anderson's risk of falling.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, P.J., and
JAMES J. SWEENEY, J., CONCUR