[Cite as *Clark v. Barcus*, 2018-Ohio-152.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DEVIN CLARK	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
DREW BARCUS. ET AL	:	Case No. CT2017-0019
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. CC2015-0192

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT: January 10, 2018

APPEARANCES:

For Plaintiff-Appellant

MILES D. FRIES
320 Main Street
P. O. Box 190
Zanesville, OH 43702-0190

For Defendants-Appellees

JOHN A. FIOCCA, JR.
41 South High Street
Suite 2300
Columbus, OH 43215

Wise, Earle, J.

{¶ 1} Plaintiff-Appellant Devin Clark appeals the judgment of the Muskingum County Court of Common Pleas granting summary judgment in favor of Appellee Drew Barcus, et al.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On December 30, 2010 around 11:30 p.m., appellant Clark arrived at his friend appellee Barcus' home to assist in the installation of a Chevrolet 350 engine into Barcus' 1985 Chevrolet pickup truck. The engine belonged to Clark. Barcus was to purchase the 350 Chevy engine from Clark after the installation if he decided he liked the engine. Clark also loaned Barcus a cherry picker, a device used to hoist an engine block into the air to facilitate installation of the engine into the engine compartment.

{¶ 3} When Clark arrived at the Barcus home that night, Barcus and his father, who also assisted in the installation, had been working on the project for a few hours. They had already installed the engine onto the cherry picker, and the motor had been suspended in the air for approximately two hours before Clark's arrival.

{¶ 4} Approximately 30 minutes after Clark began to assist, as they were installing the flywheel on the engine, one of the eyebolts holding the engine suspended from the cherry picker broke. The engine landed on Clark's right hand causing serious injury.

{¶ 5} Clark was seen at Bethesda Hospital where medical personnel cleaned and casted his injury. Microscopic hand surgery was recommended. Clark underwent hand surgery in January 2012.

{¶ 6} In December 2012, Clark filed a negligence action against Barcus and his father alleging they had negligently and carelessly installed the engine onto the cherry picker. In October 2013, Barcus moved for summary judgment. The trial court denied the motion in February 2014. Clark later voluntarily moved to dismiss the case. The trial court dismissed the matter without prejudice.

{¶ 7} In May 2015, Clark refiled the case. In November 2016, Barcus again moved for summary judgment arguing that Barcus and Clark were engaged in a recreational activity. Specifically, Barcus argued he and Clark were fellow automobile restoration enthusiasts, and were engaged in that activity at the time of the accident. Bracus thus argued that Ohio's recreational activity doctrine - an application of the doctrine of primary assumption of the risk - applied and that Clark had assumed any risk associated with automobile restoration. Alternatively, Barcus argued that Clark's claim was barred because the accident was not one that anyone could have foreseen. Barcus further argued that the *Gedra* doctrine was applicable to bar Clark's claim.

{¶ 8} In January 2017, Clark filed a memorandum contra arguing the men were not engaged in a recreational activity because Barcus was to purchase the engine from Clark, and that therefore, the two were not "playing" or engaged in recreation. Barcus filed a responsive brief in February 2017.

{¶ 9} On March 21, 2017, without explanation, the trial court granted the motion for summary judgment.

{¶ 10} Clark filed an appeal, and the matter is now before this court for consideration. He presents two assignments of error:

I

{¶ 11} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS WHEN THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPLICATION OF THE RECREATIONAL ACTIVITY DOCTRINE."

II

{¶ 12} "THE GEDRA DOCTRINE DOES NOT REQUIRE A PLAINTIFF TO ELIMINATE POSSIBLE CAUSES OF AN ACCIDENT SUGGESTED ONLY BY THE DEFENDANT."

I

{¶ 13} Both parties focus on the recreational activity doctrine, i.e., primary assumption of the risk. Clark argues the trial court erred in granting summary judgment in favor of Barcus, *et al* because there was insufficient evidence before the trial court to support application of the recreational activity/primary assumption of the risk doctrine. We agree that the trial court erred in granting summary judgment in favor of Barcus.

Standard of Review

{¶ 14} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 663 N.E.2d 639 (1996):

> Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as

a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶ 15} In *Simmons v. Quarry Golf Club,* 5th Dist. Nos. 2015CA00143, 2015CA00148, 2016-Ohio-525 ¶ 15 we noted:

A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.* (1981), 67 Ohio St.2d 427, 424 N.E.2d 311. The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning–Ferris Inds. of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 474 N.E.2d 271. A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (6th Dist.1999), 135 Ohio App.3d 301, 733 N.E.2d 1186.

{¶ 16} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 738 N.E.2d 1243 (2009).

Negligence

{¶ 17} To establish negligence, a plaintiff must demonstrate 1) the existence of a legal duty, 2) the defendant's breach of that duty, 3) injury that is the proximate cause of the defendant's breach. *Menifee v. Ohio Welding Products, Inc*., 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984).

Primary Assumption of the Risk

{¶ 18} In *Gallagher v. Cleveland Browns Football Co*., 74 Ohio St.3d 427, 431–432, 659 N.E.2d 1232 (1996), Justice Resnick set forth a clear distinction between primary assumption of the risk and implied assumption of the risk:

> Although the *Anderson* [v. *Ceccardi*, 6 Ohio St.3d 110, 451 N.E.2d 780 (1983)] court merged implied assumption of risk with contributory negligence, the court found that two other types of assumption of risk did not merge with contributory negligence—express (e.g., contractual) assumption of risk and primary ("no duty") assumption of risk. *Anderson's* statement that primary assumption of risk does not merge with contributory negligence is of critical importance to our discussion here because when a plaintiff is found to have made a primary assumption of risk in a particular

situation, that plaintiff is totally barred from recovery, as a matter of law, just as he or she would have been before *Anderson*. The net result of *Anderson's* differentiation between primary and implied assumption of risk is that now it is of utmost importance which type of assumption of the risk is put forth as a defense. In fact, after *Anderson*, these two defenses are so distinct that it is misleading that each continues to bear the title "assumption of risk," as if the two were interrelated *933 concepts. Due to the confusion occasioned by continuing usage of "assumption of risk," many commentators have advocated abolishment of the term. "[T]he concept of assuming the risk is purely duplicative of other more widely understood concepts, such as scope of duty or contributory negligence. * * * It adds nothing to modern law except confusion." 4 Harper, James & Gray, Law of Torts (2 Ed.1986) 259, Section 21.8. However, despite this confusion, Ohio continues to recognize the term and its accompanying variations.

Primary assumption of risk is a defense of extraordinary strength. Based on the distinction drawn in *Anderson* between implied assumption of risk and primary assumption of risk, and the doctrine that a plaintiff who primarily assumes the risk of a particular action is barred from recovery as a matter of law, it becomes readily apparent that primary assumption of risk differs conceptually from the affirmative defenses that are typically interposed in a negligence case. An affirmative defense in a negligence case typically is the equivalent of asserting that even assuming that the plaintiff has made a prima facie case of negligence, the plaintiff cannot

> recover. A primary assumption of risk defense is different because a defendant who asserts this defense asserts that no duty whatsoever is owed to the plaintiff. See Prosser & Keeton, Law of Torts (5 Ed.1984) 496–497, Section 68 (Primary assumption of risk "is really a principle of no duty, or no negligence, and so denies the existence of any underlying cause of action."). Because a successful primary assumption of risk defense means that the duty element of negligence is not established as a matter of law, the defense prevents the plaintiff from even making a prima facie case.

{¶ 19} In applying this definition, we are further guided by the Tenth District in *Crace v. Kent State University*, 185 Ohio App.3d 534, 2009-Ohio-6898, 924 N.E.2d 906, ¶ 15–17 (citations omitted):

> As a result, primary assumption of the risk negates a negligence claim because no duty is owed to protect against the inherent risks of the recreational activity. Given this profound impact, courts should proceed with caution when deciding to apply primary assumption of the risk.
>
> Under primary assumption of the risk, the injured plaintiff's subjective consent to and appreciation for the inherent risks are immaterial to the analysis. Indeed, "those entirely ignorant of the risks of a sport, still assume the risk * * * by participating in a sport or simply by attending the game. The law simply deems certain risks as accepted by plaintiff regardless of actual

knowledge or consent." In accordance with these principles, our court has previously held:

> [P]rimary assumption of [the] risk requires an examination of the activity itself and not plaintiff's conduct. If the activity is one that is inherently dangerous and from which the risks cannot be eliminated, then a finding of primary assumption of [the] risk is appropriate. *Gehri v. Capital Racing Club, Inc*., 10th Dist. No. 96APE10–1307, 1997 WL 324175 (June 12, 1997).
>
> On the other side, under the implied-assumption-of-the-risk defense, a court must engage in a comparative-fault analysis. To prevail on the defense of implied assumption of the risk, a defendant must demonstrate that the injured participant in fact "consented to or acquiesced in an appreciated or known risk."

{¶ 20} Whether a duty is owed to a plaintiff hinges on the foreseeability of the injury. *Menifee v. Ohio Welding Prods., Inc*. 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). As the Ohio Supreme Court explained:

> As a society we expect people to exercise reasonable precautions against the risks that a reasonably prudent person would anticipate. Conversely, we do not expect people to guard against risks that the reasonable person would not foresee. The foreseeability of the risk of harm is not affected by the magnitude, severity, or exact probability of a particular harm, but instead by the question of whether some risk of harm would be

foreseeable to the reasonably prudent person. Accordingly, the existence and scope of a person's legal duty is determined by the reasonably foreseeable, general risk of harm that is involved.

Cromer v. Children's Hosp. Med. Ctr. of Akron, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 24.

The Record

{¶ 21} The record before us includes the affidavits of Drew and Douglas Barcus, Clark's deposition, and two affidavits from Clark's expert, Hal Dunham. Although Clark cites to the depositions of Drew and Douglas Barcus, those depositions have not been included in the record for our review.

{¶ 22} During Clark's deposition, he testified in relevant part:

* * *Attorney Fiocca: It's my understanding that you have experience in the removal and replacement of engine motors into vehicles, trucks and cars.

Clark: Yeah.

Attorney Fiocca: How long have you been doing that?

Clark: Since I was 16.

* * *

Attorney Fiocca: * * * we agree you were injured in the early morning hours of December 30, 2010?

Clark: I believe it was right around midnight

* * *

Attorney Fiocca: At no time did you work for either Drew or Douglas Barcus, did you?

Clark: I'm not sure I understand that.

Attorney Fiocca: Well, you were never employed by the Barcuses, were you, for anything? Did they pay you for anything, any work?

Clark: No.

Attorney Fiocca: All right. This accident happened on December 30, 2010, correct?

Clark: Yeah.

* * *

Attorney Fiocca: Could you describe the nature of your relationship with Drew over the years?

Clark: We was pretty close friends.

Attorney Fiocca: All right. And in December of 2010, were you friends?

Clark: Yeah.

Attorney Fiocca: All right. Now, I understand that your injury occurred while you were -- excuse me – the accident occurred while you, Doug Barcus, and Drew Barcus were in the process of placing a Chevy 350 engine block into a 1985 Chevy pickup truck –

Clark: Yep.

Attorney Fiocca: -- is that right?

Clark: I believe it's an '85. Might be an '86.

Attorney Fiocca: All right. Now, why don't you describe for us why you were at the Barcus house the night of the accident?

Clark: I was helping him put a motor in his truck. We hung out, done stuff all the time. He helped me, so I'd help him.

* * *

Attorney Fiocca: What time did you arrive?

Clark: 11:30.

Attorney Fiocca: All right, and what was -- what was the purpose of going over there?

Clark: To help him put that motor in that truck.

Attorney Fiocca: Was that a hobby of his?

Clark: Not really.

Attorney Fiocca: Well, did he – did he agree to pay you for your services?

Clark: No.

Attorney Fiocca: All right. So you were doing it because, what, you enjoy doing it?

Clark: He's my friend.

Attorney Fiocca: And he – did he ask for your help?

Clark: Yeah.

Attorney Fiocca: All right. And he was restoring this truck, wasn't he?

Clark: He was putting a motor in it if that's what you want to call restoring.

Attorney Fiocca: And was this a part of his business, or was this a hobby that you two would engage in?

Clark: It was just a hobby.

* * *

Attorney Fiocca: It's my understanding that the motor they were going to drop into this Chevy – 1985 Chevy pickup truck was yours?

Clark: Yeah.

* * *

Attorney Fiocca: And what was the arrangement? Was he buying it from you, or were you just loaning it?

Clark: He was supposed to, yeah.

Attorney Fiocca: He was supposed to pay for it?

Clark: Yeah.

Attorney Fiocca: Ultimately you took the motor back?

Clark: He blew it up and gave it back to me.

Clark deposition 12-17

{¶ 23} The affidavit of Drew Barcus indicates the following:

{¶ 24} Barcus and Clark have been friends since high school and both are "gearheads," i.e, individuals interested in the mechanical aspects of cars and trucks. The two would occasionally restore old cars and trucks for fun. In December 2010, Clark agreed to loan Barcus a Chevy 350 engine. If Barcus liked the engine, he was to buy it

from Clark. If not, Barcus was to return the engine to Clark. Clark also loaned Barcus the cherry picker to install the engine.

{¶ 25} On December 30, 2010, Barcus contacted Clark and told him that he and his father planned to install the engine that evening. Barcus invited Clark over to watch or help if he so desired.

{¶ 26} Douglas and Drew began working on the project approximately 8:00 p.m that evening. They installed two 1 ¾" grade 8 threaded eyebolts into pre-drilled holes in opposite sides of the engine block so that the eye of the bolt was flush with the engine. Drew installed one, and Douglas installed the other. They then attached a 3/8" link chain, two feet in length, to the cherry picker and to then to the eyebolts. Clark showed up around 11:30 p.m and offered to help.

{¶ 27} The affidavit of Douglas Barcus indicates the following:

{¶ 28} Douglas is Drew's father. Drew and Clark had been best friends since graduating high school in 2006 and often worked on cars and trucks together as a hobby. In December 2010, Drew had a truck that needed an engine and Clark agreed to loan Drew an engine for the truck and further agreed to help with installation of the engine.

{¶ 29} Douglas is familiar with industrial grade eyebolts and a grade 8 eyebolt has the highest tensile strength – 150,000 p.s.i. The bolts used that evening were new or nearly new and appropriate for the job.

{¶ 30} Clark arrived approximately 11:30 p.m and offered to help. By the time Clark arrived, the motor had been suspended on the cherry picker for approximately two and a half hours.

{¶ 31} Finally, there are two affidavits from Hal Dunham, Clark's expert. Dunham's affidavits provide the following information:

{¶ 32} Dunham is a mechanical engineer involved in accident investigation, product testing, and forensic engineering. He was asked to review the information in this matter and determine the cause of the accident. Dunham reviewed the depositions of Clark, and Douglas and Drew Barcus. He further reviewed the motion for summary judgment, discovery, information of Chevy V8 small block engines, various methods of attaching an engine to an engine hoist, instructions and warnings regarding the proper use of eyebolts when lifting loads and proper use of chain slings.

{¶ 33} Based on Douglas and Drew's description of how they rigged the engine onto the cherry picker, and his own analysis on an exemplar engine, Dunham concluded 1) the chain used to suspend the engine was too short, 2) the eyebolts were too long, as when Dunham used the same type of bolt described by the Barcas', the eye of the bolt could not be inserted flush with the engine block, and 3) the eyebolts were installed in the wrong orientation to carry the load of the engine. Dunham opined that even if the bolt that broke was defective, it still would not have failed if the engine had been properly rigged.

Analysis

{¶ 34} First, although Clark argues we must establish whether or not he was engaged in a recreational activity at the time of the accident, no such finding is required before the doctrine of primary assumption of the risk is applicable, and Clark cites no authority which supports that argument. Sporting or recreational activities are just one scenario wherein primary assumption of the risk may be applicable. The doctrine is equally applicable in inherently dangerous non-sporting activities. See *Foggin v. Fire*

Protection Specialists, Inc. 10th Dist. Franklin No. 12AP-1078, 2013-Ohio-5541 (ladder climbing); *Cave v. Burt*, 4th Dist. Ross No. 03CA2730, 2004-Ohio-3442, (riding on the trunk of a car); *Siglow v. Smart*, 43 Ohio App.3d 55, 539 N.E.2d 636 (9th Dist. 1987), (helping a neighbor subdue a burglar); *Brewster v. Fowler*, 11th Dist. Trumbull No. 99-T-0091, 2000 WL 1566528 (Oct. 13, 2000) (using a table saw) *Kinkade v. Noblet*, 5th Dist. Richland No. 14CA4, 2014-Ohio-3172 (walking beside the moving wheels of a parade float).

{¶ 35} Next, we find questions of material fact remain in this matter. There is no evidence on the record to assist us in determining whether installing an engine block is an inherently dangerous activity from which risk cannot be eliminated. Further, whether a duty was owed to Clark in this restoration or repair endeavor depends on the foreseeability of Clark's injury. "* * * [I]f a reasonably prudent person would have anticipated that an injury was likely to result from a particular act, the court could find that the duty element of negligence is satisfied." *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 693 N.E.2d 271(1998).

{¶ 36} The question then becomes whether it was foreseeable that the bolt holding the engine on the cherry picker could break. According to the affidavits of Hal Dunham, the failure of the bolt holding the engine onto the cherry picker was foreseeable because the engine was improperly rigged, thus creating undue stress on the eyebolts. Based on Dunham's affidavits alone then, the injury sustained by Clark, due to faulty rigging of the motor to the cherry picker, was foreseeable. According to Barcus, however, the eyebolt was defective and its failure, therefore, unforeseeable.

{¶ 37} Construing the evidence in a light most strongly in favor of Clark, we reverse the trial court's grant of summary judgment in favor of Barcus et. al.

II

{¶ 38} In his second assignment of error, Clark argues the Ohio Supreme Court's holding in *Gedra v. Dallmer Co*, 153 Ohio St. 258, 91 N.E.2d 256 (1950) is inapplicable in this matter. We agree.

{¶ 39} In *Gedra*, the Ohio Supreme Court held that if the plaintiff's injury might have resulted from any one of several causes, the plaintiff must produce evidence excluding those causes for which the defendant is not liable. *Id*. at paragraph two of the syllabus.

{¶ 40} As noted by Clark, however, the Ohio Supreme Court in *Westinghouse Electric Corp. v. Dolly Madison Corp*., 42 Ohio St.2d 122, 326 N.E.2d 651 (1975) clarified its *Gedra* holding. In that matter, the Supreme Court stated that where the plaintiff's evidence is such that it is as reasonable to infer other proximate causes for which the defendant is not liable, the plaintiff has failed to supply proof of proximate cause. *Id*. at 127, 326 N.E.2d 651. The plaintiff does not, however, have to eliminate other causes where he presents " 'some evidence, direct or inferential, that the agency which produces an injury is the result of the negligence of [the] defendant.' " *Id*. at 128, 326 N.E.2d 651, quoting *Gedra*, at 265, 91 N.E.2d 256. *Gedra* does not impose on a plaintiff the burden of eliminating other possible causes suggested by the defendant in order to make the plaintiff's case. *Id*. at 127, 326 N.E.2d 651. See also *DiBlasi v. First Seventh-Day Adventist Community Church* 2014-Ohio-2702 ¶ 40-41.

{¶ 41} In this matter, Clark does not suggest multiple possible causes of injury. Rather Clark solely argues Barcus' negligent rigging of the cherry picker is the cause of his injury. Clark produced some evidence that the injury was the result of Barcus' negligence. Under the circumstances of this case, therefore, we agree with Clark that the *Gedra* doctrine is inapplicable.

By Wise, Earle, J.

Hoffman, P.J. and

Baldwin, J. concur.

EEW/rw