[Cite as *Wolfe v. Bison Baseball, Inc.*, 2010-Ohio-1390.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Beverly Anne Ohde Wolfe,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-905 (C.P.C. No. 08CVC-12-17386)
Bison Baseball, Inc. aka Buffalo Bisons et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 31, 2010

Blumenstiel, Evans & Falvo, LLC, *James B. Blumenstiel* and *Braden A. Blumenstiel*, for appellant.

John C. Nemeth & Associates, *John C. Nemeth* and *David A. Herd*, for appellee Bisons Baseball, Inc.

Reminger Co., L.P.A., and *Matthew L. Schrader*, for appellee Cleveland Indians Baseball Co.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} On April 13, 2007, Beverly Ann Ohde Wolfe was on the baseball diamond at Cooper Stadium, where she worked as a freelance television crew manager, directing pre-game interviews before a game between the Columbus Clippers and the Buffalo Bisons. While the visiting team was taking infield practice, Wolfe was standing in foul

territory between first base and the bullpen area, when an errant baseball struck her in the head. Apparently, the ball got away from the third baseman as he was making a routine throw to first. Wolfe suffered four skull fractures, as well as loss of sight in her left eye, and additional damage to her teeth and face. She brought suit against the Bisons minor league baseball team, whose third baseman threw the errant baseball, and the Cleveland Indians Baseball Company, which was Buffalo's major league affiliate at that time. Both organizations moved for summary judgment, alleging the complete defense of primary assumption of risk, which the trial court granted on August 6, 2009. The trial court also cited the open and obvious doctrine as a basis for its decision granting judgment to the defendant baseball teams.

{¶2} At issue here is whether the defense of primary assumption of risk applies to individuals at sporting events or recreational activities who are neither spectators nor participants. Under the facts of this case, it seems that Wolfe had been on a baseball field, in similar situations, enough times to know and fully appreciate the obvious risks involved. Because she was fully aware of those risks, and proceeded anyway, she is presumed to have assumed the risk of injury. We therefore affirm the judgment of the Franklin County Court of Common Pleas.

{¶3} Wolfe assigns five errors for our consideration:

> [I.] THE TRIAL COURT ERRED IN RULING [THAT] DEFENDANTS WERE NOT "OCCUPIERS" AT THE TIME APPELLANT WAS INJURED AND, THEREFORE, OWED NO DUTY.
>
> [II.] THE TRIAL COURT ERRED IN RULING [THAT] DEFENDANTS OWED NO DUTY TO APPELLANT UNDER THE THEORY OF "OPEN AND OBVIOUS" BECAUSE APPELLANT WAS A BUSINESS INVITEE AND THE CAUSE

> OF THE INCIDENT WAS NOT A STATIC CONDITION BUT WAS THE RESULT OF ACTIVE NEGLIGENCE.
>
> [III.] THE TRIAL COURT ERRED IN HOLDING [THAT] THE DEFENSE OF PRIMARY ASSUMPTION OF RISK PRECLUDED APPELLANT'S CLAIMS BECAUSE APPELLANT WAS NEITHER A SPECTATOR NOR PARTICIPANT IN A RECREATIONAL SPORT.
>
> [IV.] THE TRIAL COURT ERRED IN RULING [THAT] THE DEFENDANTS DID NOT ACT RECKLESSLY IN CAUSING APPELLANT'S INJURIES.
>
> [V.] THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WHEN SERIOUS CREDIBILITY ISSUES BETWEEN DEFENDANTS' WITNESSES EXISTED.

{¶4} When a trial court grants summary judgment, we review those decisions de novo, using the same standard that the court used below. See, e.g., *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105; *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383. This de novo standard of review effectively provides for a new trial by this court of the legal issues in the case, and in doing so, we are required to give no deference whatsoever to the trial court's decision. See *Hicks v. Leffler* (1997), 119 Ohio App.3d 424, 427 (citing *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 8).

{¶5} The summary judgment criteria is set forth in Civ.R. 56(C), which provides that summary judgment may not be granted unless: (1) there are no material facts at issue, or in dispute; (2) the moving party is entitled to judgment as a matter of law; and (3) based on the facts and record, and viewing that evidence and the inferences drawn therefrom in a light most favorable to the opposing party, reasonable minds can only come to one conclusion—that conclusion being adverse to the nonmoving party. Id.

Summary judgment must not be granted unless and until the movant sufficiently demonstrates the absence of any genuine issue of material fact. *Hicks,* supra. And if, or when, reasonable minds could arrive at differing conclusions about the facts and evidence in the case, the court must overrule the motion for summary judgment. *Hounshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427, 433.

{¶6} The relevant material facts of this case are fairly straightforward, as set forth in the first few paragraphs of this decision. Our discussion, thus, is limited to a legal analysis of Ohio tort law as it applies to those facts.

{¶7} The first assignment of error concerns Wolfe's claim that the Buffalo Bisons team is responsible for her injuries on a theory of premises liability. The primary issue with this claim is whether the Bisons were "occupiers" of the baseball field at the time of the incident. If they were not occupiers, then they cannot be liable under this theory of recovery.

{¶8} Premises liability is a landowner's liability in tort, incident to the owner's right and power to admit or exclude people to or from the premises, which stems from the owner's failure to exercise ordinary or reasonable care for the protection of the owner's invitees. See *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 645 (citations omitted); see also *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 359. But the duty to keep the premises safe for others only arises when the defendant was in possession and control of the premises at the time in question. *Simpson v. Big Bear Stores Co.* (1995), 73 Ohio St.3d 130, 132 (citing *Wills v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188). The test to determine whether the owner or occupier had control is, generally,

whether they had the power and right to admit people to (or exclude) from the premises. Id.

{¶9} Wolfe attempts to establish that the Buffalo Bisons were the "occupiers" of the baseball diamond by referencing an unspecified agreement between the Bisons and the Columbus Clippers (the home team), by which the Bisons were to possess or occupy the premises during their appointed warm-up time. Wolfe has not presented any evidence of such an agreement. Furthermore, the only argument she offers in support of her contention that the Bisons were in control of the premises at the time of the accident is that the Bisons would have denied entrance to the field if the other team had attempted to enter before their appointed time. We are not convinced, however, that the Bisons had control of the field to the extent that they were the "occupiers" for the purposes of premises liability. Additionally, in her deposition, Wolfe stated that an usher admitted her onto the field, not a member of the Buffalo Bisons organization. (Wolfe Depo., at 68–69.) This certainly undermines her contention that the Bisons were in control of the premises.

{¶10} Because we find that the Wolfe failed to demonstrate that the Buffalo Bisons were the occupiers of the premises, we overrule the first assignment of error.

{¶11} Regardless of whether the owner had possession or control, the owner or occupier of the premises is not the absolute insurer of the safety of all invitees. See *Jackson*, citing *S.S. Kresge Co. v. Fader* (1927), 116 Ohio St. 718; *Wheeling & L.E.R. Co. v. Harvey* (1907), 77 Ohio St. 235; see also *Boroff v. Meijer Stores Ltd. Partnership* (Mar. 30, 2007), 10th Dist. No. 06AP-1150, 2007-Ohio-1495, ¶9. For example, an owner or occupier will not be liable to invitees who are injured after encountering an open and obvious danger. See, e.g., *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph two of

the syllabus; *Anderson v. Ruoff* (1995), 100 Ohio App.3d 601, 604; *Boroff*, supra. This is because an owner or occupier may reasonably expect that individuals entering the premises will discover those dangers, and take appropriate measures to protect themselves. Id. See also *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 123, 2009-Ohio-2495 (quoting *Simmers* at 644).

{¶12} The test to determine whether a danger was open and obvious is foreseeability—whether a reasonably prudent person would anticipate that an injury was likely to result from the performance or nonperformance of an act. See *Boroff* at ¶10 (citing *Menifee v. Ohio Welding Products, Inc*. (1984), 15 Ohio St.3d 75, 77; *Burstion v. Chong Hadaway, Inc.* (Mar. 2, 2000), 10th Dist. No. 99AP-701, 2000 WL 234323, at *2). The dangerous condition at issue does not actually have to be observed by the plaintiff in order for it to be open and obvious; rather, the key factor is whether the danger was noticeable, or whether the plaintiff should have been aware of the condition if he or she had looked. See *Anderson*; see also *Lydic v. Lowe's Co., Inc.* 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶10.

{¶13} Natural accumulations of snow and ice are one example of an open and obvious danger. See, e.g., *Sidle*, supra, at 49; *Lawson v. Scinto*, 10th Dist. No. 08AP-1125, 2009-Ohio-2659, ¶12. Overhead structures can also be deemed open and obvious. See, e.g., *Anderson*, supra (holding that the edge of a hayloft was an open and obvious danger); *Prest v. Delta Delta Delta Sorority* (1996), 115 Ohio App.3d 712, 715 (holding that the edge of a roof was an open and obvious danger that a reasonable person would discern, despite the fact that the plaintiff did not); *Norman v. BP America, Inc.* (Nov. 4, 1997), 10th Dist No. 97APE06-790 (holding that a 6-inch by 2-inch piece of

wood used to prop open a door was an open and obvious condition as a matter of law); *Austin v. Woolworth Dept. Stores* (May 6, 1997), 10th Dist. No. 96APE10-1430 (holding that the wooden pallet causing plaintiff's fall was open and obvious). And a temporary store display can also be deemed open and obvious, as in *Boroff* at ¶16.

{¶14} The difference between the danger in this case, and those mentioned above, is that a baseball is a moving object—i.e., it is not a "static condition"—its precise location or potential to cause harm cannot be observed prior to its point of impact. See generally *Simmons v. Am. Pacific Ent., L.L.C.*, 164 Ohio App.3d 763, 2005-Ohio-6957, ¶22 (holding that the open and obvious doctrine was inapplicable where reasonable minds could come to the conclusion that the defendant's active conduct caused the plaintiff's injury).

{¶15} In this case, although we believe that Wolfe should have known of the likelihood that she could be struck with a baseball while she was standing on the field of play during team warm-ups, we decline the opportunity to extend the open and obvious doctrine to include flying objects.

{¶16} This doctrine was not intended to apply to moving objects. However, our failure to apply the open and obvious doctrine does not make the appellees negligent. Appellant was clearly on notice of the risks associated with walking on a playing surface while baseballs are being thrown. We overrule the second assignment of error.

{¶17} The third assignment of error pertains to the tort defense of assumption of risk. Before we may consider the assigned error, we must first provide some background on this tort defense in Ohio. Assumption of risk was a common law tort defense, similar to contributory negligence; the doctrine is based on a plaintiff's consent or understanding

that they are voluntarily undertaking an appreciated or known risk. See Prosser & Keeton on Torts (5th ed.1984) Section 68, at 480–81; 70 Ohio Jurisprudence 3d, Negligence, Section 94. Since its inception, assumption of risk was widely criticized, not only because of its history of barring plaintiffs from recovery—even in cases of genuine hardship—but also because the doctrine served no purpose that was not already contemplated by other common law doctrines. See Prosser & Keeton, at 493. These criticisms led many states to abolish altogether, or strictly limit the doctrine's applicability. Id. at 493–96. Reacting to the General Assembly's amendment of Ohio's comparative negligence statute, and to bring Ohio in line with a predominant number of other states' comparative negligence laws, the Supreme Court of Ohio formally abolished assumption of risk in 1983. See *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110, 113 ("Now, with the issue squarely in front of us, we hold that the defense of assumption of risk is merged with the defense of contributory negligence under R.C. 2315.19."). In doing so, however, the *Anderson* court specifically preserved the doctrines of "express assumption of risk" and "primary assumption of risk." Id. at 114.

{¶18} Express assumption of risk arises only out of a contractual agreement, and is inapplicable here. Id. Primary assumption of risk, as Prosser and Keeton point out, is really a misnomer because in situations when it does apply, it serves to negate the duty of care owed by the defendant to the plaintiff. See Prosser & Keeton, at 496. Hence, it is more appropriately called the no-duty rule. See Id; see also Kenneth S. Abraham, Forms & Function of Tort Law 155 (1997); cf. *Anderson v. Ceccardi* at 114. The leading example of primary assumption of the risk is the class of cases involving spectators at baseball games. Id. Since baseballs are batted with great swiftness and no precise

accuracy, spectators who may be hit by errant fly balls assume that risk as a part of partaking in that activity. See, e.g., *Cincinnati Baseball Club Co. v. Eno* (1925), 112 Ohio St. 175, 180–81.

{¶19} Despite the fact that the *Anderson* court did not specifically say so (in its syllabus), the type of assumption of risk that it merged with contributory negligence was implied assumption of risk. See, e.g., *Gallagher v. Cleveland Browns Football Co.* (1996), 74 Ohio St.3d 427, 431 ("Although the *Anderson* 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."). (Emphasis added.) In contrast to primary assumption of risk, implied assumption of risk (also called secondary assumption of risk) is defined as a plaintiff's consent to or acquiescence in an appreciated, known, or obvious risk to plaintiff's safety. *Collier v. Northland Swim Club* (1987), 35 Ohio App.3d 35, paragraph two of the syllabus; see Prosser & Keeton, at 485–86. "Under this theory, it is plaintiff's acquiescence in or appreciation of a known risk that acts as a defense to plaintiff's action." *Collier*, supra. Implied assumption of risk does not relieve a defendant of his duty to the plaintiff. Id.

{¶20} The delineation between primary and implied assumption of risk is somewhat blurred, because there is no bright-line rule. Generally speaking, however, the cases in which primary assumption of risk was applicable involved participation in an activity or conduct in which the inherent risks are altogether unavoidable. For example, in *Cincinnati Baseball Club*, the court's reasoning was based on the fact that it is inevitable that foul balls may travel in the direction of spectators who are watching a

baseball game from the stands. This is physics—because in the game of baseball, the batter is attempting to strike one round object with another round object, while the former is traveling towards him at a very high rate of speed, and he is swinging the latter at a very high rate of speed; if the two objects do not meet exactly, the ball will travel in a direction other than towards the field of play. See generally Ted Williams & John Underwood, Science of Hitting (Rev.Ed. 1986) 11.

{¶21} Ironically, however, *Eno* stands for the very proposition that primary assumption of risk is inapplicable to a situation where a spectator is struck with a ball during practice or warm-ups. See *Gallagher*, at 432 ("The *Eno* court intimated in dicta that primary assumption of risk would have applied if the plaintiff had been struck by a ball hit into the stands during the normal course of a game."):

> 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 (5th 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.

Id. at 431–32.

{¶22} Despite the similarity—that in *Eno* and in this case, both accidents occurred during warm-ups—there are significant differences between *Eno* and this case, which render *Eno* inapposite here. First, the spectator in *Eno* was hit with a baseball while he was in the spectator seating area; the accident here happened on the field of play. Second, and perhaps more compelling, is the fact that the plaintiff in this case was working at the time of the accident—i.e., she was performing a duty with which she was fairly familiar, something she had done on several previous occasions; thus, she absolutely knew the risks involved.

{¶23} Based on this analysis, we overrule the third and fourth assignments of error.

{¶24} In the fifth assigned error, counsel for Ms. Wolfe alleges that summary judgment was inappropriate because there were credibility issues among defendants' witnesses, citing our decisions in *Nationwide Mut. Ins. Co. v. American Elec. Power*, 10th Dist. No. 08AP-339, 2008-Ohio-5618, and *Cordle v. Bravo Dev. Inc.*, 10th Dist. No. 06AP-256, 2006-Ohio-5693.

{¶25} Although Wolfe's counsel briefly alluded to a credibility issue in his statement of facts of plaintiff's memorandum contra summary judgment, the argument was not briefed and presented to the trial court. (See R. 52, at 4.) Under App.R. 12(A), it is within our discretion to consider errors not specifically set forth in the record and separately argued, but the fundamental rule is that we will not consider any error that could have been brought to the trial court's attention. See, e.g., *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 210 (citing *State v. Glaros* (1960), 170 Ohio St. 471,

paragraph one of the syllabus); *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 314.

{¶26} The credibility issue counsel points out—more or less, for the first time—in the fifth assignment of error, concerns the depositions of Shaun Larkin, the third baseman, and Torey Lovullo, the coach who was directing infield practice, who stated that they did not see Wolfe and her crew standing in the vicinity of first base prior to the accident. (See Appellant's Brief, at 21.) Appellant argues that these statements were inconsistent with the defendants' responses to plaintiff's requests for admissions, in which the defendants admitted that they were aware of Wolfe's presence during pre-game warm-ups. "It is highly implausible that neither Larkin nor Lovullo ever noticed Wolfe and her 6 to 8 person crew standing at first base for 15 minutes before the incident occurred." Id. at 22. To the contrary, it seems highly reasonable that the third baseman and coach were focused on their own jobs, much like Wolfe was focused on hers. Professional athletes condition themselves to block out the media and other distractions so that they may concentrate on their game, technique, teammates, and coaches' instructions. This is supported by Larkin's deposition:

> Q. OKAY. DID YOU SEE BEV [WOLFE] AND HER CREW AT ANY TIME BEFORE THE INCIDENT OCCURRED?
>
> * * *
>
> A. I REALLY WASN'T PAYING ATTENTION TO OTHER PEOPLE ON OR NEAR THE FIELD, OTHER THAN THE GUYS ON MY TEAM.

(Deposition of Shaun Larkin, March 13, 2009, at 43.)

{¶27} Even if counsel had properly preserved this issue for appeal, the inconsistency is not material to the case. It seems as though counsel is intimating that the very fact that Larkin did not notice Wolfe was, by itself, negligent, which is not the case.

{¶28} The fifth assignment of error is overruled.

{¶29} Although what happened to Ms. Wolfe is extremely unfortunate, based on the record before us, it was an accident—the product of two professionals focused hard on their respective tasks, each one more or less oblivious to the other, despite the fact that they were roughly 100 feet apart from each other. This story illustrates one of the exceptions in tort law where there is no redress for the plaintiff's injuries.

{¶30} We overrule the first, second, third, fourth, and fifth assignments of error. We therefore affirm the trial court's order granting summary judgment to the defendants.

Judgment affirmed.

McGRATH, J., concurs.
SADLER, J., concurs in judgment only.

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