[Cite as *Strayer v. Cox*, 2015-Ohio-2781.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

RICHARD STRAYER, et al.	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 2015-CA-6
	:	
v.	:	Trial Court Case No. 2014-CV-02
	:	
ANTHONY COX, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellees	:	
	:	

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O P I N I O N

Rendered on the 10th day of July, 2015.

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WELBAUM, J.

{¶ 1} In this personal injury action, Plaintiff-Appellant, Richard Strayer, appeals from a summary judgment rendered on behalf of Defendants-Appellees, Anthony Cox, Heather Cox, and Auto Owners Insurance Company (collectively, "Appellees"). In support of his appeal, Strayer contends that Appellees failed to produce competent summary judgment evidence, and that their motion for summary judgment should have been denied as a matter of law.

{¶ 2} We conclude that the trial court did not err in rendering summary judgment in favor of Appellees. The undisputed facts indicate that Anthony Cox had no duty to protect Richard Strayer from an open and obvious hazard on Cox's property. Furthermore, Anthony Cox did not owe Strayer any duty under an exception to a property owner's general lack of duty to an employee of an independent contractor. Specifically, Cox did not "actively participate" as required for application of this exception by directing the activity that resulted in Strayer's injury, by giving or denying permission for the critical acts that led to Strayer's injury, or by exercising sole exclusive control over a critical variable in the working environment. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 3} In June 2012, Richard Strayer was injured while attempting to cut down a tree located on the property owned by his neighbor, Anthony Cox. Strayer had moved into the neighborhood around 2000, and Cox moved in a few years before the accident occurred. Between 1986 and 2009, when he became employed as a laborer at a quarry,

Strayer had been involved in various types of residential and commercial construction. However, for about two years during this time frame, Strayer was employed climbing cell phone towers that ranged between 180 and 1,600 feet tall. In the course of this employment, Strayer wore a safety harness. Subsequently, he also worked for three years in commercial construction, where he wore a body harness. At the time, OSHA required workers to be tied off while they were six to 12 feet above the ground.

{¶ 4} For 10 or 11 years prior to the accident, Strayer had been cutting or taking down trees in order to obtain firewood for a large wood stove used to heat his whole house. Strayer obtained wood from friends, acquaintances at work, people offering to share firewood in exchange for splitting wood, or even complete strangers who had a tree that needed to be cut down. Strayer owned three chain saws and a hydraulic log-splitter.

{¶ 5} Prior to June 2012, Strayer had climbed trees 20 to 25 times to cut them down. If he could drop a tree from the ground, he would, but if he had to climb the tree to clear power lines, a building, or telephone lines, he would climb the tree, trim around it, and bring the tree down from the top down.

{¶ 6} At some point, Anthony Cox decided that he wanted to remove the tree in his front yard. At the time, the tree was about 20 to 25 feet tall. His reason was that a lot of wind came through the area, and he did not want the tree to blow over. The tree had sparse leaves on it, and he presumed it was dead. Cox called a tree trimming service and received a rough estimate over the telephone of about $1,000 for the removal. Subsequently, Cox told Strayer he wanted to take the tree down, and asked Strayer to help because he (Cox) was afraid of heights. Previously, Strayer had helped Cox put a roof on his garage, and Cox had helped Strayer with things around the house. Strayer

also asked his uncle and cousin, John Goulliozet and John Goulliozet, Jr., to help with the tree removal.

{¶ 7} There was no indication that Cox had any experience with cutting down trees or using chain saws. Strayer indicated that he normally cuts down trees with another person. If the person has experience with chain saws, the person will help him cut. If the person does not have experience, the person just assists with taking the branches out after Strayer cuts them, and stacking the brush off to the side.

{¶ 8} It was decided that the tree would be cut down on Saturday, June 19, 2012. Cox and Strayer began working at around 11:00 a.m. that day, before the Goulliozets arrived. Per his usual procedure, Strayer inspected the tree before cutting it down. The condition of the tree looked okay to Strayer. There were some branches that were obviously dead. There was nothing about the tree that led Strayer to believe that the tree was diseased or damaged. According to Strayer, no one other than a tree expert would be able to tell that a branch was rotting, and Cox would have had no way to determine if there was rotting or damage to a limb. Cox also testified that he had tested a couple of branches before the tree was cut down, by bouncing on them, and found no problem.

{¶ 9} The parties used Strayer's chain saw, ladder, and rope. It was Strayer's understanding that he was going to use the saw to cut the branches, and Cox was going to provide whatever assistance he could. After looking at the tree, Strayer believed he could use a chain saw and cut down the tree. Cox and Strayer discussed which branches were coming down first. The first branches Strayer cut were lower branches and dead ones, to get them out of the way. Strayer started cutting on the east side of the house. When he cut the first branch, he was standing in the base of the tree, which was

10’ to 12’ above the ground. Strayer then worked his way around the tree, cutting off between five and fifteen branches. After Strayer cut off the branches, Cox pulled them away from the base of the tree.

{¶ 10} At that point, Strayer climbed out of the tree and got a rope from his own house. The rope was needed because the branch in question went over the top of Cox’s house, and they needed to pull the branch away so that it would not fall and hit Cox’s roof or take out his gutter. Because the ladder was not high enough, they had trouble getting the rope around the branch. As a result, they tied a wrench from Cox’s house around the rope, threw it through the tree, and then pulled on the wrench to tighten the rope. After the rope was attached, Cox and Strayer talked about how Cox would take the slack out of the rope. Strayer would climb up, cut the branch, and yell at Cox to yank the rope so that the branch would not hit the house. According to Strayer’s testimony, this was the appropriate way to cut down the branch. Strayer stated that he had done it many times before.

{¶ 11} Strayer then climbed back up into the tree, and was standing back in the base, where he had stood prior to all the other cutting. Just as they were ready to start, Cox’s acquaintance, Mark Lynn arrived, and Cox asked him to help with the rope. Mark stood closer to Strayer and the house, and Cox was closer to the curb. Cox was facing away from the tree, and Mark was at his back, and they had a good bit of tension on the rope, to make sure as the branch came away, it did not hit the house. The only thing Strayer asked at that point was whether the rope was tight, and Cox responded that it was.

{¶ 12} Strayer’s feet were in the base of the tree, and he was standing in the

middle of a series of big branches or limbs. The base of the tree had a fairly good size limb coming out, and the way Strayer was standing was how he had done it in other trees. Strayer specifically stated that the place where he was trying to cut a limb was different from where the limb he was standing on broke from the tree. He was cutting in a different place from where he was standing and the limb being cut was no more than two or three inches in diameter. That limb was attached to another limb, but Strayer was not standing on the larger limb. Strayer Deposition, pp. 115-116 and 133-134. In this regard, the following exchange occurred during Strayer's deposition:

Q. The limb you indicated – the limb you were trying to cut was two or three inches in diameter, was that limb dead?

A. I believe, yes.

Q. And you indicated that that limb was attached to another limb, correct?

A. Yes.

Q. Was the limb to which the two or three-inch diameter limb attached dead?

A. To the bigger limb?

Q. Yes.

A. The one we was cutting that was hanging over the house you could tell was a little dead, yeah.

Q. And the limb that attached to the base of the tree that the two to three inch diameter limb attached to, was that larger limb dead?

A. I couldn't tell. There was still bark on the tree.

> Q. The limb – the two to three inch diameter limb that you were trying to cut was attached to the limb attached to the tree, were you standing on that larger limb?
>
> A. Couldn't be standing directly on it because it come up like this. So, I was, you know – as it came up, like I said, there's maybe a section in that tree that you could stand in, you know, move your foot, but I couldn't directly stand on that limb itself.

Strayer Deposition, pp.115-116.

{¶ 13} Strayer also reiterated later that "I wasn't actually on the limb. I was in the base of the tree. I can't actually stand on that limb because it's coming off the trunk of the tree." (Emphasis added.) *Id.* at 184. He also indicated that the tree broke "where my feet were, where I was standing * * *." *Id.* at p. 133.[1]

{¶ 14} Strayer applied the chain saw to the limb and started cutting. He did not cut the entire limb. Strayer gave the following account of what happened:

> Q. What happened?

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[1] At oral argument, Strayer contended that the rope was attached to a tributary branch of the one on which he stood. In addition, he argued that pulling on the tributary branch would also necessarily pull the branch on which he stood. However, this was not the evidence. As was noted, Strayer stated that he stood in the base of the tree. Whether the limb that Strayer was cutting was a tributary limb of a larger limb is irrelevant, because Strayer was not standing on either of those limbs. Furthermore, Strayer also stated in his deposition that he did not know if pulling on the rope could have been any part of the tree limb breaking. Strayer Deposition, p. 171. There was also no evidence, as will be noted in the main text, that anyone pulled the rope before the tree broke from under Strayer's feet. Later in his deposition, at p. 182, Strayer speculated that the accident could have occurred by someone yanking on the branch or not putting enough tension on the branch; however, there was no evidence of this. "[S]peculation is insufficient to meet the non-movant's reciprocal burden in summary judgment of showing that a genuine issue of fact exists." (Citations omitted.) *Community Ins. Co. v. McDonald's Restaurants of Ohio, Inc*., 2d Dist. Montgomery No. 17051, 1998 WL 852772, *8 (Dec. 11, 1998).

A. Basically I just started cutting on the limb and the next thing I know I'm on the ground.

* * *

Q. When you were on the ground, before you looked at anything, do you know why you were on the ground?

A. Yeah.

Q. Why?

A. Where I was standing at, that limb broke, separated from the base of the tree.

Q. Did you know that while you were falling?

A. No.

Q. That's what I'm trying to find out, whether you looked around to see anything, do you know what happened?

A. Not until after I was already on the ground, and the branch that I was standing on basically I rode down to the ground with. It landed right beside me.

Strayer Deposition, pp. 128-129.

{¶ 15} There was no evidence that either Cox or Lynn pulled on the rope before Strayer fell. Cox (who was the only other fact witness from whom evidence was submitted), testified that he was not looking at the tree. He heard a branch fall and thought it had just been cut through. Cox then heard Strayer's son (who was standing on the porch) yell, and he turned around towards the tree.

{¶ 16} During Strayer's deposition, the following exchange occurred:

Q. Did you ever tell Anthony that you believed he was responsible for the accident?

A. No. That's just what it is, an accident. Accidents happen.

Strayer Deposition, p. 173.

{¶ 17} Strayer also testified that the branch fell because it was rotted. *Id.* at p. 130. As a result of the fall, Strayer sustained a substantial injury to his left ankle, which required surgery.

{¶ 18} In January 2014, Strayer and his wife, Jody, filed suit against Anthony Cox, Auto Owners Insurance Company (Cox's insurer), and United Healthcare Services, Inc. (which had insured Strayer and had a potential subrogation claim). In July 2014, Cox and Auto Owners filed a motion for summary judgment against the Strayers. Subsequently, the Strayers filed an amended complaint, adding Heather Cox, Anthony's wife, as a party, solely on the basis of premises liability. United Healthcare also filed cross claims against the Coxes and Auto Owners, based on its subrogation interest.

{¶ 19} After the Strayers filed their own motion for summary judgment, the trial court rendered summary judgment in favor of Anthony Cox, Heather Cox, and Auto Owners on February 4, 2015. The court also overruled the Strayers' motion for summary judgment and dismissed their complaint. This appeal followed, although the notice of appeal was filed only on behalf of Richard Strayer.

II. Did the Court Err in Rendering Summary Judgment?

{¶ 20} Strayer's sole assignment of error states that:

Appellees Failed to Produce Competent Summary Judgment

Evidence, and Their Arguments in Favor of Summary Judgment Should Have Been Denied as a Matter of Law.

{¶ 21} Under this assignment of error, Strayer contends that the trial court erred by construing the facts in Cox's favor, and by placing the blame for the accident on Strayer. In addition, Strayer contends that the trial court erred by failing to consider the affidavit of Strayer's expert, Mark Webber, a certified master arborist, who concluded that the tree limb that failed was in a deteriorated and hazardous condition and that Cox failed to follow the necessary steps for a homeowner-directed operation. Finally, Strayer challenges the trial court's conclusions about Cox's liability for the actions of an independent contractor.

{¶ 22} Before we address the assignment of error, we will consider whether the trial court's order was a final appealable order. Although neither side has challenged jurisdiction, we can raise this issue on our own motion. *Discover Bank v. Fine*, 2d Dist. Miami No. 2014-CA-13, 2014-Ohio-4855, ¶ 7. "The appellate jurisdiction of this court is limited to review of final orders and judgments." *Langer v. Langer*, 123 Ohio App.3d 348, 352, 704 N.E.2d 275 (2d Dist.1997), citing *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 540 N.E.2d 266 (1989). "An order of a court is a final, appealable order only if the requirements of both Civ.R. 54(B), if applicable, and R.C. 2505.02 are met." *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989).

{¶ 23} Under R.C. 2502.02(B), an order is a final order, among other things, when it is "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment * * *." R.C. 2505.02(B)(1). This requirement has been satisfied. The summary judgment order affected a substantial right because it

determined the action and prevented a judgment in favor of the Strayers. However, Civ.R. 54(B) also provides that where multiple claims for relief or multiple parties are involved, "the court may enter final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay."

{¶ 24} Multiple parties were involved in this case, and the trial court did not specifically rule on United Healthcare's cross claims, nor did it include a Civ.R. 54(B) determination. Upon examination, however, we conclude that the lack of a Civ.R. 54(B) certification does not prevent the judgment from being final, because the summary judgment in favor of Appellees mooted United Healthcare's claims, which were based on subrogation.

{¶ 25} "The legal doctrine of subrogation has long been recognized as an insurer's derivative right." *Bogan v. Progressive Cas. Ins. Co*., 36 Ohio St.3d 22, 29, 521 N.E.2d 447 (1988), *overruled in part on other grounds, Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927, paragraph two of the syllabus. The recovery of United Healthcare, which insured Strayer, was thus contingent upon Strayer's success, and the summary judgment rendered against the Strayers mooted United Healthcare's cross claims. *See Hines v. Aetna Cas. & Sur. Co.*, 8th Dist. Cuyahoga No. 59600, 1992 WL 2588, *6 (Jan. 9, 1992) (concluding that a final order existed, even though the trial court did not mention Civ.R. 54(B), because the remaining claims were subrogation and indemnification claims that were mooted by the judgment in favor of the defendants.) *Accord Ashbaugh v. Family Dollar Stores*, 4th Dist. Highland No. 99 CA 11, 2000 WL 146391, *1 (Jan. 20, 2000) (summary judgment granted in

defendant's favor in tort action rendered the insurer's subrogation claim moot, and the summary judgment order was a final appealable order despite the lack of specific resolution of the subrogation claim and the lack of a Civ.R. 54(B) determination.)

{¶ 26} Accordingly, the trial court's order in the case before us was a final appealable order, despite the lack of a Civ.R. 54(B) certification. We, therefore, have jurisdiction over this appeal.

{¶ 27} Turning now to the substantive arguments, we note that "[a] trial court may grant a moving party summary judgment pursuant to Civ. R. 56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." (Citation omitted.) *Smith v. Five Rivers MetroParks*, 134 Ohio App.3d 754, 760, 732 N.E.2d 422 (2d Dist.1999). "We review summary judgment decisions de novo, which means that we apply the same standards as the trial court." (Citations omitted.) *GNFH, Inc. v. W. Am. Ins. Co*., 172 Ohio App.3d 127, 2007-Ohio-2722, 873 N.E.2d 345, ¶ 16 (2d Dist.).

{¶ 28} In the case before us, the claims against the Coxes were based on negligence in connection with the removal of the tree. "It is fundamental that in order to establish a cause of action for negligence the plaintiff must show (1) the existence of a duty, (2) a breach of that duty, and (3) an injury proximately resulting therefrom." *Colville v. Meijer Stores Ltd.*, 2d Dist. Miami No. 2011-CA-011, 2012-Ohio-2413, ¶ 23, citing *Menifee v. Ohio Welding Prod., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984).

{¶ 29} Concerning the existence of a duty, "[i]n Ohio, the status of the person who

enters upon the land of another (*i.e*., trespasser, licensee, or invitee) continues to define the scope of the legal duty that the landowner owes the entrant." (Citation omitted.) *Gladon v. Greater Cleveland Regional Transit Auth*., 75 Ohio St.3d 312, 315, 662 N.E.2d 287 (1996). "Invitees are persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner." (Citations omitted.) There is no dispute about Strayer's status, as both sides agree that Strayer was an invitee at the time of his injury.

{¶ 30} Regarding invitees, we have indicated that:

> An owner or occupier of a premises owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition so that invitees are not unnecessarily and unreasonably exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E.2d 474. The owner or occupier, however, is not an insurer of an invitee's safety and owes no duty to protect invitees from open and obvious dangers on the property. *Id.* at 203-204, 480 N.E.2d 474; citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589. Open and obvious hazards are those hazards that are neither hidden nor concealed from view and are discoverable by ordinary inspection. *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50-51, 566 N.E.2d 698. "[T]he dangerous condition at issue does not actually have to be observed by the plaintiff in order for it to be an 'open and obvious' condition under the law. Rather, the determinative issue is whether the condition is observable." *Caravella v. West–WHI Columbus Northwest Partners*, Franklin App. No. 05AP-499,

> 2005-Ohio-6762. We have held that the crucial inquiry is whether an invitee exercising ordinary care under the circumstances would have seen and been able to guard himself against the condition. *Kidder v. The Kroger Co.*, Montgomery App. No. 20405, 2004-Ohio-4261.

Blair v. Vandalia United Methodist Church, 2d Dist. Montgomery No. 24082, 2011-Ohio-873, ¶ 15.

{¶ 31} "Liability only attaches when an owner has 'superior knowledge of the particular danger which caused the injury' as an 'invitee may not reasonably be expected to protect himself from a risk he cannot fully appreciate.' " *Uhl v. Thomas*, 12th Dist. Butler No. CA2008-06-131, 2009-Ohio-196, ¶ 13, quoting *LaCourse v. Fleitz*, 28 Ohio St.3d 209, 210, 503 N.E.2d 159 (1986). Furthermore, "[w]hen applicable, the open-and-obvious doctrine obviates an owner's duty of care, and acts as a complete bar to any negligence claim." *Id*. at ¶ 16, citing *Armstrong v. Best Buy Co., Inc*., 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5. *Accord Murphy v. McDonald's Restaurants of Ohio, Inc.*, 2d Dist. Clark No. 2010 CA 4, 2010-Ohio-4761, ¶ 18; *Cage v. Sutherland Bldg. Prods., Inc.*, 10th Dist. Franklin No. 14AP-227, 2014-Ohio-3891, ¶ 11. "[T]he open and obvious doctrine is determinative of the threshold issue, the landowner's duty. In the absence of duty, there is no negligence to compare." *Anderson v. Ruoff*, 100 Ohio App.3d 601, 604, 654 N.E.2d 449 (10th Dist.1995)

{¶ 32} "The landowner's duty to invitees also includes the obligation to inspect the premises to discover possible dangerous conditions." *Rowe v. Pseekos*, 10th Dist. Franklin No. 13AP-889, 2014-Ohio-2024, ¶ 7, citing *Perry v. Eastgreen Realty Co*., 53 Ohio St.2d 51, 52, 372 N.E.2d 335 (1978). In *Rowe*, the court noted that:

> Should a landowner fail to conduct a reasonable inspection of the premises, the landowner will be charged with constructive knowledge of any latent defect which the landowner would have discovered had he or she conducted the reasonable inspection. *Beck v. Camden Place at Tuttle Crossing*, 10th Dist. No. 02AP-1370, 2004-Ohio-2989, ¶ 30. Once imputed with constructive knowledge of the latent defect, the landowner may face liability for failing to warn the invitee of the latent defect or otherwise make the premises reasonably safe. *Ferguson v. Eastwood Mall, Inc.,* 11th Dist. No. 97 CV 134 (Dec. 4, 1998).

Rowe at ¶ 7.

{¶ 33} The trial court concluded that the Strayers were barred from recovery because the deteriorating tree was an open and obvious hazard that Richard Strayer freely ascended. The court also observed that Richard was in a better position to assess the safety of standing on the branch and that Cox had no duty to warn him about dangers of which Cox was unaware, i.e., the fact that the limb was deteriorating on the inside, which was not observable from the outside. In addition, the court observed that Richard had significant experience with cutting trees and that the risk of encountering deteriorating branches was open and obvious.

{¶ 34} We agree with the trial court. There was nothing in the record to indicate that Cox had knowledge of a latent defect or failed to conduct a reasonable inspection. The condition of the tree was as observable to Strayer as it was to Cox. Strayer also had substantial experience with tree removal, and was actually in a superior position to assess the dangers of doing the work. Based on the undisputed facts, Cox had no duty

to protect Strayer against this open and obvious danger.

{¶ 35} Strayer also argues, based on the affidavit of Mark Webber, a certified arborist, that Cox was required to contact a certified arborist prior to removal to conduct a risk assessment of the tree. According to Webber, Cox's failure to have a risk assessment conducted violated American National Standards Institute ("ANSI") sections Z133 and A300, part 1 and 9, which require that any tree being worked on "undergo a tree risk assessment for tree worker safety." Webber Affidavit attached to the Deposition of Mark Webber as Exhibit S, ¶ 21.

{¶ 36} The trial court rejected the application of these ANSI standards, which relate to standards for the tree-cutting industry and are also voluntary. In particular, the trial court noted that Cox was not engaged in the tree-cutting industry, and there was no reason to believe that he would be familiar with these standards, or that he would be expected to comply with them for the benefit of an independent contractor who engaged in the practice of cutting down trees.

{¶ 37} Again, we agree with the trial court. As a preliminary matter, we note that Strayer has furnished no authority, other than Webber's own statements, to suggest that homeowners like Cox are subject to the requirements of ANSI. In a similar context, the Tenth District Court of Appeals found that OSHA regulations and standards had no application, because "OSHA standards relate only to employers and do not provide a private cause of action for third parties." *Anderson*, 100 Ohio App.3d at 605, 654 N.E.2d 449, citing *State ex rel. Goodyear Tire & Rubber Co. v. Tracey*, 66 Ohio App.3d 71, 76, 583 N.E.2d 426 (1st Dist.1990). *Anderson* was an action brought against a landowner on behalf of a purchaser of hay, who fell to his death from a hayloft that lacked a guardrail.

Id. at 603.

{¶ 38} We have also found OSHA regulations immaterial in a case involving a scaffold, "[i]n the absence of any evidence that [the homeowner], or a reasonable person in [the homeowner's] position, could be expected to be familiar with the regulations of the Occupational Safety and Health Administration of the United States Department of Labor pertaining to scaffolds * * *." *Hagans v. McKee*, 2d Dist. Montgomery No. 19480, 2003-Ohio-1559, ¶ 13. The same reasoning would apply to ANSI standards. No evidence was presented that Cox, or a reasonable homeowner in Cox's position, could be expected to be familiar with ANSI standards.

{¶ 39} As an additional matter, we note Webber's admission that every ANSI standard states that the standard is voluntary. Webber Deposition, pp. 50-51. Furthermore, "Ohio courts have held that summary judgment may be granted in cases where building code violations are open and obvious 'because the open-and-obvious nature of the defect obviates the premises owner's duty to warn.' " *Pesci v. William Miller & Assoc*., 10th Dist. Franklin No. 10AP-800, 2011-Ohio-6290, ¶ 28, quoting *Johnson–Steven v. Broadway Sunoco*, 8th Dist. Cuyahoga No. 89544, 2008-Ohio-691, ¶ 15. As was noted, the hazard of climbing on the tree limb in a tree with dead branches was open and obvious. Strayer also stressed that Cox would not have been able to tell that the limb had deteriorated from the inside.

{¶ 40} Strayer's final argument is that Cox should be held liable because Strayer was working as an independent contractor at the time of his injury, and Cox actively participated in the work.

{¶ 41} In *Wellman v. E. Ohio Gas Co.*, 160 Ohio St. 103, 113 N.E.2d 629 (1953),

the Supreme Court of Ohio held that:

> Where an independent contractor undertakes to do work for another in the very doing of which there are elements of real or potential danger and one of such contractor's employees is injured as an incident to the performance of the work, no liability for such injury ordinarily attaches to the one who engaged the services of the independent contractor.

Id. at paragraph one of the syllabus.

{¶ 42} Subsequently, in *Hirschbach v. Cincinnati Gas & Elec. Co.*, 6 Ohio St.3d 206, 452 N.E.2d 326, (1983), the court established the following exception to this doctrine, by stating that:

> One who engages the services of an independent contractor, and who actually participates in the job operation performed by such contractor and thereby fails to eliminate a hazard which he, in the exercise of ordinary care, could have eliminated, can be held responsible for the injury or death of an employee of the independent contractor.

Id. at syllabus.

{¶ 43} As a preliminary matter, we note that Strayer was not an employee of an independent contractor; he was the independent contractor. However, for purposes of our discussion, we will assume that this exception could apply.[2]

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[2] At oral argument, Cox argued that this doctrine does not apply to independent contractors, but applies only to employees of independent contractors. We have previously applied the doctrine to independent contractors, where the contractor was the employee who was injured. *See Szotak v. Moraine Country Club, Inc.*, 172 Ohio App.3d 34, 2007-Ohio-2974, 872 N.E.2d 1270, ¶ 13-16 (2d Dist.). Therefore, we will assume, for purposes of our discussion, that the doctrine applies to an independent contractor, where the contractor, himself, or herself, is also the party who is injured. Generally,

{¶ 44} In *Hirschbach*, an employee of an independent contractor fell to his death when a tower arm on a tower collapsed. *Id.* at 207. The collapse was caused by excessive force from a tractor winch that had been positioned too close to the base of the tower. *Id.* Prior to the accident, the decedent and several employees of the independent contractor had asked the inspector in charge for the property owner to give them permission to move the tractor winch a safe distance away from the tower. However, the inspector refused permission. *Id.*

{¶ 45} After being sued, the property owner claimed that it could not be held responsible under *Wellman*. *Id.* at 208. The Supreme Court of Ohio held to the contrary, agreeing with the appellant that "[t]he controlling and dispositive factual distinction is that in this case, the appellee actually participated in the job operation performed by the crew of the independent contractor." *Id*.

{¶ 46} After discussing the facts, including that the property owner, through its agent, knew that the winch was positioned too close to the tower, and that the employees of the independent contractor had attempted to remedy the situation, the court stated that:

> Hence, under the circumstances of this case, a jury could reasonably conclude that CG & E [the owner] had sole control over the safety features

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Wellman and its progeny have been applied in cases involving employees of independent contractors or subcontractors who are injured on construction jobs or other business sites, not residential property. *See, e.g.*, *Betzner v. Navistar Internatl. Transp. Corp.*, 77 Ohio App.3d 611, 603 N.E.2d 256 (2d Dist.1991); *Smith v. Peck Hannaford & Briggs Co.*, 161 Ohio App.3d 468, 2005-Ohio-2741, 830 N.E.2d 1226 (1st Dist.); and *Castle v. Columbus Roof Trusses, Inc.*, 10th Dist. Franklin No. 95APE06-822, 1995 WL 739912 (Dec. 12, 1995). Furthermore, as a general rule, an independent contractor is primarily responsible for protecting its employees. *Eicher v. U.S. Steel Corp.*, 32 Ohio St.3d 248, 250, 512 N.E.2d 1165 (1987).

> necessary to eliminate the hazard. By denying the Wagner-Smith crew its request to reposition the winch tractor: (1) CG & E refused to eliminate the hazard, (2) CG & E interfered with the mode of the job operation, and (3) CG & E actually participated in the job operation by dictating the manner and mode in which the winching phase of the job was to be performed.
>
> Based upon the foregoing, it is our opinion that this case presents a jury question as to whether CG & E is responsible for decedent's death by allegedly failing to eliminate a hazard which it, in the exercise of ordinary care, could have eliminated.

Hirschbach, 6 Ohio St.3d at 208, 452 N.E.2d 326.

{¶ 47} The Supreme Court of Ohio further refined this holding in *Cafferkey v. Turner Const. Co*., 21 Ohio St.3d 110, 488 N.E.2d 189 (1986). In *Cafferkey*, the court stated that:

> A general contractor who has not actively participated in the subcontractor's work, does not, merely by virtue of its supervisory capacity, owe a duty of care to employees of the subcontractor who are injured while engaged in inherently dangerous work.

Id. at syllabus.

{¶ 48} In *Cafferkey*, a supervisor for the general contractor was in the vicinity of the accident, which was caused by actions of the subcontractor's employees. Specifically, the employees lit torches in the presence of methane gas while attempting to free a jammed twister bar. *Id.* at 111. However, the supervisor was not consulted either about the decision to unjam the twister bar, or about the decision to send men down into the

hole to unjam the bar. *Id.* at 112. Under these circumstances, the court concluded that the general contractor did not owe a duty of care to the subcontractor's employees because it "did not direct or interfere" with the subcontractor's work. *Id.* at 113.

{¶ 49} The Supreme Court of Ohio subsequently construed *Cafferkey* in *Bond v. Howard Corp.*, 72 Ohio St.3d 332, 650 N.E.2d 416 (1995), holding that:

> For purposes of establishing liability to the injured employee of an independent subcontractor, "actively participated" means that the general contractor directed the activity which resulted in the injury and/or gave or denied permission for the critical acts that led to the employee's injury, rather than merely exercising a general supervisory role over the project.

Id. at syllabus, construing and applying *Cafferkey*, 21 Ohio St.3d 110, 488 N.E.2d 189.

{¶ 50} In the case before us, Strayer contends that Cox "actively participated" in the job for purposes of the exception, because Cox controlled where he and Strayer would be positioned during the tree removal process, and directed Strayer to climb the ladder and cut tree branches without providing Strayer with safety equipment. These statements, however, misconstrue the testimony. To the contrary, the testimony of the parties indicates that if anyone directed the activities that day, it would have been Strayer, who was the individual experienced in cutting down trees and using chain saws.

{¶ 51} The citation for these "facts" in Strayer's brief is the affidavit of Mark Webber. See Appellant's Brief, p. 19, fn. 104, which cites to paragraph 35 of Webber's affidavit. However, Webber's affidavit, itself, misstates the evidence by stating that "Strayer was directed by the Defendant to climb the ladder and cut the tree branch * * * ." Doc. 35, Affidavit of Mark Webber, ¶ 35. Webber did not observe the accident, and his

opinions were required to be based on "facts or data * * * perceived by the expert or admitted in evidence at the hearing." Evid. R. 703.

{¶ 52} There was no testimony indicating that Cox required Strayer to climb the ladder and cut the tree branch. It is true that Cox asked Strayer days earlier if he could help with the tree removal because Cox was afraid of heights. Strayer Deposition, p. 100. However, the record is devoid of any indication that Cox directed Strayer to do anything on the day of the accident. There is also no evidence that Cox had any prior experience with chain saws or with cutting down trees, or that Strayer thought that Cox had any such experience. To the contrary, even at his deposition, Strayer stated that he did not know if Cox had such experience. *Id*. at p. 132. Strayer indicated that if an individual had prior experience with chain saws, the person would help him with cutting. However, if the person did not have prior experience with chain saws, he would have the person assist him (as Cox did that day), by taking branches out and stacking brush off to the side. Strayer Deposition, pp. 92, 101, and 107-109.

{¶ 53} Strayer's reply brief also misstates facts, by contending that Cox was responsible for attaching the rope to a wrench and throwing it over the limb, and by contending that Cox pulled the rope taut before being given the voice command to do so from Strayer, "which resulted in Mr. Strayer falling from the tree and being injured." Appellant's Reply Brief, p. 7, fn. 38 and 39, which reference Strayer's Deposition at pp. 111 and 133.

{¶ 54} Instead, Strayer stated that he (Strayer) retrieved the rope from his house and that "*we* tied a wrench around the rope and threw it through the tree." (Emphasis added.) Strayer Deposition, p. 110. Furthermore, there was simply no evidence that

Cox pulled the rope before he was told to do so by Strayer. To the contrary, at the cited part of the deposition, Strayer said that "I never had time to even tell him to yank the rope before the limb itself broke." *Id.* at p. 133. Immediately after making this statement, Strayer stated that the limb he was cutting was not where he was standing. They were *two different locations*. (Emphasis added.) *Id.* As was noted, Strayer said he was standing in the base of the tree, not on the small limb he was cutting or on the limb to which the smaller limb was attached. Strayer also stated that the limb he was standing on separated from the base of the tree, that he rode the branch down to the ground, and that the branch landed beside him. *Id* at pp. 127-128. When asked why the branch fell, Strayer stated that "It was rotted." *Id.* at p. 130.

{¶ 55} Thus, there is no evidence that Strayer "actively participated," in that he "directed the activity which resulted in the injury and/or gave or denied permission for the critical acts that led to the employee's injury." *Bond*, 72 Ohio St.3d at 332, 650 N.E.2d 416.

{¶ 56} In *Sopkovich v. Ohio Edison Co*., 81 Ohio St.3d 628, 693 N.E.2d 233 (1998), the Supreme Court of Ohio further elaborated on its prior decisions in *Hirschbach* and other cases, stating that "as is evident from a careful review of the foregoing authorities, active participation giving rise to a duty of care may be found to exist where a property owner either directs or exercises control over the work activities of the independent contractor's employees, or where the owner retains or exercises control over a critical variable in the workplace." *Id*. at 643.

{¶ 57} In *Sopkovich*, the landowner was found to have owed a duty to an employee of an independent contractor who had been burned by contact with high

voltage electricity. This decision was based on the fact that the landowner (Ohio Edison) did "retain and exercise exclusive control over a critical variable in the working environment, i.e., the de-activation of specific electrical conductors in the work area." *Id.* at 643.

{¶ 58} In the case before us, Strayer appears to be contending that Cox retained exclusive control over "critical variables" such as instructing Strayer to scale the tree, pulling the rope around the branch, and pulling the rope taut prematurely. However, as was noted, the undisputed facts do not bear this out. Cox did not direct Strayer to do anything, nor did he have exclusive control over the decision to pull the rope around the branch. In addition, Cox did not have exclusive control over the rope, as another individual, Mark Lynn, was holding onto the rope. However, even if we assumed that Cox had exclusive control over the rope while he held it, there is no evidence that the rope played a part in Strayer's injury. Instead, the cause of Strayer's injury, in his own words, was that the limb on which he stood fell, taking him down with it, because the limb "was rotted." Accordingly, the exception outlined in *Hirschbach* and its progeny does not apply to the case before us.

{¶ 59} Based on the preceding discussion, Strayer's sole assignment of error is overruled.

III. Conclusion

{¶ 60} Strayer's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

DONOVAN, J. and HALL, J., concur.

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