[Cite as *Scharver v. Am. Plastics Prods., L.L.C.*, 2010-Ohio-230.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PETER A. SCHARVER

Plaintiff-Appellant

-vs-

AMERICAN PLASTIC PRODUCTS LLC, et al.

Defendants-Appellees

JUDGES:
Hon. John W. Wise, P. J.
Hon. Julie A. Edwards, J.
Hon. Patricia A. Delaney, J.

Case No. 2009 CA 00087

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 05249
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 25, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendants-Appellees
PETER A. SCHARVER PRO SE 3311 12th Street, NW Canton, Ohio 44708	BRIAN D. SULLIVAN REMINGER CO. LPA 1400 Midland Building 101 Prospect Avenue Cleveland, Ohio 44115-1311

Wise, P. J.

{¶1} Appellant Peter A. Scharver appeals the decision of the Stark County Court of Common Pleas, which granted summary judgment in favor of Appellees American Plastic Products, LLC, et al. in a personal injury action brought by appellant. The relevant facts leading to this appeal are as follows.

{¶2} In February 2007, Gary Zedell, the owner of Appellee American Plastic Products, LLC, engaged appellant, a journeyman electrician, to replace light fixtures in the company warehouse in Alliance, Ohio. Appellant gave Zedell an estimate for the job. On February 21, 2007, appellant, using a pallet and tow-motor vehicle arrangement as a means of raising himself up to the lights, fell approximately twenty feet to the floor.

{¶3} On September 11, 2007, appellant filed a lawsuit in the Stark County Court of Common Pleas against Appellee American Plastic Products, LLC, Appellee Gary Zedell, and Appellee Dave Jewell, an employee of the company. Appellant claimed that he suffered injury to his arm and wrist and other bodily injury because of the negligence of the aforesaid appellees. Appellant thereafter voluntarily dismissed his complaint, but re-filed a similar complaint on December 10, 2008.

{¶4} On February 18, 2009, appellees filed a motion for summary judgment, supported by an affidavit from Gary Zedell, averring in pertinent part that appellant had been hired as an independent contractor, that he had previously done electrical work at the same warehouse, and that he was responsible for the manner in which he performed his work.[1]

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[1] The trial court file does not contain the summary judgment motion; however, we find appellees' summary judgment motion from appellant's prior action was implicitly incorporated by reference in the case sub judice.

{¶5} On March 10, 2009, the trial court granted summary judgment in favor of appellees.

{¶6} On April 6, 2009, appellant filed a notice of appeal. He herein raises the following Assignment of Error:

{¶7} "I. (A) APPELLANT PETER A. SCHARVER HAS RESPONDED AND PUT EVIDENCE BEFORE THE COURT IN THE TIME FRAME SET FORTH BY JUDGE SINCLAIR WITH PLAINTIFFS (SIC) RESPONSE TO DEFENDENTS' (SIC) MOTION FOR SUMMARY JUDGMENT FILED MARCH 6, 2009 BY STARK COUNTY CLERK OF COURTS WITH APPROPRIATE AFFIDAVITS, ETC. (B) PLAINTIFF PETER A. SCHARVER WAS RELEASED FROM PRISON TO COMMUNITY TREATMENT CORRECTION CENTER (C.T.C.C.) ON APRIL 15, 2009 AND IS PRESENTLY RESIDING THERE IN CANTON, OHIO. (C) THE ISSUE BEFORE THE COURT IS NOT WHETHER PETER A. SCHARVER WAS AN INDEPENDENT CONTRACTOR BUT WHETHER DEFENDANT, AMERICAN PLASTICS (SIC) PRODUCTS LLC AND IT'S (SIC) EMPLOYEE DAVID JEWEL (SIC) WAS COMPARATIVELY NEGLIGENT IN CAUSING PLAINTIFF PETER A. SCHARVERS' (SIC) FALL AND INJURIES."

I.

{¶8} In his sole Assignment of Error, appellant challenges the trial court's summary judgment in favor of appellees.

{¶9} As an appellate court reviewing summary judgment issues, we must stand in the shoes of the trial court and conduct our review on the same standard and evidence as the trial court. *Porter v. Ward*, Richland App.No. 07 CA 33, 2007-Ohio-

5301, ¶ 34, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

{¶10} Civ.R. 56(C) provides, in pertinent part:

{¶11} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * * "

{¶12} In regard to the appellant's cause of action for negligence, it is fundamental that the plaintiff in such a case must show (1) the existence of a duty, (2) a breach of duty, and (3) an injury proximately resulting therefrom. *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77, 15 OBR 179, 472 N.E.2d 707.

{¶13} Appellant herein does not appear to dispute that he functioned as an independent contractor on the date of his alleged injuries. When performing work on the premises of the employer, an independent contractor is considered to be an invitee of the employer. See *Schwarz v. General Electric Realty Corp*. (1955), 163 Ohio St. 354, 357-358. The owner of a premises has no duty to protect invitees from conditions that are either known to the invitee or are so obvious and apparent that the invitee may reasonably be expected to discover and protect himself against them. *Uhl v. Thomas*,

Butler App.No. CA2008-06-131, 2009-Ohio-196, ¶ 15, citing *Ahmad v. AK Steel Corp.,* 119 Ohio St.3d 1210, 893 N.E.2d 1287, 2008-Ohio-4082, ¶ 23. Thus, a company generally "has a duty to independent contractors to keep the premises in a reasonably safe condition and to warn of known hazards." *Dawson v. Milcor, Inc*., Allen App.No. 1-07-15, 2007-Ohio-6968, ¶ 5, citing *Eicher v. United States Steel Corp.* (1987), 32 Ohio St.3d 248, 512 N.E.2d 1165. However, the Ohio Supreme Court has recognized that a hazard which is open and obvious is, in itself, a warning. *Armstrong v. Best Buy Co., Inc.,* 99 Ohio St.3d 79, 788 N.E.2d 1088, 2003-Ohio-2573, ¶ 5. The Ohio Supreme Court has further held: "The rule of general acceptance is 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." *Wellman v. East Ohio Gas Co.* (1953), 160 Ohio St. 103, 108, 113 N.E.2d 629. See, also, *Dawson*, supra.

{¶14} The predominant theory of appellant's case is that Zedell, the company owner, asked appellant to work on the overhead lights using a tow-motor/pallet arrangement as a means of lift. According to appellant, he had asked for a scissors-lift or man-lift, but he agreed to use Zedell's arrangement. Appellant's Trial Court Affidavit, dated March 1, 2009. Appellant averred that the pallet "broke free" of the tow-motor while he worked on the lights, leading to his twenty-foot fall. Id. Appellees, via Zedell's affidavit, nonetheless asserted that appellant "controlled the method, means, and matter (sic) in which he performed his work." Gary Zedell Affidavit at 1.

{¶15} Appellant urges that Appellee American Plastic Products and its representatives were comparatively negligent. However, our analysis need not reach that point, as we herein conclude summary judgment was proper in favor of appellees based on the "open and obvious" doctrine. See *Nageotte v. Cafaro Co.*, 160 Ohio App.3d. 702, 2005-Ohio-2098, ¶ 29. ("The issue of comparative negligence is never reached if the landowner or business owner owes no duty, since, in the absence of a duty, there is no negligence to compare.") Although neither side presented expert evidence in the case, common experience warrants the conclusion that use of a device meant to handle pallets and cargo in a warehouse is unsuited for lifting an unharnessed person to a high ceiling, and a reasonable person in appellant's status as a journeyman electrician and independent contractor, who was under no evident coercion, would have recognized the risks involved before undertaking the project.[2]

[2] We would reach a similar conclusion under the circumstances of this case via an application of primary assumption of the risk. This defense "directly attacks the duty element of a prima facie negligence case * * *." *Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427, 432, 1996-Ohio-320, f.n.3.

{¶16} Therefore, upon review of the record before us, we find no error in the trial court's grant of summary judgment in favor of appellees. The Assignment of Error is overruled.

{¶17} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, P. J.

Delaney, J., concurs.

Edwards, J., dissents.

/S/ JOHN W. WISE_____

/S/ PATRICIA A. DELANEY_____

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JUDGES

JWW/d 1215

EDWARDS, J., DISSENTING OPINION

{¶18} I respectfully dissent from the majority's analysis and disposition of appellant's sole assignment of error.

{¶19} The majority, in its Opinion, holds that the trial court did not err in granting summary judgment in favor of appellees based on the "open and obvious" doctrine.

{¶20} However, a review of the docket and the trial court record reveals that no Motion for Summary Judgment was filed in the case sub judice (Case No. 2008 CV 05249). While there is an unfiled copy of appellees' Motion for Summary Judgment attached to appellant's March 6, 2009, "Response to Defendants Motion for Summary Judgment," such motion references Case No. 2007 CV 03712. Such case was voluntarily dismissed. There is no indication in the record in the case sub judice that the Motion for Summary Judgment from Case No. 2007 CV 03712 was incorporated by reference into this case. In short, there was no Motion for Summary Judgment filed in the case sub judice. Therefore, I conclude that the trial court was without authority to rule on said motion.

{¶21} For such reason, I would reverse the judgment of the trial court.

/S/ JULIE A. EDWARDS_____

Judge Julie A. Edwards

JAE/dr/rmn

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PETER A. SCHARVER	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
AMERICAN PLASTIC PRODUCTS LLC, et al.	:	
Defendants-Appellees	:	Case No. 2009 CA 00087

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ PATRICIA A. DELANEY_____

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JUDGES