[Cite as *Czepak v. Heiges*, 2011-Ohio-5523.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Bohdan R. Czepak, M.D.

Appellant

v.

Charles W. Heiges, et al.

Appellee

Court of Appeals No. OT-10-039

Trial Court No. 09CV580C

DECISION AND JUDGMENT

Decided: October 28, 2011

* * * * *

James A. Marx and Michael I. Shapero, for appellant.

Stephen J. Proe, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} We consider an appeal of a trial court judgment granting the defendant summary judgment in a premises liability action for personal injuries. Appellant, Bohdan R. Czepak, M.D. appeals an October 7, 2010 judgment of the Ottawa County Court of Common Pleas. In the judgment, the trial court granted the motion for summary judgment of appellee, Charles W. Heiges, in an action brought by Czepak for personal injuries suffered when he stepped through a rotted wooden floor.

{¶ 2} Appellant asserts three assignments of error on appeal:

{¶ 3} "1. The trial court erred in granting summary judgment to defendant-appellee Charles W. Heiges ("Heiges") and in ruling that the evidence presented by plaintiff-appellant Bohdan R. Czepak, M.D. ("Czepak"), even when construed most strongly in his favor and against Heiges, would not allow reasonable minds to find Heiges liable.

{¶ 4} "2. The trial court erred in ruling, sua sponte, that Czepak was a licensee when Heiges had not advanced that argument as a ground for summary judgment.

{¶ 5} "3. The trial court erred in ruling, there was no evidence of hidden dangers and that the evidence 'suggested' the danger was open and obvious."

{¶ 6} Heiges filed transcripts of depositions of Czepak and Paul Coles, with exhibits, in support of his motion. Coles testified that Heiges' property was almost 25 acres in size with a cabin on the Portage River in Port Clinton, Ohio. The property came to his attention in November 2007 when he saw it listed on a list of foreclosures in a local newspaper.

{¶ 7} Coles contacted Heiges about the property and learned from Heiges that foreclosure was imminent and that Heiges believed there was nothing he could do to prevent foreclosure. Coles told Heiges that he was interested in stopping the foreclosure and in purchasing the property.

{¶ 8} Coles visited the property with Heiges in December 2007 and on two other occasions with others afterwards. He reached an agreement to purchase the property for

$85,000 in December 2007, a day before the property was scheduled for sheriff's sale. Under the agreement Coles paid $10,000 down and the Lorain National Bank agreed to give him "30 days to come up with the rest of the financing." Coles testified that he made the $10,000 down payment in December 2007 and made the final payment after appellant was injured at the property.

{¶ 9} Czepak and Coles had discussed an interest in buying property for hunting in the past. According to Coles, he contacted Czepak and told him that he was purchasing an abandoned duck marsh. He also told Czepak that he was attempting to find a few investors because the purchase price was probably more than he could "handle." He invited Czepak to look at the property. It is undisputed that Heiges had no knowledge that appellant would be present on the property on January 12, 2008, when Czepak was injured.

Summary Judgment

{¶ 10} The standard of review of judgments granting motions for summary judgment is de novo; that is, an appellate court applies the same standard in determining whether summary judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Civ.R. 56(C) provides:

{¶ 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. No evidence or stipulation may be considered except as stated in this rule. * * *.

{¶ 12} Summary judgment is proper where the moving party demonstrates: "* * *(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 13} Under Assignment of Error No. 1, Czepak argues that the trial court erred in granting Heiges summary judgment based upon a determination that appellant was a licensee rather than an invitee on the property when he was injured. The distinction determines the duty of care owed by the owner to persons on the premises:

{¶ 14} "In 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. *Shump* [*v. First Continental-Robinwood Assoc.* (1994)], 71 Ohio St.3d at 417, 644 N.E.2d at 294." *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315; accord, *Lang v. Holly Hill Motel Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, ¶ 10.

{¶ 15} "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. *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68, 28 OBR 165, 167, 502 N.E.2d 611, 613;

Scheibel v. Lipton (1951), 156 Ohio St. 308, 46 O.O. 177, 102 N.E.2d 453, paragraph one of the syllabus." *Gladon,* 75 Ohio St.3d at 315. The general rule is that an owner or occupier of land owes a duty to invitees to exercise ordinary care for their safety and to keep the premises in a reasonably safe condition. *Lang v. Holy Hill Motel, Inc.* at ¶ 10; *Light v. Ohio Univ.*, 28 Ohio St.3d at 68.

{¶ 16} "A licensee is a person who enters the premises of another by permission or acquiescence, for his own pleasure or benefit, and not by invitation. *Light v. Ohio University* (1986), 28 Ohio St.3d 66." *Hammer v. McKinnis*, 6th Dist. No. L-04-1054, 2004-Ohio-7158, ¶ 7. Owners and occupiers of land owe a duty to licensees to refrain from willfully, wantonly, or recklessly injuring them. Id. at ¶ 8; see *Gladon*, supra, at 317; *Light*, supra, at 68-69. They must warn licensees of hidden dangers. Id. at ¶ 9; *Hannan v. Ehrlich* (1921), 102 Ohio St. 176, 185-186.

{¶ 17} Czepak argues that he was present on the property for the business purpose of considering whether to invest in Coles' purchase of the property and that Heiges stood to benefit from his presence through securing investors to fund the purchase and thereby avoiding foreclosure sale of the property. Heiges argues that he had no knowledge that Czepak was on the property and had not invited him. Czepak contends that under such circumstances an invitation by Heiges to enter the property is implied.

{¶ 18} In our view there is at least a genuine issue of material fact on the issue of whether appellant was an invitee under the implied invitation of appellee due to the financial benefit to appellee presented by Coles' securing investors to fund the purchase

of the property. Heiges avoided foreclosure sale of the property and retained an interest in the property under the terms of the sale to Coles and a group of investors. Accordingly, we conclude that the trial court erred in granting summary judgment on the basis that appellant was a licensee rather than an invitee.

{¶ 19} Heiges argues alternatively that, even were Czepak deemed an invitee, under the open and obvious doctrine Heiges owed no duty of care to Czepak as the condition of the premises was open and obvious. Heiges argues that he is entitled to summary judgment under the open and obvious doctrine.

Open and Obvious Doctrine

{¶ 20} "To prevail in a negligence action, a plaintiff must demonstrate that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the defendant's breach proximately caused the plaintiff to be injured. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 21, citing *Menifee v. Ohio Welding Prods., Inc.* (1984), 15 Ohio St.3d 75, 77, 15 OBR 179, 472 N.E.2d 707." *Lang v. Holly Hill Motel, Inc.*, supra, at ¶ 10.

{¶ 21} Under the open and obvious doctrine, "[w]here a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 42 O.O.2d 96, 233 N.E.2d 589 approved and followed." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, syllabus. "The rationale underlying this doctrine is 'that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that

persons entering the premises will discover those dangers and take appropriate measures to protect themselves.' *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644, 597 N.E.2d 504." *Armstrong* at ¶ 5. The open and obvious doctrine "acts as a complete bar to any negligence claims." Id.

{¶ 22} To establish that a claim is barred under the open and obvious doctrine does not require proof that the individual plaintiff saw the defect. Rather, it requires proof that the defect was observable. *Armstrong* at ¶ 16; *Riehl v. Bird's Nest, Inc.*, 6th Dist. No. OT-09-003, 2009-Ohio-6680, ¶ 50. Accordingly, determination of whether a danger is open and obvious is highly fact specific and resolved on a case by case basis. *Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961, ¶ 13; *Townsend v. Dollar Gen. Corp.*, 6th Dist. No. E-09-067, 2010-Ohio-6523, ¶ 26.

{¶ 23} Heiges submitted the deposition testimony of Dennis Coles and of appellant in support of the motion for summary judgment. Coles testified that the cabin was in "terrible" shape. According to Coles, "[i]t was falling down. The front wall – The wall towards the river was already leaning over. The roof was coming down."

{¶ 24} Coles testified that the roof was missing along the front wall. Coles prepared a drawing in his deposition depicting the cabin and the absence of roofing along the entire front wall and extending to a width of roughly one quarter of the building. Coles testified that the condition of the roof was obvious to persons approaching the property.

{¶ 25} Exhibit "F," a photograph taken by Coles, depicts the exterior of the cabin, facing the entrance door. It shows that there is a missing section of roof along the left side of the building in a manner consistent with Cole's deposition testimony and drawing. The photograph also depicts the exterior of the cabin as old, weather-beaten, and in a state of general disrepair. Building debris, including roofing materials, are shown in a large pile located on the surface of a deck near the entrance door to the cabin

{¶ 26} It is undisputed that Czepak followed Coles into the building and stepped 2, 3, or 4 steps from the doorway and stepped through the wooden floor. It is also undisputed that the interior of the building had sufficient natural lighting to see. Although the floorboard, itself, where Czepak stepped through the floor appeared solid, Coles testified that there were holes elsewhere in the floor of the 15 by 10 foot room. Coles testified that defects in the flooring were observable including the fact that the floor was rotted:

{¶ 27} "A. Just told him, 'Step where I step.'

{¶ 28} "Q. And why did you tell him that?

{¶ 29} "A. Well, because I knew the floor was rotten. The only thing safe to stand on was the floor joist.

{¶ 30} "Q. How did you know the floor was rotten?

{¶ 31} "A. Well, you could see foam was actually laying on the floor already. I mean, it was down in the foundation. Where the front wall had collapsed, the front part of the floor had already sunk down."

{¶ 32} Appellant had been told the property was abandoned. The testimony of Coles, supported by a photograph of the cabin, showed it to be weather beaten and in a general state of disrepair. There was an opening in the roof providing exposure of the cabin interior to the elements. The interior room was small, 10 by 15 feet in size. Coles' testimony established the roof opening to be the full length of the front of the cabin, fifteen feet. Coles also testified that the interior showed evidence of active decay of the wood interior. There was foam on the foundation, the front wall had collapsed, and the front part of the floor had already sunk down.

{¶ 33} In our view, appellant supported his motion for summary judgment with sufficient evidentiary materials that it became appellee's burden to submit a response to the motion for summary judgment by affidavit or as otherwise setting forth "specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). Under the rule, "[i]f the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Id.

{¶ 34} Appellant submitted an affidavit and deposition testimony of George J. Saad, M.D. in opposition to Heiges' motion for summary judgment. Saad accompanied appellant to the premises and was also a potential investor. Saad's affidavit was prepared and his deposition was taken after appellee filed his motion for summary judgment with supporting depositions and exhibits.

{¶ 35} Saad did not directly contest in either his affidavit or deposition testimony the accuracy of the photograph depicting the cabin at the time of the incident or Coles'

testimony as to the missing section of roof. As to the cabin exterior, he claimed that "[a]s we approached the cabin, I do not recall the roof or any of the walls of the cabin being collapsed or torn down." Such a statement does not constitute a positive statement of fact that there was no opening in the roof or missing section of the roof that would conflict with photographic evidence or Coles' specific deposition testimony.

{¶ 36} In his deposition Saad testified that the cabin "looked like a normal structure. It was not like dilapidated or anything else like that." Appellant presented no evidence contesting the accuracy of the photographic depiction of the cabin. Conclusory allegations in an affidavit are insufficient to overcome a properly supported motion for summary judgment under Civ.R. 56(E). *Jackson v. J-F Enterprises, Inc.*, 6th Dist. No. L-10-1285, 2011-Ohio-1543, ¶ 26-27; *H & H Properties v. Hodkinson*, 10th Dist. No. 10AP-117, 2010-Ohio-5439, ¶ 11. Conclusory statements by Saad that the cabin looked normal or that it was not dilapidated, lack sufficient specificity to conflict with Coles' detailed description of the exterior of the building and photographic evidence depicting the cabin exterior.

{¶ 37} With respect to the interior of the building, Coles testified that the interior showed evidence of active decay of the wood: foam on the foundation, the front wall had collapsed, the front part of the floor had already sunk down. Neither Saad's testimony nor affidavit directly disputed these claims by Coles. Saad simply claimed that he "did not see anything to alert me to the floor being rotted through or unsafe to walk on." The statement provides no specifics as to what Saad saw or did not see in the interior of the

building. Under Civ.R. 56(E), appellant had a burden to respond to the motion for summary judgment with specific facts contesting evidence submitted in support of the motion.

{¶ 38} We conclude that appellant failed to present specific facts by affidavit or otherwise under Civ.R. 56(E) to show that there is a genuine issue for trial on the issue of whether the condition of the cabin presented an open and obvious risk of injury to persons on the property against which the owner could reasonably expect them to protect themselves. We agree with appellee's contention that the motion for summary judgment should have been sustained on the alternative ground that the claim is barred under the open and obvious doctrine.

{¶ 39} We find Assignment of Error No. 1 is not well-taken.

{¶ 40} As we concluded that the trial court erred in granting summary judgment on the basis that appellant was a licensee and not an invitee, we conclude that Assignment of Error No. 2 is moot. Accordingly, under App.R. 12(A)(1)(c), we do not consider the assignment of error. On that basis, we find Assignment of Error No. 2 is not well-taken.

{¶ 41} Under Assignment of Error No. 3, appellant argues that the trial court erred in holding the evidence demonstrated an absence of hidden dangers on the property. Appellant contends under the assignment of error that the condition of the premises was not open and obvious of the danger presented by a rotting floor.

{¶ 42} We addressed the issues presented under Assignment of Error No. 3, in our consideration of Assignment of Error No. 1. Based upon our conclusion that this action is barred under the open and obvious doctrine, we find Assignment of Error No. 3 is not well-taken.

{¶ 43} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE