[Cite as *Noe v. Keller*, 2013-Ohio-2251.]

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

Pamela J. Noe, etc.	Court of Appeals No. L-12-1199
Appellant	Trial Court No. CI0201101581
v.	
Donald E. Keller, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: May 31, 2013

* * * * *

Alan J. Lehenbauer, for appellant.

Cormac B. DeLaney, for appellee Donald E. Keller.

* * * * *

JENSEN, J.

I. Introduction

{¶ 1} In this case, Pamela J. Noe, individually and as administrator of the Estate of Peter J. Bettinger, seeks damages for injuries to, and death of, Mr. Bettinger. Bettinger died on November 6, 2006, when he fell through a roof he was working on and struck a concrete floor 14 feet below.

{¶ 2} The complaint sets forth two wrongful death claims, a survivorship claim, and an employer intentional tort claim. Following discovery, appellees Tom and Alicia Breeden and appellee Don E. Keller filed separate motions for summary judgment. The trial court granted the motions and dismissed the case. For the reasons that follow, we affirm.

II. Facts

{¶ 3} The incident occurred on property owned by Don E. Keller at 9325 West Sylvania Avenue in Sylvania, Ohio. Situated upon the property is a "pole barn" measuring approximately 40 by 70 feet. The barn has a flat metal roof with little to no pitch. The interior of the barn, including the ceiling, is covered with foam insulation. In the summer of 2006, Keller noticed water on the foam ceiling. Keller climbed up a ladder outside the barn to inspect the roof, where he found a hole and rust surrounding the hole. According to Keller, the hole was about 12 inches in diameter and was "clearly visible; the metal was gone."

{¶ 4} Keller hired David Studenka to lay a replacement roof over the old one. Mr. Studenka, who is not a party to this action, told Keller he would provide two workers. Keller concluded that the job required a third person and contacted Bettinger (hereinafter "decedent") to ask for his help. Keller described decedent as a longtime friend who was unemployed and living in a house owned by Keller. Keller stopped by decedent's home and "told him we were fixing my roof and could he come down and help." Keller did not offer to pay decedent.

{¶ 5} On the morning of November 6, 2006, Mr. Studenka dropped off appellees Tom and Alicia Breeden to begin the project. Keller picked up decedent and brought him to the barn. Keller then took decedent and the Breedens up to the roof "to show what had to be done. We had to take the old screws out, lay the tar paper down, lay the new [roofing] sheet down, put the screws back in." Keller had been advised, perhaps by Studenka, to lay tar paper in between the old and new roof to prevent the new roof from rusting.

{¶ 6} According to affidavits provided by Keller and the Breedens, Keller pointed out the hole and surrounding rust. The Breedens' affidavit further states that Keller warned them to be careful after laying the tar paper because if the paper "covered over a rusted spot, and we then walked over that paper, the roof would give way, and we would fall through."

{¶ 7} Decedent and the Breedens worked on the roof, cutting and laying sheets of tar paper and then installing the new roof panels. Keller worked from the ground, operating a lift truck to raise the roofing panels up to the roof.

{¶ 8} About a third of the way into the project, the group reached the area where the hole was. According to the Breedens, decedent placed a piece of tar paper over the section, including the hole. As decedent went to lay a second sheet, he lost his footing, causing him to land on "all fours" atop the tar paper that covered the hole. The tar paper and rusted roof immediately gave way, causing decedent to fall 14 feet below onto the concrete floor.

{¶ 9} Keller heard the Breedens yell, "He fell." Keller went into the barn, saw that decedent was "not coherent" and called emergency services. Decedent was taken by Life Flight to an area hospital where he died at 4:38 p.m. later that day. After Life Flight left with decedent on board, Keller and the Breedens returned to the roofing project.

III. Procedural History

{¶ 10} Appellant originally filed suit against appellees on October 31, 2008 (Lucas County Common Pleas case No. CI0200807825). The complaint was voluntarily dismissed and then refiled on February 4, 2011. Count I is a wrongful death claim against the property owner Don Keller. Appellant alleges that Keller failed (1) to maintain the roof in a reasonably safe manner; (2) warn decedent of the roof's unreasonably poor condition; (3) furnish proper supervision of the roofing project; and (4) provide safety equipment.

{¶ 11} Count II is a wrongful death claim against appellees Tom and Alicia Breeden. Appellant alleges that the Breedens failed to warn decedent, provide appropriate supervision or safety equipment or otherwise exercise due care.

{¶ 12} Count III is a survivorship claim in which appellant claims that the joint and several negligence of appellees proximately caused decedent to sustain numerous bodily injuries including blunt-force head and chest injuries.

{¶ 13} Count IV is an employer intentional tort claim against Keller and/or the Breedens.

{¶ 14} On January 25, 2012, the Breedens moved for summary judgment, and on March 6, 2012, Keller moved for summary judgment. Appellant opposed both motions on April 23, 2012. The trial court granted the motions and dismissed the complaint in its entirety on July 3, 2012.

{¶ 15} Appellant timely appealed and presents four assignments of error for our review.

> I. THE TRIAL COURT ABUSED ITS DISCRETION TO THE PREJUDICE OF APPELLANT BY ADMITTING AS EVIDENCE THE AFFIDAVIT OF APPELLEES BREEDEN FOR PURPOSES OF SUMMARY JUDGMENT.
>
> II. THE TRIAL COURT ERRED BY GRANTING THE MOTION FOR SUMMARY JUDGMENT OF APPELLEE, DONALD KELLER.
>
> III. THE TRIAL COURT ERRED BY GRANTING THE MOTION FOR SUMMARY JUDGMENT OF APPELLEES, TOM AND ALICIA BREEDEN.
>
> IV. THE TRIAL COURT ERRED BY APPLYING THE OPEN AND OBVIOUS DOCTRINE AS AN ABSOLUTE BAR TO RECOVERY.

IV. Analysis

{¶ 16} First, we note that appellant has not appealed the trial court's dismissal of the employer intentional tort claim.

{¶ 17} In her first assignment of error, appellant complains that the Breedens' counsel failed "to secure the attendance of the Breedens for deposition." Appellant

argues that the trial court should have compelled the Breedens' attendance and/or should not have considered their affidavit as it contains hearsay statements.

{¶ 18} A trial court's decision regarding the regulation of discovery will not be reversed on appeal absent an abuse of discretion. *State ex. rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 295 N.E.2d 659 (1973). More than an error in law or judgment, an abuse of discretion implies that the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 19} The affidavit at issue was executed during the pendency of the original case. After the complaint was refiled, the Breedens moved for summary judgment, attaching their joint affidavit. By letter dated February 7, 2012, appellant expressed interest in deposing the Breedens. Appellant claims to have been told by the Breedens' counsel that their whereabouts were unknown and that Mr. Breeden "may be incarcerated." Appellant did not pursue the matter further.

{¶ 20} Civ.R. 30(A) provides that "a party may take the testimony of any person, including a party, by deposition upon oral examination. * * * The attendance of a party deponent may be compelled by the use of notice of examination as provided by division (B) of this rule." Appellant can hardly complain that the Breedens were unavailable when she made no effort to compel their attendance. Further, if Mr. Breeden was, in fact, incarcerated, Civ.R. 30(A) specifically allows for a party to depose an incarcerated

individual "by leave of court on such terms as the court prescribes." We reject appellant's argument that the Breedens were unavailable.

{¶ 21} As for the trial court's consideration of the Breedens' affidavit, Civ.R. 56(E) provides that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

{¶ 22} The content of the Breedens' affidavit is limited to recounting their experience on the roof. The Breedens claim, in part, that "[Keller] explained that once we laid the felt paper down, we had to take care of what was underneath it, because if that underlayment covered over a rusted spot, and we then walked over that paper, the roof would give way, and we would fall through." Appellant complains that the proffer is hearsay and should not have been considered by the trial court.

{¶ 23} Evid.R. 801(C) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The alleged warning by Keller, as recounted by the Breedens, is not, by definition, hearsay inasmuch as it does not establish the truth of the matter asserted. That is, so long as it is not interpreted to establish that the roof would, in fact, "give way" or that they "would fall through" Keller's warning is not hearsay. Instead, we interpret Keller's warning merely as a proffer that notice was given to the Breedens that they should avoid the vulnerable area of the roof once it was covered with tar paper. If

offered for that limited purpose, it does not run afoul of the hearsay rule. *State v. Lewis*, 22 Ohio St.2d 125, 132-134, 258 N.E.2d 445 (1970). Thus, we find that the affidavit comports with Civ.R. 56(E), and we find no abuse of discretion by the trial court in considering it.

{¶ 24} Moreover, given our finding in the next section that Keller owed no duty, as a matter of law, to warn decedent, the Breedens' affidavit on that subject is irrelevant. Thus, whether or not Keller cautioned decedent about walking over the hole after the tar paper was in place is not a material fact in this case. In either event, appellant's first assignment of error is not well-taken.

{¶ 25} The remaining assignments of error pertain to the trial court's grant of summary judgment. The second and fourth assignments of error will be considered together as they challenge the grant of summary judgment as to Keller and the application of the "open and obvious doctrine." The third assignment of error challenges the grant of summary judgment as to the Breedens.

{¶ 26} Appellate review of a summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). A reviewing court is required to examine the evidence to determine whether, as a matter of law, no genuine issue exists for trial. A court may only grant summary judgment when: (1) there is no genuine issue as to any material fact; (2) as a matter of law, the moving party is entitled to judgment; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the non-moving party, who is entitled to have the

evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978).

{¶ 27} When seeking summary judgment, the moving party must specifically delineate the basis upon which the motion is brought. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988), syllabus. The movant must also identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, the adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

{¶ 28} 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 breach proximately caused the plaintiff's injury. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 21, citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984).

A. Summary Judgment as to Keller

{¶ 29} Appellant's second assignment of error challenges the trial court's grant of summary judgment as to Keller. "Whether or not an owner of a premises is liable to a party who sustains injury on his property turns on the relationship of the parties and whether the owner breached a duty of care arising from the parties' relationship." *Light v. Ohio University*, 28 Ohio St.3d 66, 67, 502 N.E.2d 611 (1986).

{¶ 30} The trial court found that decedent was a volunteer based on evidence proffered by Keller, i.e. that Keller asked for decedent's help on the project and did not offer to pay decedent for that help. Appellant argues that reasonable minds could conclude that "there was a standing agreement between [decedent] and Keller for [decedent] to perform work for Keller in exchange for [decedent's] rent on a house owned by Keller." We disagree. Keller specifically denied such an agreement, and appellant put forth no evidence to support an alternative version. Based upon the record evidence, reasonable minds can come to one conclusion which is that decedent voluntarily accepted Keller's request to help repair the roof.

{¶ 31} Moreover, because we find that no agreement existed between decedent and Keller, it follows that ordinary principles of premises liability law apply to this case and not other common law principles reserved for independent contractors, general contractors and/or subcontractors. Also inapplicable is any corresponding analysis of whether decedent was engaged in an "inherently dangerous activity" and/or any exceptions to the general rule that no duty ordinarily attaches where a subcontractor is

engaged in inherently dangerous work. *Wellman v. East Ohio Gas.*, 160 Ohio St. 103, 113 N.E. 629 (1953).

{¶ 32} With the above principles in mind, we begin with a discussion about what duty Keller owed decedent. Ohio adheres to the common-law classifications of invitee, licensee, and trespasser in cases of premises liability. *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 417, 644 N.E.2d 291 (1994). One who is invited onto the premises of another, for the benefit of the owner, is considered an invitee. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 662 N.E.2d 287 (1996). Here, decedent was an invitee because he was on Keller's property, at Keller's request, in order to provide Keller the benefit of a repaired barn roof.

{¶ 33} The owner of a premises owes an invitee a duty of ordinary care in maintaining the premises in a reasonably safe condition, such that its invitees will not unreasonably or unnecessarily be exposed to danger. The owner should warn an invitee of any latent dangers which the owner knows about or, with the exercise of reasonable care, should know about, and should take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use. *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 203-204, 480 N.E.2d 474 (1985). "However, this duty does not require landowners to insure the safety of invitees on their property. * * * Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." (Citation omitted.) *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 11.

{¶ 34} The open and obvious doctrine states that "[a]n occupier of premises is under no duty to protect a business invitee against dangers which are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them." *Sidel v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968), paragraph one of the 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." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, paragraph five of the syllabus. "The fact that an [invitee] was unreasonable in choosing to encounter the danger is not what relieves the property owner of liability. Rather, it is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the [invitee]." *Id.* at ¶ 13. A hazard is considered to be open and obvious when it is in plain view and readily discoverable upon ordinary inspection. *Miller v. First Internatl. Fidelity & Trust Building, Ltd.*, 6th Dist. Case No. L-08-1187, 2009-Ohio-6677, ¶ 68.

{¶ 35} Upon our review of the record, we find that the area which gave way was open and obvious. Indeed, appellant concedes that "uncontroverted evidence establishes that Keller had shown [decedent] the spot in question prior to the paper being laid * * *." Instead, appellant argues that the tar paper obscured the open and obviousness of the

danger and/or that the "attendant circumstances exception" to the open and obvious rule should apply to this case. We reject both arguments.

{¶ 36} The record evidence indicates that it was decedent who laid the tar paper over the area at issue, and that, while laying a second sheet of paper, he tripped. There are two conclusions to be drawn from the evidence. First, it was decedent who concealed the danger. Second and perhaps more importantly, it was decedent's act of tripping that caused his death and *not* some momentary failure to appreciate his whereabouts relative to the hole, which arguably could have been obviated with a warning.

{¶ 37} We also find that the attendant circumstances exception does not apply to this case. "Attendant circumstances" act as an exception that allows a plaintiff to avoid the open and obvious doctrine. *McGuire v. Sears, Roebuck & Co.*, 118 Ohio App.3d 494, 498, 693 N.E.2d 807 (1st Dist.1996). An attendant circumstance is a factor that contributes to the fall and is beyond the control of the injured party. *Backus v. Giant Eagle, Inc.*, 115 Ohio App.3d 155, 158, 684 N.E.2d 1273 (7th Dist.1996). The phrase refers to all circumstances surrounding the event, such as time and place, the environment or background of the event, and the conditions normally existing that would unreasonably increase the normal risk of a harmful result of the event. *Cash v. Cincinnati*, 66 Ohio St.2d 319, 324, 421 N.E.2d 1275 (1981). Here, the only evidence in the record indicates that it was decedent who laid the tar paper and that some unknown variable caused him to trip. We find no factors contributing to decedent's fall beyond his control that would trigger the exception to the open and obvious rule.

{¶ 38} In sum, we agree with the trial court that application of the open and obvious doctrine applies to this case and that its application acts as a complete bar to appellant's negligence claims against Keller. Appellant's second assignment of error is not well-taken.

{¶ 39} In her fourth assignment of error, appellant states, "Ohio statutes and legal theory no longer support the application of the open and obvious doctrine as an absolute bar to recovery." Appellant would have this court apply the rule expressed in the Restatement of the Law 2d, Torts, Section 343A(1), (1965). That section provides,

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness*. (Emphasis added.)

The Supreme Court of Ohio specifically rejected the view expressed above in *Armstrong*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, at ¶ 13. More recently, the court reaffirmed its adherence to the open and obvious doctrine: "As we have repeatedly recognized, '[t]he open-and-obvious doctrine remains viable in Ohio. Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises.'" *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 11, quoting *Armstrong* at syllabus. We are bound by stare decisis to apply the law as it currently exists. Appellant's fourth assignment of error is not well-taken.

B. Summary Judgment as to the Breedens

{¶ 40} In her third assignment of error, appellant argues that the trial court erred by granting the Breedens' motion for summary judgment. Neither Tom nor Alicia Breeden filed an appellate brief in this matter.

{¶ 41} Appellant argues that the Breedens owed decedent a duty of ordinary care which included an affirmative duty to act, namely to "mark somehow the flat, black surface of the roofing felt [sic] to identify the location of the concealed, unsupported area of the roof."

{¶ 42} In a case of nonfeasance, "the existence of a legal duty is critical. Under Ohio law, unless such a duty is established, a defendant's mere failure to act does not create liability." *Clemets v. Heston*, 20 Ohio App.3d 132, 486 N.E.2d 287 (6th Dist.1985), paragraph one of the syllabus. Absent a special relationship between the parties, there is no duty to act affirmatively for another's aid or protection. *Id.* at paragraph two of the syllabus.

{¶ 43} We find no evidence of a "special relationship" that would trigger a duty by the Breedens to take the kind of measures proposed by appellant. Indeed, the Breedens did not supervise decedent, did not instruct him or tell him how to perform his duties, nor did they exert any control over the very activity that resulted in his fall. There is simply no evidence that a relationship existed between the Breedens and decedent that would have imposed an affirmative duty to act on his behalf. We agree with the trial court that

"the evidence shows that the Breedens were in the unenviable position of witnessing [decedent's] fall without being able to do anything to prevent it."

{¶ 44} Construing the evidence in appellant's favor, we find that reasonable minds can only conclude that the Breedens did not, as a matter of law, owe decedent an affirmative duty of care, nor did they breach a duty to exercise ordinary care. We find appellant's third assignment of error is not well-taken.

{¶ 45} Having found appellant's assignments of error not well-taken, we hereby affirm the judgment of Lucas County Court of Common Pleas. Costs are assessed to appellant in accordance with 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.

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE