[Cite as *Semprich v. Erie Cty.*, 2013-Ohio-3561.]

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

Lori Semprich, et al.	Court of Appeals No. E-12-070
Appellants	Trial Court No. 2011-CV-0668
v.	
County of Erie, Ohio, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: August 16, 2013

* * * * *

Brian Palmer, Jeffrey H. Friedman and Christine LaSalvia,
for appellants.

Kurt D. Anderson, for appellees.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Lori Semprich,[1] challenges the trial court's summary judgment ruling dismissing her negligence claims against appellees, Erie County and Herbst

[1] Curtis Semprich, Lori's husband, is also an appellant in this matter. However, for ease of discussion, we will use "appellant" to refer only to Lori.

Excavating, for injuries Semprich sustained when she fell into an excavated area. Finding no error, we affirm.

A. Facts and Procedural Background

{¶ 2} In August 2010, Erie County contracted with Herbst Excavating to replace the Taylor Ditch drainage culvert under Woodlawn Avenue in Perkins Township, Ohio. Work commenced in October, closing Woodlawn Avenue just west of the intersection with Dill Avenue.

{¶ 3} On November 11, 2010, at about 11:00 p.m., appellant and her husband were walking from their home on Oakland Avenue to the Outlaw Clubhouse located on DeWitt Avenue. Appellant and her husband testified that they had two beers before leaving home. When they arrived at the Outlaw Clubhouse, they each consumed a six-pack of beer while playing cards with friends. Appellant also testified to smoking marijuana while at the Outlaw Clubhouse.

{¶ 4} Around 3:00 a.m., the couple decided to head home, taking a different route so that appellant could show her husband Skateworld where she had recently taken up roller derby. The route took them north on Paxton Avenue, then right onto Woodlawn Avenue toward the excavation area. It was dark, but the couple testified that there was enough lighting to see where they were walking. They both testified that they did not see any barricades alerting them that there was a bridge out or a construction site ahead. Appellant was walking close to the right side of the road, entering the excavated area, when she suddenly fell approximately 10 feet into the small creek and struck her knee on

a large rock. Mr. Semprich attempted to pull appellant out of the embankment, but was unsuccessful. Eventually, he woke a neighbor near the construction site to get help.

{¶ 5} When appellant reached the hospital, it was determined that she suffered multiple fractures to her tibial plateau on her right knee requiring reconstructive surgery. As a result, she suffered permanent damage to her right leg. It was also determined at the hospital that appellant's blood alcohol content was .265 at the time of her fall.

{¶ 6} On September 22, 2011, appellant filed a complaint against appellees alleging negligence. Thereafter, appellees moved for summary judgment. After extensive briefing, the trial court granted appellees' motion for summary judgment, thereby dismissing appellant's claims. This appeal followed.

B. Assignments of Error

{¶ 7} On appeal, appellant raises the following assignment of error:

1. The trial court erred when it granted summary judgment in favor of County of Erie, Ohio et al., on Lori Semprich's negligence claim.

II. Analysis

{¶ 8} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Leonard v. Modene & Assocs., Inc.*, 6th Dist. Wood No. WD-05-085, 2006-Ohio-5471, ¶ 50, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Pursuant to Civ.R. 56(C), summary judgment is proper when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come but to 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 construed most strongly in his or her favor.

{¶ 9} As an initial matter, appellant has acknowledged in briefing that two barricades approximately five-feet high and ten-feet wide with orange and white stripes and a flashing yellow light were, in fact, positioned at the entrance of the construction site. Nonetheless, appellant argues that appellees' failure to provide adequate barricades and signage, as described in their contract to replace the Taylor Ditch drainage culvert, is a breach of their duty to protect pedestrians from road construction. Appellant points to contractual provision MT 101.60, which provides that, "when the road is closed to traffic, barricades shall be used to effectively close the entire roadway, including the paved or aggregate shoulder." Specifically, appellant claims that the barricades lacked adequate signage, and failed to block the entire roadway including the berm. We find this argument unpersuasive.

{¶ 10} "[I]n order to establish actionable negligence, one seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom." *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285, 423 N.E.2d 467 (1981). It is a question of law whether or not a duty exists in a negligence action. *Benton v. Cracker Barrel Old Country Store, Inc.*, 10th Dist. Franklin No. 02AP-1211, 2003-Ohio-2890, ¶ 11. The first issue we must resolve in this case is whether Erie County owed a

duty to appellant. Appellees argue such a duty was not owed here because the excavated area constituted an open and obvious danger.

{¶ 11} The open-and-obvious doctrine provides that owners do not owe a duty to persons entering their premises regarding dangers that are open and obvious. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 14, citing *Sidle 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 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.*, 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (1992).

{¶ 12} Courts must consider whether the object or danger itself was observable. *Haymond v. BP America*, 8th Dist. Cuyahoga No. 86733, 2006-Ohio-2732, ¶ 16. Even when an invitee does not actually see the object or danger until after he or she falls, no duty exists when the invitee could have seen the object or danger if he or she had looked. *Id.* The issue of whether a risk was open and obvious may be decided by the court as a matter of law when only one conclusion can be drawn from the established facts. *Witt v. Saybrook Invest. Corp.*, 8th Dist. Cuyahoga No. 90011, 2008-Ohio-2188, ¶ 21, citing *Klauss v. Marc Glassman, Inc.*, 8th Dist. Cuyahoga No. 84799, 2005-Ohio-1306, ¶ 18. But, where reasonable minds could reach different conclusions as to the obviousness of the risk, the issue should be resolved by a jury. *Id.*

{¶ 13} Here, appellant and her husband testified that there was enough lighting for them to see at least four to five steps ahead of them as they were walking. Thus, regardless of whether appellant actually noticed the signs and barricades warning her that the road was closed, she could have seen that the bridge was out if she had looked. A bridge that is out for repair is an open and obvious danger to a reasonable person. Therefore, Erie County owes no duty to appellant.

{¶ 14} Appellant, for her part, argues that the danger was not open and obvious because it was dark at the time of the fall. However, "'[d]arkness' is always a warning of danger, and for one's own protection it may not be disregarded." *Jeswald v. Hutt*, 15 Ohio St.2d 224, 239 N.E.2d 37 (1968), paragraph three of the syllabus. Ohio courts have consistently recognized that darkness is an open and obvious condition that should not be disregarded. *See, e.g., Witt, supra*; *Rezac v. Cuyahoga Falls Concerts, Inc.*, 9th Dist. Summit No. 23313, 2007-Ohio-703; *Leonard v. Modene & Assocs., Inc.*, 6th Dist. Wood No. WD-05-085, 2006-Ohio-5471; *see also Swonger v. Middlefield Village Apts.*, 11th Dist. Geauga No. 2003-G-2547, 2005-Ohio-941, ¶ 13 ("[s]ince darkness itself constitutes a sign of danger, the person who disregards a dark condition does so at his own peril"); *McCoy v. Kroger Co.*, 10th Dist. Franklin No. 05AP-7, 2005-Ohio-6965, at ¶ 16 ("darkness increases rather than reduces the degree of care an ordinary person would exercise").

{¶ 15} In similar cases where a plaintiff has sought to recover against a property owner for injuries sustained as a result of stepping into darkness and then being injured

by another object or danger, courts have applied the open-and-obvious doctrine and denied recovery.

{¶ 16} In *Leonard*, this court decided that a plaintiff's disregard for darkness supported the grant of summary judgment against him on his negligence claim. *Leonard* at ¶ 56. In that case, the plaintiff stepped from a dimly lit hallway to what he thought would be cellar stairs. The area was, instead, an old, unlighted coal bin that had no stairway. Plaintiff acknowledged that he could not see into the darkened area but proceeded anyway, resulting in his fall into the coal bin. Applying the open-and-obvious doctrine, the court found that the plaintiff encountered two hazards: the drop-off into the coal bin and the darkness. To the extent that the plaintiff attempted to create a genuine issue of material fact regarding the degree of darkness, the court still found summary judgment appropriate based on the following reasoning:

> If, in fact, there was enough light to see, [plaintiff] should have been able to observe that there were no steps, making the drop-off an open and obvious danger. If the room was too dark to see the drop-off, however, and [plaintiff] entered the area without being able to see where he was stepping, then he also disregarded an open and obvious hazard-the darkness. * * * Under either condition, [plaintiff] * * * simply failed to exercise proper care and failed to protect himself from an observable, obvious hazard. *Id.*

{¶ 17} Similarly, the Ninth District Court of Appeals in *Rezac*, relying on *Leonard*, recently reached the same conclusion: darkness is an open and obvious

condition that will preclude recovery when a plaintiff disregards it. *Rezac* at ¶ 19. In *Rezac*, the plaintiff injured herself after falling into a ravine when she left a lighted and paved path and entered the woods where she could not see where she was stepping. In upholding the trial court's grant of summary judgment in favor of the property owner, the court rejected the plaintiff's claim that the property owner had a duty to warn of the latent danger, namely, the ravine. Instead, the court held that the darkness was an open and obvious hazard against which appellant failed to protect herself and disregarded at her own peril. *Id.* at ¶ 25. Consequently, the court found that the property owner owed no duty to warn or protect against the hazard of darkness and denied recovery. *Id.*, citing *Swonger* at ¶ 13.

{¶ 18} Here, if it was too dark to see that the bridge was out then appellant disregarded the open and obvious hazard that was the darkness. Therefore, she cannot establish that Erie County owed her a duty.

{¶ 19} Appellant next argues that even if the missing bridge is an open and obvious danger, such a determination does not relieve appellee, Herbst Excavating, from liability. We agree that the Ohio Supreme Court has held that the open-and-obvious doctrine only exonerates an owner or occupier of the land from the duty to protect against open and obvious dangers; an independent contractor is not relieved of liability. *Simmers*, 64 Ohio St.3d at 645, 597 N.E.2d 504. Nevertheless, we hold that appellant's negligence claim against Herbst Excavating must fail.

{¶ 20} In *Simmers*, CSX Transportation contracted with Bentley Construction Company to remove some materials near a bridge. In the process of removing the materials, Bentley accidently put a fifteen-foot by four-foot hole in the walkway portion of the bridge. Even though it knew that children regularly used the bridge, Bentley never made any attempt to repair the hole. Stephen Simmers was walking across the bridge with a friend when he plummeted through the hole onto the rock and debris below. Because the open-and-obvious doctrine did not apply to Bentley, the Ohio Supreme Court turned to the general law of negligence. The court found that Bentley owed a duty to users of the bridge but determined that different conclusions could be reached as to whether that duty was breached, whether the condition of the hole was itself sufficiently discernible to constitute an adequate warning of the danger, and whether Stephen was contributorily negligent making summary judgment improper. *Id*. at 646. In its analysis, the court noted that, "Issues of comparative negligence are for the jury to resolve unless the evidence is so compelling that reasonable minds can reach but one conclusion." *Id.*

{¶ 21} The present case is an example of where the evidence is so compelling that reasonable minds can only reach one conclusion. The material facts are not in dispute. Here, appellant was walking home from the bar at 3:00 a.m., in the dark. She was drunk, as evidenced by her .265 blood alcohol content at the hospital, and she had been smoking marijuana. She testified that she could see four to five steps in front of her, but she somehow did not see that the bridge was out. Further, she testified that although she was walking on the right shoulder, she did not see the two ten-foot wide and five-foot high

orange and white barricades across the road with the sign "road closed." Regardless of whether Herbst Excavating negligently failed to extend the barricades across the shoulder, or negligently failed to place a sign that read "bridge out," reasonable minds could only conclude that appellant was contributorily negligent, and that her negligence was the greater cause of her injuries. Consequently, her recovery must be denied. *See* R.C. 2315.33 ("The contributory fault of a person does not bar the person as plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and of all other persons from whom the plaintiff does not seek recovery in this action").

{¶ 22} Accordingly, appellant's sole assignment of error is not well-taken.

III. Conclusion

{¶ 23} For the foregoing reasons, we affirm the judgment of the Erie County Court of Common Pleas. 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.

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE