[Cite as *Lisko v. Slag*, 2009-Ohio-6535.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

TINA LISKO, et al.	)	CASE NO. 08 MA 170
	)	
PLAINTIFFS-APPELLANTS	)	
	)	
VS.	)	OPINION
	)	
SHARON SLAG, INC.	)	
	)	
DEFENDANT-APPELLEE	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 07 CV 1154
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiffs-Appellants:	Atty. Robert J. Rohrbaugh 4800 Market Street, Suite A Boardman, Ohio 44512
For Defendant-Appellee:	Atty. David Ross Atty. Michelle J. Sheehan Reminger Co., L.P.A. 1400 Midland Building 101 Prospect Avenue West Cleveland, Ohio 44115-1093
JUDGES:	
Hon. Cheryl L. Waite Hon. Gene Donofrio Hon. Mary DeGenaro	
	Dated: December 8, 2009

[Cite as *Lisko v. Slag*, 2009-Ohio-6535.]
WAITE, J.

{¶1} Appellants, Tina Lisko and her son Michael Pruitt, appeal the entry of summary judgment by the Mahoning County Court of Common Pleas against them and in favor of Appellee, Sharon Slag Inc., in this premises liability action. Pruitt, who was fourteen years of age at all times relevant to the complaint, was injured when he attempted to cross a 50-foot high dam while trespassing on Appellee's property.

{¶2} In their sole assignment of error, Appellants contend that the attractive nuisance doctrine precludes summary judgment in this case. Because there is no evidence that Appellee knew or should have known that children trespassed on the property, and Pruitt conceded at his deposition that he was aware of the danger inherent in crossing the dam, the trial court's entry of summary judgment is affirmed.

Standard of Review

{¶3} An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court pursuant to Civ.R. 56(C). *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 364 N.E.2d 267. When a court

considers a motion for summary judgment the facts must be taken in the light most favorable to the non-moving party. Id.

{¶4} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim*." (Emphasis in original.) *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 662 N.E.2d 264. If the moving party carries its burden, the nonmoving party has the reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. Id. at 293, 662 N.E.2d 264. In other words, in the face of a properly supported motion for summary judgment, the nonmoving party must produce some evidence that suggests that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 386, 701 N.E.2d 1023.

Facts

{¶5} The facts in this case are not in dispute, and are taken from the deposition of Michael Pruitt and the affidavit of David J. Gennaro, the President of Gennaro Pavers, Inc. The deposition and affidavit were the only evidence before the court on summary judgment.

{¶6} Pruitt, his younger brother, and two friends rode their bicycles to the woods at Mount Carmel Church in Lowellville, Ohio on December 1, 2005. (Pruitt Depo., pp. 17, 21.) When they arrived, they abandoned their bicycles and set out on foot. (Pruitt Depo., p. 21.) Pruitt conceded that he knew he was on private property.

(Pruitt Depo., pp. 22-23.) He had never been in the woods by the church prior to the day of the fall. (Pruitt Depo., p. 61.)

{¶7} At some point, Pruitt encountered a dam, forty feet in length and one to two feet in width, which he attempted to cross because he saw his friends on the opposite side. (Pruitt Depo., pp. 27-28.) The dam is a remnant of an old steel production plant formerly located on the property, now used as a quarry. (Gennaro Aff., ¶4.)

{¶8} Pruitt conceded that he could have gone around the dam, but the alternative route involved walking down a steep hill and then up another steep hill, which he could avoid by walking across the dam. (Pruitt Depo., p. 30.) Pruitt assumed that his friends had crossed the dam, when, in fact, they had not. (Pruitt Depo., p. 27.)

{¶9} Pruitt could not determine the depth of the drop from the dam to the valley below, so he walked approximately twenty feet onto the dam and dropped sticks to the left side of the dam in order to approximate the depth of the drop. (Pruitt Depo., p. 24.) He acknowledged that "it was actually pretty far." (Pruitt Depo., p. 24.) Later in his deposition, Pruitt testified that he dropped the sticks on the left side of the dam because he was "just curious." (Pruitt Depo., p. 29.)

{¶10} He assumed that the water on the right side of the dam was the same depth as the drop on the left side of the dam. (Pruitt Depo., p. 34) He testified that he was not concerned about falling into the water because he could "probably pull [himself] back up." (Pruitt Depo., pp. 34-35.)

{¶11} After dropping the sticks, he decided to carefully cross the dam, wary of the fact that if he fell he could get hurt. (Pruitt Depo., pp. 29, 38.) Pruitt was halfway across the dam when he fell. (Pruitt Depo., p. 32.) According to Pruitt, the fall shattered his right ankle, tore the anterior cruciate ligament ("ACL") of his right knee, and fractured his right cheek. He also suffered a "blowout fracture" of his right eye as a result of the fall. (Pruitt Depo., p. 44.) A blowout fracture is a fracture of one or more of the bones surrounding the eye and is commonly referred to as an orbital floor fracture.

{¶12} Appellant underwent surgery immediately after the fall to repair his ankle, which included the insertion of 13 pins and a rod to stabilize his leg. (Pruitt Depo., p. 44.) Appellant walks with a limp and suffers chronic pain in his ankle. (Pruitt Depo., pp. 52-53.) The injury to his ACL and his right eye did not require surgery. (Pruitt Depo., p. 45.) However, he suffers from blurred vision, astigmatism, and arthritis as a result of those injuries. (Pruitt Depo., pp. 49-51.)

ASSIGNMENT OF ERROR

{¶13} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SUSTAINING APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

{¶14} To overcome summary judgment on a claim of negligence in Ohio, a plaintiff must show a duty and breach of that duty as the direct and proximate cause of an injury. *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565, 697 N.E.2d 198. A duty of care is not assumed, but is usually based on the classification of the property owner in relation to the plaintiff. See *Gladon v. Greater Cleveland*

Regional Transit Auth. (1996), 75 Ohio St.3d 312, 315, 662 N.E.2d 287. In the present case, the record reflects that Pruitt was a trespasser on the property.

{¶15} A trespasser is, "one who, without express or implied authorization, invitation or inducement, enters private premises purely for his own purposes or convenience." *McKinney v. Hartz & Restle Realtors, Inc.* (1987), 31 Ohio St.3d 244, 246, 510 N.E.2d 386. A property owner owes a trespasser only a duty, "to refrain from willful, wanton or reckless conduct which is likely to injury him." *Gladon* at 317, 662 N.E.2d 287.

{¶16} The Supreme Court of Ohio adopted the attractive nuisance doctrine as a theory of negligence in *Bennett v. Stanley* (2001), 92 Ohio St.3d 35, 748 N.E.2d 41. The doctrine confers a special status upon children and recognizes an enhanced duty of care owed to them in tort law. The doctrine is premised upon the Court's recognition that "[c]hildren of tender years, and youthful persons generally, are entitled to a degree of care proportioned to their inability to foresee and avoid the perils that they may encounter." Id. at 39.

{¶17} Prior to the attractive nuisance doctrine, the enhanced duty of care was extended to child trespassers under the "dangerous instrumentality" doctrine established in *Coy v. Columbus, Delaware & Marion Elec. Co.* (1932), 125 Ohio St. 283, 181 N.E. 131. The dangerous instrumentality doctrine placed a higher duty of care on a landowner who maintained a condition for which the danger was not readily known to children. Id. *Bennett* merged the enhanced duty of care and dangerous instrumentality doctrine into what is now known as the attractive nuisance doctrine.

{¶18} As adopted by the Ohio Supreme Court in *Bennett*, the attractive nuisance doctrine is set forth in the Restatement of the Law, Torts (1965), Section 339:

{¶19} "A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon land if:

{¶20} "(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

{¶21} "(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

{¶22} "(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

{¶23} "(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

{¶24} "(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children." Id. at 40.

{¶25} The Ohio Supreme Court noted that the doctrine does not apply in the event that the hazard is open and obvious and that the risk of harm is or should be foreseeable to the child. Id. at 44, citing *Restatement,* Section 339 comment i.

{¶26} In the matter before us, Appellants have failed to demonstrate that Appellee knew or has reason to know that children were likely to trespass in the

woods. Appellee provided the affidavit of the President of Gennaro Pavers, Inc., David A. Gennaro, wherein he stated that no officer, employee or representative of Appellee knew of trespassers on the property. (Gennaro Aff., ¶5.) Appellants provided no evidence to the contrary. Although Pruitt alleged that his brother and friends had talked about "hanging in the woods," there was no testimony from any of the boys that they regularly trespassed on the property. (Pruitt Depo., p. 62.)

{¶27} Appellants also failed to demonstrate that the risk of danger created by the dam could not be appreciated by Pruitt. Pruitt's own testimony established that he was well aware of the danger inherent in crossing the dam. He dropped sticks on the left side of the dam to approximate the drop, and concluded that "it was actually pretty far." (Pruitt Depo., p. 24.) He conceded that he crossed the dam with caution because he knew that he could get hurt if he fell.

{¶28} Because Appellants failed to establish that Appellee knew or should have known that children trespassed in the woods and the risk created by the dam was open and obvious, Appellants' sole assignment of error is overruled and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.