[Cite as *Nibert v. Columbus/Worthington Heating & Air Conditioning*, 2010-Ohio-1288.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STEPHEN O. NIBERT,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-08-015
	:	O P I N I O N
- vs -		3/29/2010
	:	
COLUMBUS/WORTHINGTON HEATING & AIR CONDITIONING dba Columbus Mechanical, Inc., et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 08-CVH-00460

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RINGLAND, J.

{¶1} Plaintiff-appellant, Stephen O. Nibert, appeals a decision of the Fayette County Court of Common Pleas granting summary judgment in a negligence action in

favor of defendant-appellee, Columbus/Worthington Heating & Air Conditioning d/b/a Columbus Mechanical, Inc. (Columbus Mechanical).

{¶2} In 2004, Retail Construction Services, Inc. entered into a contract with Prime Retail, an outlet shopping center developer, to provide general construction services at the Jeffersonville Prime Outlets shopping mall. The construction services included the installation of a new rooftop heating, ventilation and air conditioning system (HVAC). As the general contractor, Retail Construction contracted with Columbus Mechanical to remove and replace the existing HVAC units. Additionally, Retail Construction hired Kelley Brothers Roofing, Inc. to "redeck" the 4' by 8' foot holes that would be created in the shopping mall roof after the existing HVAC units were removed. To secure each hole, a supportive metal decking and insulation is installed then covered by a weather resistant rubber membrane to watertight the roof.

{¶3} On August 19, 2004, Columbus Mechanical removed three existing HVAC units from the mall roof and affixed new "curbs"[1] and ducts in the roof for the placement of the new HVAC units. The Columbus Mechanical employees then covered the existing holes with "any available materials [they] could find." However, there were no materials available to insure that the holes would be watertight.

{¶4} Jeffersonville was hit by a heavy rainstorm that night which continued through the early morning hours. Since the holes in the roof were only partially covered and not "water-tight," water leaked into the retail stores below, causing significant damage. Upon arriving at the outlet mall the following morning, Retail Construction's on-sight supervisor, Mike Tatar, instructed the Columbus Mechanical workers to suspend the HVAC work on the roof.

{¶5} Kelley Brothers was scheduled to "redeck" the holes that morning; however,

1. A curb is a structure that supports an HVAC unit.

Matthew Kelley, the Service Department Manager at Kelley Brothers, decided not to dispatch the roofing crew because "it was raining, and bad weather was expected all day * * *." Kelley did not inform anyone at Retail Construction of his decision. When no individuals from Kelley Brothers arrived at the job site as expected, Corey LaSarge, a representative with Retail Construction, contacted Kelley to inquire as to the whereabouts of the roofing crew. LaSarge informed Kelley that rainwater was leaking through the roof into the retail stores below.

{¶6} Following this discussion, Kelley contacted Stephen Nibert, a service technician with Kelley Brothers who was returning from a job site in Cleveland. Although Nibert was not scheduled to work at the Jeffersonville outlet mall, Kelley informed Nibert that a problem had been reported at the outlet mall and dispatched him to the mall with his "helper," Jeremy Head, to investigate the reported roof leak. Nibert and Head, both of whom were unaware of Kelley Brothers' contract to "redeck" the shopping mall roof, arrived at approximately 12:15 p.m.

{¶7} According to Nibert, upon their arrival an "unidentified man" employed by Retail Construction met them at their vehicle, walked them to the doorway of the damaged retail store, and "pointed towards the ceiling * * * pointing out what appeared to be two holes * * * covered with visqueen/plastic and with pallets over top of them" that were "visible because some light was able to shine through." Nibert and Head then climbed and surveyed the roof where he saw "holes cut into the roof with curbs installed," "at least one other fan box with a hole cut into it with nothing covering it," and "two different areas where there were large holes cut into the rubber membrane of the roof."

{¶8} Further down the roof, Nibert and Head observed Columbus Mechanical employees cutting into the rubber membrane and "cutting in a curb." Nibert instructed Head to tell the Columbus Mechanical employees to stop cutting, since it would cause

more leaks, while he called Kelley for further instructions on how to proceed. Kelley instructed Nibert to "cover the holes temporarily the best he could in order to stop the leaks."

{¶9} While Nibert was talking to Kelley, Head approached the Columbus Mechanical employees to request that they stop making cuts into the roof. According to Head, the workers informed him that "there was no metal decking underneath the visual insulation board," and that "someone had just covered the holes left by the removal of the old HVAC units with only insulation board." Head asked the workers why the holes were not temporarily secured with plywood for support, but received no response. Head stated that he did not relay to Nibert that the holes in the roof were unsupported. After discussing how to stop the leaking rainwater, Head gathered the necessary materials from the van to temporarily fix the holes. While unrolling plastic sheeting, Nibert stepped back and fell through a hole covered solely by insulation board to the concrete floor below. Nibert suffered serious injuries as a result of the fall.

{¶10} Nibert filed suit against Retail Construction and Columbus Mechanical. Retail Construction and Columbus Mechanical both filed motions for summary judgment, which were subsequently granted by the trial court. Nibert appealed from the trial court's decision granting summary judgment, raising a single assignment of error.

{¶11} "THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANT-APPELLEES AND AGAINST THE PLAINTIFF-APPELLANT."[2]

{¶12} In his sole assignment of error, Nibert argues that the trial court erred by granting summary judgment in favor of Columbus Mechanical.

{¶13} Summary judgment is a procedural device used to terminate litigation and

2. Prior to oral argument, Nibert reached a settlement agreement with Retail Construction. Due to the settlement agreement, we will not address Nibert's arguments relating to Retail Construction in this appeal.

avoid a formal trial when there are no issues in a case to try. *Forste v. Oakview Const., Inc.*, Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶7. An appellate court's review of a summary judgment decision is de novo. *Creech v. Brock & Assoc. Constr.*, 183 Ohio App.3d 711, 2009-Ohio-3930, ¶9, citing *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 1996-Ohio-336. In applying the de novo standard, a reviewing court is required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran,* 155 Ohio App.3d 713, 2004-Ohio-181, ¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383. In turn, an appellate court must review a trial court's decision to grant or deny summary judgment independently, without any deference to the trial court's judgment. *Bravard,* citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 295.

{¶14} A trial court may grant summary judgment only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The party moving for summary judgment bears the burden of demonstrating no genuine issue of material fact exists. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. The nonmoving party must then present evidence to show that there is some issue of material fact yet remaining for the trial court to resolve. Id. at 293. A material fact is one which would affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505. In deciding whether a genuine issue of material fact exists, the evidence must be construed in the nonmoving party's favor. *Walters v. Middletown Properties Co.,* Butler App. No. CA2001-10-249, 2002-Ohio-3730, ¶10.

{¶15} Negligence claims require the showing of a duty owed, a breach of that duty, and an injury proximately caused by the breach. *Wallace v. Ohio Dept. of Commerce,* 96 Ohio St.3d 266, 2002-Ohio-4210, ¶22. "The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability." *Adelman v. Timman* (1997), 117 Ohio App.3d 544, 549. Determination of whether a duty exists is a question of law for the court to decide. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318.

{¶16} In *Sopkovich v. Ohio Edison Co.*, 81 Ohio St.3d 628, 1998-Ohio-341, the Ohio Supreme Court engaged in a thorough summary of contractor liability law in Ohio and the applicable standards. Generally, no duty ordinarily attaches where a subcontractor is engaged in inherently dangerous work. Id., citing *Wellman v. East Ohio Gas Co.* (1953), 160 Ohio St.3d 103, paragraph two of the syllabus.

{¶17} However, in *Hirschbach v. Cincinnati Gas & Elec. Co.* (1983), 6 Ohio St.3d 206, the court recognized an exception to the general rule, holding that "[o]ne who engages the services of an independent contractor, and who actually participates in the job operation performed by such contractor and thereby fails to eliminate a hazard which he, in the exercise of ordinary care, could have eliminated, can be held responsible for the injury or death of an employee of the independent contractor." Id. at syllabus.

{¶18} In *Cafferkey v. Turner Constr. Co.* (1986), 21 Ohio St.3d 110, the court defined the exact duty of care a general contractor owes to its subcontractors when conducting inherently dangerous work. "A general contractor who has not actively participated in the subcontractor's work, does not, merely by virtue of its supervisory capacity, owe a duty of care to employees of the subcontractor who are injured while engaged in inherently dangerous work." Id. at syllabus.

{¶19} In *Kucharski v. Natl. Eng. & Contracting Co.*, 69 Ohio St.3d 430, 1994-Ohio-

320, the court addressed the duty that exists between subcontractors. Extending *Cafferkey* to situations involving two independent contractors, the court held, "[a]n independent contractor who lacks a contractual relationship with a second independent contractor owes no affirmative duty beyond that of ordinary care to the employees of the second contractor, where the first contractor does not supervise or actively participate in the second contractor's work." Id. at syllabus. "[W]hen two or more independent contractors are engaged in work on the same premises, it is the duty of each contractor, in prosecuting its work, to use ordinary and reasonable care not to cause injuries to the employees of another contractor." Id. at 434. The *Kucharski* standard is applicable to the instant matter since it involves two independent subcontractors with no contractual relationship. See *Cogar v. Scheetz Construction Co.* (Jan. 14, 1998), Summit App. No. 18501, 1998 WL 34608, *2.

{¶20} The Ohio Supreme Court first defined "active participation" in *Bond v. Howard Corp.*, 72 Ohio St.3d 332, 1995-Ohio-81. "[F]or purposes of establishing liability to the injured employee of an independent subcontractor, 'actively participated' means that the general contractor directed the activity which resulted in the injury and/or gave or denied permission for the critical acts that led to the employee's injury, rather than merely exercising a general supervisory role over the project." Id. at 337. As is plainly clear, this definition specifically applies to a general contractor/subcontractor relationship. The Supreme Court has extended this definition to the landowner/contractor relationship. *Sopkovich* at 642-643.

{¶21} Additionally, in *Sopkovich*, the court further explained that "active participation" extends to control over both the work area and work activities of an independent contractor. Id. at 639-640. "[A]ctive participation giving rise to a duty of care may be found to exist where a property owner either directs or exercises control over the

work activities of the independent contractor's employees, or where the owner retains or exercises control over a critical variable in the workplace [environment]." Id. at 643. See, also, *Barnett v. Beazer Homes Invests., LLC*, 180 Ohio App.3d 272, 2008-Ohio-6756, ¶18-20.

{¶22} Applying the "active participation" definition as stated in *Bond* or *Sopkovich* is often unworkable in situations involving multiple subcontractors since the roles among subcontractors are typically not supervisory in nature. Subcontractors are usually employed to perform separate tasks, but, as here, these tasks often overlap in some manner or involve the same workspace although no supervisory relationship exists. Surely subcontractors in a nonsupervisory position can also "actively participate" in the performance of another subcontractor's work and, as such, must exercise a duty of ordinary and reasonable care to other subcontractors when executing their job functions in an inherently dangerous work environment. To declare otherwise, would allow all nonsupervisory subcontractors to complete their work without regard for others on the job site.

{¶23} In this case, we find that Nibert has submitted evidence demonstrating a genuine issue of material fact regarding "active participation" between Columbus Mechanical and Kelley Brothers. Although Columbus Mechanical was not contracted to directly participate in the work activities of Kelley Brothers, both companies were hired to work in tandem with one another on the Jeffersonville Prime Outlets improvement project. Columbus Mechanical was hired to remove and install new HVAC units on the store roofs. Once Columbus Mechanical removed a unit, Kelley Brothers was required to "redeck" the holes that remained in the roof. Without the work performed by Columbus Mechanical, there was no purpose for Kelley Brothers.

{¶24} Columbus Mechanical exercised control over Kelley Brothers' work area and

the area Nibert was dispatched to fix. *Sopkovich* at 639. On the day prior to Nibert's injury, Columbus Mechanical removed three HVAC units. After removing an existing HVAC unit, an employee from Columbus Mechanical placed only insulation board without any supportive metal decking over the hole in which Nibert fell. Columbus Mechanical failed to mark the location or place a barricade around the hole. Moreover, three individuals from Columbus Mechanical were on the roof while Nibert attempted to fix the leaks and did not disclose to him the existence of the hole. One of the Columbus Mechanical employees did instruct Nibert's co-worker about concealed holes in the roof, but issues remain regarding timeliness and whether this notice to Head can be imputed to Nibert.

{¶25} According to Nibert, he had no prior knowledge of the project. Nibert received no warning about the fact that the hole had been affixed with only insulation. Nibert stated that he was unaware of the existence of any concealed holes present in the roof or that there was an unsupported opening in the spot where he fell. It appeared to Nibert that the hole had been properly secured. When viewing this evidence in a light most favorable to Nibert, genuine issues of material fact exist that should be left for a jury to determine.

{¶26} Additionally, no evidence was presented that safety procedures were employed by Columbus Mechanical to ensure that Kelley Brothers, or Nibert, were aware of the concealed, unsupported holes. See *Smith v. Peck Hannaford & Briggs Co., Inc.*, 161 Ohio St.3d 468, 2005-Ohio-2741, ¶17; *Cogar* at *2. Columbus Mechanical created a potentially dangerous condition by covering the hole with insulation. A genuine issue of fact remains whether the affirmative duty of care required Columbus Mechanical to warn Nibert about the condition.

{¶27} Nibert has submitted evidence demonstrating a material fact regarding

Columbus Mechanical's breach of this duty which proximately caused his injury. As a result, we conclude that the trial court erred in determining, as a matter of law, that Columbus Mechanical owed no duty of care to Nibert. See *Barnett v. Beazer Homes Invests., LLC*, 180 Ohio App.3d 272, 2008-Ohio-6756, ¶25. The evidence submitted by Nibert creates genuine issues of material fact regarding whether Columbus Mechanical "actively participated" in the job duties of Kelley Brothers, and, if so, the extent of the duty owed to Nibert and whether Columbus Mechanical satisfied that duty.

{¶28} The dissent in this case misconstrues our position, asserting that this decision "essentially strips away all meaning from the established rationale behind contractor liability law and creates a situation where all contractors on the property become a guarantor of the safety of all others * * *." The evidence in this case indicates that Columbus Mechanical may have created a dangerous condition in Kelley Brothers' direct work area. The Ohio Supreme Court has concluded on multiple occasions that a duty is owed where "active participation" exists between contractors. As we have thoroughly discussed, genuine issues of material fact exist in this case regarding whether there was "active participation" between the parties and, if so, whether the duty of care required Columbus Mechanical to timely warn Nibert of the condition or if warning the co-worker can be imputed to Nibert. This in no way means that Columbus Mechanical is a guarantor of Nibert's safety. We cannot ignore the evidence showing the existence of "active participation."

{¶29} Accordingly, we find that the trial court's decision to grant summary judgment was premature. Nibert's sole assignment of error is sustained.

{¶30} Judgment reversed and this cause is remanded.

HENDRICKSON, J., concurs.

POWELL, P.J., dissents.

POWELL, P.J., dissenting.

{¶31} I respectfully dissent from the majority's decision as Nibert, an employee of Kelley Brothers, was engaged in an inherently dangerous activity for which Columbus Mechanical did not supervise or actively participate, and therefore, it owed him no duty of care. Accordingly, because Columbus Mechanical did not owe Nibert a duty of care, I would affirm the trial court's decision granting summary judgment in its favor.

{¶32} As the majority correctly states, "[a]n independent contractor who lacks a contractual relationship with a second independent contractor owes no affirmative duty beyond that of ordinary care to the employees of the second contractor, where the first contractor does not supervise or actively participate in the second contractor's work." *Kucharski v. Natl. Eng. & Contracting Co.*, 69 Ohio St.3d 430, 1994-Ohio-320, syllabus. In turn, based on *Kucharski*, which all parties agree is the applicable law, it seems apparent that when two or more independent contractors are engaged in work on the same premises, "the first independent contractor owes a duty in prosecuting its work to use ordinary and reasonable care not to cause injuries to the employees of the second contractor." *Circelli v. Keenan Construction*, 165 Ohio App.3d 494, 2006-Ohio-949, ¶10, citing *Kucharski* at 434; *Smith v. Peck Hannaford & Briggs Co., Inc.*, 161 Ohio App.3d 468, 2005-Ohio-2741, ¶15.

{¶33} However, while *Kucharski* indicates Columbus Mechanical would generally owe Kelley Brothers' employees a duty of ordinary care, after a thorough review of the record, I disagree with the majority opinion finding a question of fact as to whether Columbus Mechanical "actively participated" in Kelley Brothers' work. Contrary to the majority's belief, "active participation," as provided by the Ohio Supreme Court and as

recently applied by this court, does not occur simply because two subcontractors are engaged in work that "overlap[s] in some manner," and a subcontractor does not "exercise control" over a work area merely by establishing its presence at the site first.[3] To hold otherwise, which the majority does here, essentially strips away all meaning from the established rationale behind Ohio contractor liability law and creates a situation where all contractors on the property become a guarantor of the safety of all others simply because they are "work[ing] in tandem" towards the completion of an "improvement project."

{¶34} With these principles in mind, based on the definition of "active participation" as provided by the Ohio Supreme Court and applied by this court, I find the record devoid of any evidence indicating the Columbus Mechanical employees, while removing and replacing the existing HVAC units, exerted control over Kelley Brothers' "work area and work activities," or any evidence that they supervised or directed Kelley Brothers' attempts to temporarily fix the leaking roof that ultimately resulted in Nibert's injury when he *stepped backwards* onto a hole causing him to fall through the roof to the concrete floor below.[4] *Fulton v. McCarthy Bros. Co.* (July 25, 1996), Cuyahoga App. No. 69900, 1996 WL 417149 (McMongle, J., concurring); see, e.g., *Smith v. Peck Hannaford & Briggs Co., Inc.*, 2005-Ohio-2741 at ¶16. Therefore, I disagree with the majority's decision finding a question of fact as to whether Columbus Mechanical actively participated in Kelley

3. Active participation, as defined by the Ohio Supreme Court and as recently applied by this court, means more than "supervising or coordinating," but instead involves "direct[ing] the activity that resulted in the injury and/or [to] give or deny permission for the critical acts that led to the employee's injury." *Barnett v. Beazer Homes Investments, L.L.C.*, 180 Ohio App.3d 272, 2008-Ohio-6756, ¶17; *Bond v. Howard Corp.,* 72 Ohio St.3d 332, 337, 1995-Ohio-81. Active participation also exists "where a property owner either directs or exercises control over the work activities of the independent contractor's employees * * *." *Barnett* at ¶18; *Sopkovich v. Ohio Edison Co.*, 81 Ohio St.3d 628, 643, 1998-Ohio-341.

4. While not argued by the parties, the evidence does indicate that Nibert *stepped backwards*, i.e. blindly, onto the hole, and, in turn, I find the facts somewhat similar to cases involving a "step-in-the-dark." See, e.g., *Salmon v. Rising Phoenix Theatre*, Butler App. No. CA2005-11-491, 2006-Ohio-4328, citing *Stazione v. Lakefront Lines, Inc.*, Cuyahoga App. No. 83110, 2004-Ohio-141, ¶14-18.

Brothers' work.

{¶35} Furthermore, as was noted by the Ohio Supreme Court, "[a] general contractor who has not actively participated in the subcontractor's work, does not, merely by virtue of its supervisory capacity, owe a duty of care to employees of the subcontractor who are injured while engaged in inherently dangerous work." *Cafferkey v. Turner Constr. Co.* (1986), 21 Ohio St.3d 110, syllabus. In turn, by applying the same principles to this case, which I find to be appropriate, where a subcontractor is engaged in inherently dangerous work, and where there is no evidence of active participation, the duty of ordinary care established by *Kucharski* is eliminated "because [the injured subcontractor] should have been aware of the dangers of his work and protected himself against them." *Solanki v. Doug Freshwater Contracting, Inc.*, Jefferson App. No. 06-JE-39, 2007-Ohio-6703, ¶43-44; see, also, *Barnett v. Beazer Homes Investments, L.L.C.*, 180 Ohio App.3d 272, 2008-Ohio-6756, ¶15, 17. [5]

{¶36} In light of the foregoing, I find it clear that Nibert was employed by Kelley Brothers, a subcontractor to Retail Construction, to work on the shopping mall roof, which, due to the extensive remodeling project, can be classified as nothing other than a construction site. *McCumbers v. Yusa Corp.*, Fayette App. No. CA2006-05-018, 2006-Ohio-5847, ¶8; see, e.g., *Adkins v. Armco Steel Co.* (Apr. 15, 1996), Butler App. Nos. CA95-07-119, CA95-08-132, CA95-08-142, at 4-5. In turn, because "[a] construction site is inherently a dangerous setting," and because a "subcontractor at a construction site is engaged in inherently dangerous work," I disagree with the majority and find the trial court did not err in its decision finding Columbus Mechanical "had no legal duty * * * to

5. Before applying the "inherently dangerous test" in *Solanki*, the Seventh District Court of Appeals noted that the "rationale behind the 'inherently dangerous' cases," which requires an independent contractor or subcontractor performing inherently dangerous work to guard against the "intrinsic risk in the work," should apply even though the case involved two unrelated parties hired to work on the same premises. Id. at ¶43-44. I agree with the Seventh Appellate District's application of Ohio contractor liability law as it relates to the facts of this case.

barricade, warn, or otherwise notify Nibert of the presence of openings in the roof" when it had not actively participated in Kelley Brothers' work. *Bond v. Howard Corp.*, 72 Ohio St.3d 332, 336, 1995-Ohio-18; *Michaels v. Ford Motor Co.*, 72 Ohio St.3d 475, 479, 1995-Ohio-142; see, also, *Shuman v. Detroit Diesel* (Dec. 6, 1999), Stark App. No. 1999CA00101, 2000 WL 1632 at *3 (roofing considered inherently dangerous).

{¶37} I disagree with the majority decision and find Columbus Mechanical did not owe Nibert a duty of care where he was engaged in an inherently dangerous activity for which it did not actively participate. Therefore, while the majority goes to great lengths to find a question of fact, I simply find no support for the majority's decision finding Columbus Mechanical owed Nibert a duty of care. Accordingly, I respectfully dissent and would affirm the trial court's decision granting summary judgment in Columbus Mechanical's favor.

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