

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

George Wertz, as Administrator of the
Estate of Michael Thomas Dolinskas,

Plaintiff,

vs.

Case No. 08CVH-11428 (Sheward, J.)

Showe Management Corp., Inc., et al.,

Defendants.

George Wertz, as Administrator of the
Estate of Michael Thomas Dolinskas,

Plaintiff,

vs.

Case No. 08CVH-14225 (Sheward, J.)

Jeffersonville Green Limited
Partnership., et al.,

Defendants.

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
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CLERK OF COURTS

**DECISION AND ENTRY GRANTING THE SHOWE DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT, FILED MARCH 1, 2010**

Rendered this 4 day of May 2009. (Sheward, J.).

This matter is before the Court upon the Motion of Defendants Showe Management and Jeffersonville Green Apartments (the Showe Defendants) for Summary Judgment, filed March 1, 2010. The Plaintiff filed a Memorandum in opposition on March 18, 2010 and the Defendants filed a Reply on March 25, 2010.

In addition to the Motion for Summary Judgment, there are a number of Motions to Strike related to witnesses or issues addressed in the summary judgment briefs. They

include: Plaintiff's Motion to Exclude the expert opinion of Alan Caskey regarding playground fencing, filed March 1, 2010; Plaintiffs' Motion to Exclude expert testimony on the issue of adult supervision, filed March 1, 2010; and, Plaintiffs' Motion to exclude expert testimony by Gregory Balko with regard to pain and suffering, also filed March 1, 2010. Lastly, the Showe Defendants move to strike the Affidavit of Jerry Groves, filed April 16, 2010.

I. FACTS

Plaintiffs' decedent, Michael Dolinskas ("Michael"), lived with his family at 36C Colonial Drive in the Jeffersonville Green Apartments. Bolton Dep. 16-17. On October 6, 2006 his step-grandfather, Timothy J. Shallo, Sr. ("Shallo,") took Michael outside to play on a playground area in front of the apartment unit. Shallo Dep. 26, 28, 112. Michael's 11-year-old half-sister, Kailey Sturgill, accompanied Michael and Shallo at the playground. Id. 35-37. Shallo pushed Michael on the swing set for a while before leaving the play area and walking across the street to talk to a neighbor, Barry Beard. Id. at 35-37. Kailey stayed on the playground. Id.

As the two men talked, Beard showed Shallo some pictures on a digital camera. Id. at 45. At some point during the conversation, Defendant Marty Barker drove his F-350 pickup truck into the complex to deliver a pizza. Id. 41-43. He parked his truck next to the curb immediately in front of unit 36C, such that the truck's passenger side faced the playground located across the street. Id; Barker Aff., attached to Defendant Barker's Motion for Summary Judgment. At the time, he was aware that children were playing on the playground. Defendant Barker's Responses to Plaintiff's Requests for Admission Nos.

1 and 19. Defendant Barker left his truck running while he delivered a pizza to another unit. Shallo Dep at 43. Although Defendant Barker's truck blocked Shallo's view of the playground, Shallo did not move so he could see Michael. Shallo Dep at 47.

Defendant Barker returned to his truck that he had left idling. Id. at 44. As Barker began to pull away, Shallo heard a "crunch", and turned to see Michael's body laying on the roadway in the area where the driver's side rear tires had been while the truck was parked. Id. at 49-51. At some point, Michael left the playground. Shallo last saw him on the swings. Id.

Bystanders yelled for Defendant Barker's attention. Id. at 52. He stopped. Id. Shallo ran immediately toward Michael's body, scooped him and carried him into his home. Id. at 56-57. He showed no sign of life. Id. at 58. When the deputies arrived, they found no signs of life. Olsen Dep. At 31, 33-34. Nevertheless, they performed CPR until EMS arrived, took over CPR, and transported Michael to the hospital where he was pronounced dead. Id. at 32-33. The coroner determined the cause of death to be blunt force injuries/trauma to the head that led to immediate death. Montgomery County Coroner's report; Omalu Dep. 228; Omalu Report attached as Exh. A to Plaintiff's Motion to Exclude Balko's testimony regarding pain and suffering.

As a result of Michael's tragic passing, the administrator of his estate has instituted this action against Defendant Barker and the Showe Defendants. With respect to the Showe Defendants, the Plaintiff brought claims for wrongful death and survivorship. Counts Three and Four of the Second Amended Complaint. The wrongful death claim incorporates allegations of common law and statutory negligence. Second Amended

Complaint ¶34. Specifically, Plaintiff alleges the Showe Defendants are liable for causing the playground area to be built and located in a peninsula of the parking lot, thereby exposing children who use it to the dangers of traffic on all sides; and, failing to install a fence or a gate around the playground area. *Id.* And, they failed to keep the premises in a safe and sanitary condition as required by R.C. 5321.04(A)(3). *Id.* Additionally, the Plaintiff's expert maintains the Showe Defendants were negligent by failing to comply with Consumer Product Safety Commission (CPSC) and American Society for Testing and Materials (ASTM) standards that call for fencing around a playground of the type located in front of 36C Colonial Drive. *Burton Dep.* 174, 183. The Showe Defendants have moved for summary judgment on all aspects of the Plaintiff's claims.

II: STANDARD OF REVIEW

The Court shall grant a motion for summary judgment if the evidentiary materials in the case show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The Ohio Supreme Court has ruled that " * * * the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292.

A motion for summary judgment must be backed by some type of evidence which shows that the nonmoving party has no evidence to support its claims. The moving party must point to Civ.R. 56(C) evidence in the record (i.e., pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, or stipulations of fact) that demonstrates the absence of any genuine issues of material fact. *Id.* at 293. If

the moving party meets this test, the nonmoving party must rebut the motion with specific facts and/or affidavits showing a genuine issue of material fact that must be preserved for trial. *Id.* The court must construe the evidence against the moving party and grant summary judgment only when it appears that reasonable minds can reach but one conclusion which is against the nonmoving party. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

III: DISCUSSION

In light of the above standard, the Court must construe the Civil Rule 56(C) evidence against Plaintiff in order to determine whether or not a genuine issue of material fact exists that must be preserved for trial. *Bennett v. Stanley* (2001), 92 Ohio St.3d 35. In considering the motion for summary judgment has reviewed all Civil Rule 56(C) evidence filed with the Court.

A. Common Law Negligence

A negligence action requires a plaintiff to establish that 1) the defendant owed the plaintiff a duty of care; 2) the defendant breached the duty of care; and, 3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. *Texler v. D.O. Summers Cleaners* (1998), 81 Ohio St. 3d 677, 680. The existence of a particular party's duty depends on the foreseeability of the injury. *Menifee v. Ohio Welding Products, Inc.*, (1984), 15 Ohio St 3d 75 at 77, citations omitted. The test to be used in order to determine foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. *Id.* Where a danger is open and obvious, a landowner owes no duty of care to individuals

lawfully on the premises." *Armstrong v. Best Buy Co, Inc.*, 99 Ohio St.3d 79, syllabus. That is because the condition itself is so obvious that it absolves the property owner from taking any further action to protect the plaintiff. *Id.* at P13.

Here, the Defendants argue the playground area, the adjacent streets, and the lack of fencing presented an open and obvious condition. Showe Memo at 8. Michael's family had lived in that apartment for roughly a year and a half before the unseemly accident. Bolton Dep at 34. Michael's mother had regularly allowed her children to play on the playground as they did the day of Michael's death. Thus, the allegedly dangerous nature was open and obvious, and Showe had no duty to warn of, fence, or otherwise position it differently. Showe Memo at 8.

The Plaintiff argues the open and obvious doctrine does not apply to young children, including Michael, who could not appreciate the danger. Memo Contra at 31. In addition, Plaintiff argues whether the play area was an open and obvious danger is an issue of fact. *Id.* at 33.

In making the determination, the Court is mindful of the Supreme Court's affirmation to the doctrine. *Armstrong v. Best Buy*. There, the Court reiterated, "that when courts apply the rule, they must focus on the fact that the doctrine relates to the threshold issue of duty. By focusing on the duty prong of negligence, the rule properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it. The fact that a plaintiff 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 plaintiff." *Id.* at *82.

Here, the alleged dangerous condition was the location of the playground in proximity to vehicles. The dangerous nature of the playground was sizeable and readily visible. The consequences of children in traffic were recognizable. The open and obvious doctrine fits within the larger scheme of duty. When an object is open and obvious, it is foreseeable that it will be recognized and avoided, thus no duty is owed. *Anderson v. Ruoff* (1995), 100 Ohio App. 3d 601, 604, citing *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St. 3d 642, 644. To accept the Plaintiff's position would be to divert the focus of the inquiry to the nature of Michael's conduct in encountering it. Therefore, the Court finds the playground without a fence and in close proximity to passing traffic was an open and obvious danger for which no duty applies.

B. Statutory Negligence

Alternatively, R.C. 5321.04(A)(2) provides that a landlord who is a party to a rental agreement shall "[m]ake all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." Plaintiff submits that its expert's opinion that a fence was necessary is evidence that the playground premises were not fit or habitable. Plaintiff's Memo at 27. Plaintiff cites *Hickory Grove Investors, Ltd. v. Jackson* in support. 180 Ohio App. 3d 60. In that case, there was a statute on point, and here there is none that requires a fence. There are however cases from the Tenth District which apply the open and obvious doctrine to landlord-tenant negligence claims. *Howson v. Amorose* 2000 Ohio LEXIS 5542 and *Sherred v. Koon* 2002-Ohio-6562. In both cases, the danger was open and obvious and applied in spite of the

statutory duty set out R.C.5331.04(A). Such is the case here. There is no statutory negligence because the playground was an open and obvious danger. Having found the property owners owed no duty to the Plaintiff, there can be no negligence, and Plaintiff's wrongful death claim fails. R.C. 2521.01.

C. Survivorship Claim

Likewise, Plaintiff's survivorship claim fails. A survival action brought to recover for a decedent's own injuries before his or her death is independent from a wrongful-death action seeking damages for the injuries that the decedent's beneficiaries suffer as a result of the death, even though the same nominal party prosecutes both actions. *Peters v. Columbus Steel Castings Co.*, 115 Ohio St. 3d 134. Survival actions and wrongful-death actions "are not the same," even though they both relate to the defendant's alleged negligence. *Id.*, citing *Mahoning Valley Ry. Co. v. Van Alstine* (1908), 77 Ohio St. 395, 414; Compare R.C. 2305.21 and R.C. 2125.02. But, both are premised on negligence elements, and the court has found there was no negligence by the Showe Defendants. Thus, the Survivorship claim fails.

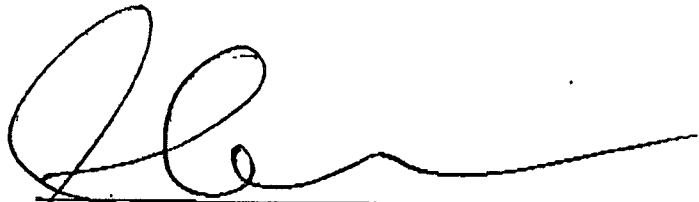
D. Punitive Damages

Plaintiff sought to recover punitive damages for the allegedly willful and wanton conduct of the Showe Defendants. Amended Complaint at 47. Again, this claim component claim fails because no negligence has been established as a matter of law.

IV. CONCLUSION

After construing all of the evidence in Plaintiff's favor, the Court finds there is no genuine issue of material fact. No one witnessed the accident. But, all the same the

danger the playground presented was known. It was open and obvious. Accordingly, the Court finds the Showe Defendants owed no duty of care with respect to the playground, either under the common law, or by statute. Summary Judgment is therefore granted to the Showe Defendants on both Counts Three and Four of Second Amended Complaint. The conclusion obviates the need to address the pending motions to strike. Therefore, this Decision, in conjunction with the Decision Granting Defendant Barker's Motion for Summary Judgment, resolves all claims and thus constitutes a final appealable order. Civ.R. 54(B).



Richard S. Sheward, Judge

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