

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

SHERILL BRUCKNER	:	APPEAL NO. C-070765
	:	TRIAL NO. A-0606969
and	:	
ROGER BRUCKNER,	:	
Plaintiffs-Appellants,	:	<i>DECISION.</i>
vs.	:	
PROSCAN IMAGING, LLC.,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: May 23, 2008

*Michael L. Gay, Jesse R. Lipcius, and Cors & Bassett, LLC, for Plaintiffs-Appellants,  
Tracy A. Cassinelli and Reminger & Reminger, for Defendant-Appellee.*

Please note: This case has been removed from the accelerated calendar.

**SYLVIA SIEVE HENDON, Judge.**

{¶1} In one assignment of error, Sherrill and Roger Bruckner appeal the trial court’s granting of summary judgment in favor of Proscan Imaging (“Proscan”). For the following reasons, we reverse.

{¶2} Proscan is a business that offers various medical services. Sherrill Bruckner went to Proscan for an MRI. There, she was shown to a dressing room and asked to change into a gown. As Bruckner sat down on the dressing-room bench to untie her shoes, the bench broke, causing her to fall. Bruckner claimed that she was seriously injured as a result.

{¶3} The Bruckners sued Proscan for negligence and for loss of consortium arising from Proscan’s negligence. Proscan moved for summary judgment, claiming that because it did not have notice that the bench might have been unsafe, it had not breached a duty to Sherrill Bruckner. The Bruckners responded, in part, that Proscan or its agent had constructed the bench at issue, and therefore that notice of the defect could be presumed. The trial court granted Proscan’s motion and entered judgment in its favor.

{¶4} We review the trial court’s judgment de novo.<sup>1</sup> Summary judgment is appropriate only if (1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) construing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party.<sup>2</sup>

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<sup>1</sup> *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

<sup>2</sup> Civ.R. 56; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; see, also, *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107, 662 N.E.2d 264.

{¶5} To establish actionable negligence, a plaintiff must show the existence of a duty, a breach of that duty, and injury proximately resulting from the breach.<sup>3</sup> Here, it is not disputed that Sherrill Bruckner was Proscan’s business invitee.<sup>4</sup> Proscan therefore owed her a duty of “ordinary care” to ensure her safety while she was on Proscan’s premises.<sup>5</sup> Both parties’ arguments on appeal center on whether Proscan had breached its duty to Sherrill Bruckner. And in this regard, the Bruckners and Proscan argue the wrong law. The parties each take issue with whether the evidence demonstrated that Proscan knew or should have known about any defect in the bench—and therefore whether Proscan had breached its duty to repair it or to warn Bruckner of it.<sup>6</sup> But the issue of “notice” was irrelevant. This is because “one who created the condition is presumed to know what it created.”<sup>7</sup> And the Bruckners presented sworn testimony that Proscan or its agent had constructed the bench. This was sufficient to establish a material issue of fact as to whether Proscan had breached its duty to Sherill Bruckner.

{¶6} The case cited by Proscan in support of its “notice” argument, *Fant v. Copeland*,<sup>8</sup> presents a somewhat similar fact pattern to the present case and holds that a business owner must have notice of a hazardous condition before a duty to warn about or to repair the condition exists. But *Fant* is a judgment entry. It has no precedential value and therefore should not have been cited.<sup>9</sup> Whether a business had actual or

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<sup>3</sup> *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285, 423 N.E.2d 467.

<sup>4</sup> See *Provencher v. Ohio Dept. of Transportation* (1990), 49 Ohio St.3d 265, 265-266, 551 N.E.2d 1257.

<sup>5</sup> *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 31, 303 N.E.2d 81; *Rogers v. Sears, Roebuck and Co.*, 1st Dist. No. C-010707, 2002-Ohio-3304, at ¶3.

<sup>6</sup> See *id.*

<sup>7</sup> *Cione v. K-Mart Corp.* (May 8, 1998), 1st Dist. No. C-970475, citing *Crane v. Lakewood Hosp.* (1995), 103 Ohio App.3d 129, 136, 658 N.E.2d 1088.

<sup>8</sup> (Jan. 22, 2003), 1st Dist. No. C-020347.

<sup>9</sup> See S.Ct.R.Rep.Op. 3(A) and 4(B).

constructive notice of a defect is ordinarily only relevant in instances where a third party created the allegedly hazardous condition.<sup>10</sup> This is not such a case.

{¶7} In sum, because the issue of “lack of notice” was immaterial on the record presented, Proscan failed to demonstrate the absence of a genuine issue of material fact on any element of the Bruckners’ claims. Summary judgment was improper.

{¶8} We sustain the Bruckners’ sole assignment of error. The judgment of the trial court is reversed. This case is remanded for further proceedings consistent with this decision.

Judgment reversed and cause remanded.

**PAINTER, P.J., and DINKELACKER, J., concur.**

*Please Note:*

The court has recorded its own entry on the date of the release of this decision.

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<sup>10</sup> See *Presley*, supra, at 83, 1996-Ohio-107, 662 N.E.2d 267; *Johnson v. Wagner Provision Co.* (1943), 141 Ohio St. 584, 589, 49 N.E.2d 925.