

IN THE SUPREME COURT OF OHIO

BUSTER SCOTT, Dec'd., et al.,

Appellants,

vs.

ANN MARCKEL, etc. et al.,

Appellees.

Case No. **08-1462**

ON APPEAL FROM THE DEFIANCE
COUNTY COURT OF APPEALS,
THIRD APPELLATE DISTRICT

Court of Appeals
Case No. 04-07-027

* * * * *
**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANTS BUSTER SCOTT, DEC'D ET AL.**
* * * * *

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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents two issues of public or great general interest. The first issue deals with the issue of proximate cause and when it presents issues of material fact. As well be demonstrated below, Appellants argue where there is conflicting evidence as to proximate cause, it is a question of fact for the trier of fact and not appropriate for summary judgment. In the instant case there is an issue of dual causation and reasonable minds can reach more than one conclusion as to the proximate cause. Appellees offer nothing more than mere allegations as to proximate cause, leaving room for a question of fact. It is for a jury to weigh the testimony, credibility, bias and motives of the denials and claims of the defendants, not the function of the court. Appellants respectfully request that this Court take this issue under its jurisdiction to shed light on the correct interpretation of this law.

The second issue involves the law of expert affidavit testimony. The court of appeals below simply disregarded the expert engineer affidavit testimony. It wrongfully concluded that Appellants' expert's affidavit "left open more questions that it answered and would not be helpful to the trier of fact." The court of appeals was wrong because Appellants' expert's affidavit is based on engineering analysis based on factual evidence in the case. Ohio law does not require an expert to lay out every particular for opinion where foundation is a matter of common experience. Appellants respectfully request that this Court take this issue to set forth the requirements for an expert's affidavit in considering a motion for summary judgment.

II. STATEMENT OF THE FACTS AND CASE

This is a lawsuit brought by Plaintiffs/Appellants Buster and Mary Scott against Defendants/Appellees Ann Marckel, Larry Marckel and/or Weddings By Design the constructors and designers of the display seeking to recover for the serious injuries suffered by Buster Scott and for the loss of consortium suffered by Mary Scott. The parties conducted written discovery Appellants took oral testimony by depositions.¹

On November 27, 2004, Plaintiff/Appellant Buster Scott (hereinafter "Appellant") was attending the wedding of his granddaughter Kaycie Deming (now Wachtman) at the Ridgeville Legion Hall. (Affidavit of Buster Scott, hereinafter referred to as "Scott Aff.", attached to Memorandum in Opposition at Exhibit 1) Mr. Scott was preparing to leave and was talking to his daughter, Linda Deming, when a large wedding-display structure fell and struck his back and neck causing him to fall to the floor. Mr. Scott was taken by the emergency squad to the Defiance Regional Medical Center where he was found to have fractured his back.

The decorations for the wedding reception at issue were provided by Defendants/Appellees (hereinafter "Appellees") Ann Marckel d/b/a Weddings by Design which is no longer in existence. (Deposition of Larry A. Marckel, Jr., hereinafter referred to as "Marckel Depo" at p. 9) As a decorating business, Weddings by Design had numerous displays built by Larry A. Marckel Jr., Ann Marckel's husband. Mr. Marckel has built lattice greens, overhead hanging lattice, fake trees, pillars, and eight "box sets" similar

1

It should be noted that Appellees did not conduct any discovery depositions. The deposition of Appellant Buster Scott was not taken. He subsequently died on December 29, 2007.

to the structure in the case at hand. (Marckel Depo., at p. 10) The display that fell on Buster Scott was designed and set up by Ms. Marckel's husband, Appellee Larry A. Marckel Jr. (Marckel Depo at p. 16, 22)

Appellees have provided an "eye witness" to some of the events described above: the D. J. at the wedding reception at issue, Alvin (Al) Shook. Mr. Shook testified that he saw at least one child swinging about the pillars of the display box, that the display begin to wobble and that it fell over and hit Mr. Scott. (Deposition of Alvin Shook, hereinafter referred to as "Shook Depo" at p.59, 64)

Appellants obtained the independent evaluation of expert Douglas L. Oliver, Ph.D., P.E. to give his opinion regarding the wedding display structure constructed by Mr. Marckel. Dr. Oliver provided an affidavit. After reviewing the facts and applying them to his expert experience, Dr. Oliver found that the structure appears to have been unstable and thus "dangerously inappropriate for a crowded wedding reception". (Dr. Oliver Aff.) Appellees claim that the "only cause" for the box display falling over was "unsupervised children" that knocked the display over. (Defendant's Motion for Summary Judgment). However, Dr. Oliver has testified that, to a reasonable degree of engineering certainty, the unstable structure was the proximate cause of Mr. Scott's injuries.

Appellees filed their motion for summary judgment on March 21, 2007. On June 4, 2007, Appellants filed their memorandum in opposition to Appellees' motion for summary judgment. Defendants/Appellees filed a reply brief along with a motion to strike affidavit and Appellants filed a surreply. On July 10, 2007 the trial court heard oral arguments on Appellees' motion. The trial court rendered its decision in it's Judgment Entry on November 14, 2007. (Attached as Appendix #1), granting summary judgment for

Defendant. On December 12, 2007, Appellants filed their Notice of Appeal to the Judgment Entry filed November 14, 2007.

On February 15, 2008 Appellants filed their Brief, and on February 29, 2008, Appellees filed their Brief. Appellants filed a Reply Brief on March 13, 2008. On April 15, 2008 counsel participated in oral arguments. On June 10, 2008 the Court of Appeals, Third District, affirmed the judgment of the Trial Court granting summary judgment.

III. ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

A. Proposition of Law Number One: Where There is Conflicting Evidence As to Proximate Cause, It is a Question of Fact for Trier of Fact and Not Appropriate for Summary Judgment

"A party seeking summary judgment bears the initial burden of informing the trial court of the basis of the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." Dresher v. Burt (1996) 75 Ohio St. 3d 280, 293 To meet this burden, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party's claims are not supported by any evidence. And, "the moving party cannot discharge its initial burden under Civ.R. 56 simply by making conclusory assertions" Id A party seeking summary judgment must specifically delineate the basis for which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond." Mitseff v. Wheeler (1998), 38 Ohio St.3d 112, 116. "As explained in Mitseff (and more recently in Dresher), bare allegations by the moving party are simply not enough. Only if the moving party meets this initial burden does the burden then shift to the nonmoving party to set forth specific facts to demonstrate that there is a genuine

issue of material fact. *Id.*

Here, Appellees have not pointed to any evidence that *affirmatively demonstrates* that Appellants' engineering-based evidence that the display was unstable is inaccurate or unsupported. The two averments Appellees "hang their hats on" are (1) that the children were seen swinging on the display by Al Shook and (2) the display has not fallen in the past. Neither affirmatively shows that the wedding display was not negligently designed or constructed.

As seen in their motion for summary judgment, Appellees provide nothing but conclusory assertions and bare allegations. For example: "The acts of these children were the only cause of the pillar box display falling."; and "[T]he cause of the pillar box display falling and striking Plaintiff was due solely to the negligence of one ore more of the 'John Doe' defendants."; and "Any reasonable person knows there was one cause and one cause only for this incident". (See Defendants' Motion for Summary Judgment) These statements are not backed up by *any* evidence and are nothing more than mere allegations. Furthermore, the issue of proximate cause is left wide open by Appellees leaving room for a question of fact that must be determined by the trier of fact. Appellees have clearly not met their initial burden, and if the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. Dresher at 293.

In the instant case, a material issue of fact exists as to the proximate cause of Buster Scott's injury. Appellees testified that they are familiar with the large size of wedding receptions at the Ridgeville Legion Hall. The D.J. at the wedding reception, Alvin Shook, has been involved in numerous weddings over the years. He has been in the "D.J. business" for the past 20 years and he averages 24 weddings a year. (Shook Depo at p.

17) He is very familiar with "the attending circumstances" at wedding receptions including the wedding reception in issue. The wedding reception of November 27, 2004 was fun with a large crowd. (Shook Depo at p. 30) Typical weddings have a variety of ages from young to old and the Demming wedding was the same way. (Shook Depo. at p. 33) The children at the wedding reception at issue were making a lot of noise, screaming and running around "as kids do" (Shook Depo. at p. 50) Even Mr. Marckel himself described a "typical wedding with alcohol" as having "people bumping into each other by accident" (L. Marckel Depo at p. 44) Thus if this behavior is expected at a wedding, it is foreseeable someone would bump into the pillar display and due to the fact that it was unstable, a bump or swing on it creates the likelihood that it would fall and cause damage.

The court of appeals below agrees, stating: "We agree that it was foreseeable that there would be crowds and perhaps children running around at weddings, and that displays and furnishings might be inadvertently bumped and jostled." (Attached as Appendix #2) However, the court of appeals then states that Appellants "did not present any evidence that the display fell down after receiving 'the slightest bump'." Why should Appellants have to present evidence on that point? The court of appeals is wrongfully shifting the burden of proof to Appellants, the non-moving party. The fact remains that the proximate cause for Mr. Scott's injuries is yet to be determined and can only be done so by the trier of fact. The granting and upholding of summary judgment was premature.

Appellees contend that the "sole" cause of the incident was the children swinging on the pillars. Appellants contend that the children alone did not cause the pillars to fall. Appellants' evidence demonstrates that the activities of the children combined with the unstable nature of the pillar was the proximate cause of pillar falling. It is the dual

causation of the foreseeable activities of children coupled with the unstable nature of the display. Reasonable minds could find it foreseeable that children playing at a wedding could knock over an unstable structure.

"The rule of proximate cause 'requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligent act.' " Jeffers v. Olexo (1989), 43 Ohio St.3d 140, 143, 539 N.E.2d 614 citing Ross v. Nutt (1964) 177 Ohio St. 113, 203 N.E. 118 See also Mussivand v. David (1989) 45 Ohio St.3d 314, 321, 544 N.E.2d 265 citing Mudrich v. Standard Oil Co. (1950) 153 Ohio St. 31, 29, 90 N.E. 2d 859

Ordinarily **proximate cause is a question of fact for the jury**. See Strother v. Hutchinson (1981), 67 Ohio St. 2d 282, 288, 423 N.E.2d 467 citing Clinger v. Duncan (1957) 166 Ohio St. 216, 141 N.E.2d 156 Summary judgment typically is inappropriate in negligence actions where breach and proximate cause are the disputed issues. Genova v. Hillbrook Club, Inc. (2004) 2004 WL 1486987 (Ohio App. 11 Dist) citing Whiteleather v. Yosowitz (1983) 10 Ohio App.3d 272, 274, 461 N.E.2d 1331 Summary judgment may be granted on the issue of proximate cause only where the facts are clear and undisputed and the relation to cause and effect is so apparent that only one conclusion may be fairly drawn. Schutt v. Rudolph-Libbe, Inc. 1995 WL 136777 (Ohio App. 6 Dist) citing Tolliver v. Newark (1945) 145 Ohio St. 517, 526 In the instant matter, reasonable minds can come to several conclusions. In Schutt, the Sixth District held that questions of fact remained as to the proximate cause of plaintiff's injury of a slip and fall on a negligently constructed sidewalk.

Appellees claim that the acts of the children relieve them of any negligence. Based

upon the evidence in this case, the acts of the children cannot be viewed as an "intervening act". The test for determining whether an intervening act breaks the "chain of causation" between negligence and injury "depends on whether that intervening cause was reasonably foreseeable". See R.H. Macy & Co., Inc. v. Otis Elevator Co. (1990) 51 Ohio St.3d 108 at 110. Like proximate cause "*the issue of intervening causation generally presents **factual issues to be decided by the trier of fact.*** The determination of intervening causation 'involves a weighing of the evidence, and an application of the appropriate law to such facts, a function normally to be carried out by the trier of facts.'" Leibreich v. A.J. Refrigeration (1993) 67 Ohio St. 3d 266, 269

Appellees claim that "any reasonable person knows that there was one cause and one cause only for this incident". The "cause" for the incident certainly is not that simple and certainly if the structure was as stable as Appellees make it out to be, it would not have fallen. What is reasonable, however, is that there will be children at a large wedding, and it is reasonable that children would be playing at the wedding. The court of appeals below demands Appellants show that the display fell down after receiving "the slightest bump" but never explains why. The court of appeals took great liberty with the testimony in stating that at least one child, if not more "physically knocked the display down" and that even with all the "forceful activity" the display did not fall right away, but only started to rock back and forth before it finally slowly fell." This is the very focus of Appellants' case, that the wobbling before it fell helps to demonstrate the instability of the display. This does not prove that Appellees met their initial burden and as demonstrated above, the issue of proximate cause has yet to be determined. The purpose of summary judgment is not to try issues of fact,

but is, rather, to determine whether triable issues of fact exist. Fuller v. German Motor Sales, Inc. (1988) 51 Ohio App.3d 101, 103

Thus, this proposition of law presents an issue of great public interest as it centers on the clarification of Ohio case law which is being misinterpreted and misused. As this Court is well aware, summary judgment is a drastic measure and should be used with caution. Justice Resnick, writing for the Ohio Supreme Court in Osborne v. Lyles (1992), 63 Ohio St. 3d 326, 333, reinforced the care necessary to consider summary judgment:

We must be mindful that “[s]ummary judgment is a procedural device to terminate litigation and to avoid a formal trial where there is nothing to try. It must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion. . .”

In essence, summary judgment is “a drastic device since its prophylactic function, when exercised, cuts off a party’s right to present his case to the jury.” Dupler v. Mansfield Journal (1980), 64 Ohio St. 2d 116, 120. It is for a jury to weigh the testimony, credibility, bias and motives of the denials and claims of the defendants, not the function of the court.

Appellants respectfully request that this Court take this issue under its jurisdiction to shed light on the correct interpretation of this law.

B. Proposition of Law Number Two: In Granting a Motion for Summary Judgment, a Court Cannot Disregard an Expert Affidavit Because it Fails to Detail Every Single Step in the Expert’s Scientific Analysis

1.

The court of appeals simply disregarded the expert engineer affidavit testimony as to the design and instability of the wedding display. It wrongfully concluded that Dr. Oliver’s affidavit “left open more questions that it answered and would not be helpful to the trier of

fact." The court of appeals was wrong because Dr. Oliver's affidavit is based on engineering analysis based on factual evidence in the case. Ohio law does not require an expert to lay out every particular for opinion where foundation is a matter of common experience.

The trial court understood this concept. In considering Appellees' motion to strike the affidavit of Dr. Oliver, the trial court stated: "No novel or questionable scientific principles are called into question in the opinion of the expert. It is simply a matter of force, weight, stability, and gravity, none of which have been recently scientifically questioned." Here, as set forth by the trial court, this is a matter of gravity and math. Dr. Oliver based his professional opinion on the dimensions of weight, height, diameter that were given in the testimony of Mr. Marckel, the creator, designer and assembler of the display. As Dr. Oliver sets forth his affidavit, he uses those facts and applies mathematical formulas to reach his conclusions. Whether or not his opinions or conclusions are correct does not matter for the purpose of summary judgment.

Admissibility of expert testimony is governed by Evid. R. 702, which provides:

A witness may testify as an expert if all the following apply:

- (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among laypersons;
- (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training or education regarding the subject matter of the testimony;
- (C) The witness' testimony is based on reliable scientific, technical, or other specialized information.

The court of appeals, so it seems, is not questioning whether Dr. Oliver is qualified as an expert. The issue is whether his opinion is reliable. This Court has held in Miller v. Bike Athletic Company "A trial court's role in determining whether an expert's testimony is

admissible under Evid. R. 702(C) focuses on whether the opinion is based upon scientifically valid principles, not whether the expert's conclusions are correct or whether the testimony satisfies the proponent's burden of proof at trial." (1998) 80 Ohio St.3d 607, 613, 687 N.E.2d 735, 741 citing Joiner v. Gen. Elec. Co. (C.A. 11, 1996), 78 F.3d 524, 530

This Court, in Miller, adopted the standards set forth in Daubert v. Merrell Dow Pharmaceuticals Inc. (1993), 509 U.S. 579, 113 S. Ct 2786. In Daubert, the US Supreme Court held "to determine reliability, a court must assess whether the reasoning or methodology underlying the testimony is scientifically valid." Id at 592 In doing so the Court set forth several factors to be considered: "(1) whether the theory or technique has been tested, (2) whether it has been subject to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance. Id. at 593 The court notes that "although these factors may aid in determining reliability the inquiry is flexible." Id. at 594

The reliability requirement of Daubert should not be used to exclude all evidence of questionable reliability, nor should a court exclude such evidence simply because the evidence is confusing. Miller citing In re. Raoli RR. Yard PCB Litigation (C.A.3, 1994), 35 F.3d 717, 744 Dr. Oliver's calculations are based on height, weight, diameter and the concept of gravity. These are techniques and concepts which are a matter of common scientific theory. Even the trial court below acknowledges the this argument is flawed. As stated in the Judgement Entry:

Defendants' memoranda, laced with hyperbole, appears to argue that the affidavit of Dr. Oliver lacks adequate scientific basis and therefore ought not to be considered on the principles of Daubert. Clearly, the defendant's argument in this regard is misplaced. No novel or questionable scientific principles are called into question in the opinion of the expert. It is simply a

matter of force, weight, stability and gravity, none of which have been recently scientifically questioned.

As the court of appeals below points out, the “ultimate touchstone is helpfulness to the trier of fact, and with regard to reliability, helpfulness turns on whether the experts ‘technique or principle [is] sufficiently reliable so that it will aid the jury in reaching accurate results.’” Miller citing DeLuca v. Merrel Dow Pharmaceuticals, Inc. (C.A.3, 1990) 911 F.2d 941, 956 Here, the techniques used by Dr. Oliver are “sufficiently reliable” as they are standard formulas when discussing gravity principles, these formulas as applied to the facts given by Appellee Larry Marckel, help Dr. Oliver reach his conclusion. The court of appeals makes a point that Dr. Oliver “did not personally see the pillar box display, nor did he conduct any experiments or tests or submit any type of scientific report.” These are all factors that are not requirements of an expert opinion, but, again, create questions of fact for the jury to weigh the credibility of the testimony. Of course, Appellees had the opportunity to obtain an expert of their own to refute the testimony of Dr. Oliver and to offer another opinion based on the same (or different) methodology. The trier of fact then will be able to weigh the credibility of each expert’s testimony against the other. Appellees did not, however, obtain any testimony or provide any evidence whatsoever to refute Dr. Oliver’s testimony.

2.

In addition, the court of appeals claims that Dr. Oliver’s testimony contains only “conclusory statements and legal conclusions without supporting facts.” This simply is not true. His affidavit contains his expert qualifications, the relevant facts upon which he relies, and his scientific opinions.

Evid. R. 703 sets forth "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing".

An expert witness is someone who testifies concerning matters of scientific, mechanical, professional or other like nature, requiring special study, experience or observation not within the common knowledge of laymen . See McKay Machine Co. v. Rodman (1967), 11 Ohio St.2d 77, 228 N.E.2d 304 paragraph one of the syllabus.

The individual offered as an expert need not have complete knowledge of the field in question as long as the knowledge she possesses will aid the trier-of-fact in performing its fact-finding function." State v. Baston (1999) 85 Ohio St.3d 418, 423, 709 N.E.2d 128 citing State v. D'Ambrosio (1993), 67 Ohio St.3d 185, 616 N.E.2d 909

In State v. Solomon (1991), 59 Ohio St.3d 124, 579 N.E.2d 1118 the Ohio Supreme Court discussed the requirements of Evid. R. 703:

Accordingly, we find that where an expert bases his opinion, in whole or in major part, on facts or data perceived by him, the requirement of Evid. R. 703 has been satisfied. It is important to note that Evid. R. 703 is written in the disjunctive. Opinions may be based on perceptions or facts or data admitted in evidence.

To the affidavit, Dr. Oliver attached a copy of his Curriculum Vitae which describes generally his professional experience as a professor of mechanical engineering at the University of Toledo. Dr. Oliver reviewed the following materials to give him the facts of the case and the display at issue: the deposition transcripts of Scott Marckel and Alvin Shook; defendants' discovery responses, the complaint and amended complaint, defendants' motion for summary judgment (including affidavits of Alvin Shook and Scott Marckel) and the photographs of the structure taken at the wedding.

In his affidavit, Dr. Oliver cites to facts as given in the deposition testimony. As demonstrated in paragraphs 3, 4, 6 and 7, Dr. Oliver sets forth the factual basis for his conclusions. Dr. Oliver uses the dimensions (including lengths, heights, weights, and diameters) as given as facts by Mr. Marckel himself as the creator and designer of the structure at issue. Dr. Oliver applies his personal knowledge to the factual support to reach his opinion regarding the instability of the structure. Dr. Oliver, from the testimony and the photographs points out that the two tapered flower pots are the primary means of stability for the display as it is freestanding. (Affidavit of Douglas L. Oliver, Ph.D., P.E., hereinafter referred to as "Dr. Oliver Aff., attached to Plaintiff/Appellant's Memorandum in Opposition at Exhibit 2) Flower pots are not intended to give structural stability to tall, 8-9 feet high, heavy, 50-65 pounds, structures. (Dr. Oliver Aff.) The tapering inwards and smaller diameter at the base of the flower pots reduces their structural stability when they are used for a tall and heavy arch. (Dr. Oliver Aff.) The high and heavy horizontal box structure would substantially add to the instability and danger of this structure. (Dr. Oliver Aff.) Appellees claim that they were prohibited by the Ridgeville Legion Hall from bracing the display. (Defendant's Motion for Summary Judgment) Dr. Oliver testified that regardless of that fact, "defendants were not prohibited from using a broader diameter base." (Dr. Oliver Aff.) These are conclusions that Dr. Oliver reached supported by the facts as outlined in his affidavit. Appellants respectfully request that this Court grant jurisdiction over this issue as the area of expert testimony is one that is a matter of public and great interest.

IV. CONCLUSION

For the reasons outlined above, Appellants respectfully request that the issues in her appeal should be heard for the reasons that both of these issues affect the practical, day-to-day actions of Ohio litigants and are thus a matter of public and great general interest.

Respectfully submitted,

SPITLER & WILLIAMS-YOUNG CO., L.P.A.

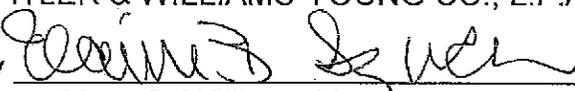
By 

Marc G. Williams-Young
Elaine B. Szuch

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was mailed by first-class U.S. Mail, postage prepaid to: Stephen F. Korhn, Clemens, Korhn, Liming & Warncke, Ltd., Block Six Business Center, 49 Fifth Street, Suite 2000, Defiance, Ohio 43512, this 24th day of July, 2008

SPITLER & WILLIAMS-YOUNG CO., L.P.A.

By 

Marc G. Williams-Young
Elaine B. Szuch

NOV 15 2007

IN THE COURT OF COMMON PLEAS OF DEFIANCE COUNTY, OHIO

Buster Scott, et.al.

Plaintiffs **FILED**
IN COURT OF COMMON PLEAS
DEFIANCE COUNTY, OHIO : Case No. 06-CV-38133

-vs-

NOV 14 2007

Ann Marckel, etc., et.al.

Sean Fejler
Clerk

: JUDGMENT ENTRY

Defendants

This cause came on for consideration of the motion for summary judgment filed on behalf of Defendants, Ann Marckel, Larry Marckel and the Ridgeville Legion Post. The Marckel's operate an enterprise Weddings by Design, and the Ridgeville Legion Hall is operated by the American Legion Post 454, Ridgeville Corners, Ohio. This action is a consolidation of Case Nos. 06-CV-38133 and 06-CV-38131 involving the same parties. A Third-Party Complaint filed by Defendant, Ridgeville Legion Hall, and/or American Legion Post 454, against additional parties has been voluntarily dismissed.

Plaintiffs bring this negligence action based upon an incident which occurred at a wedding reception on November 27, 2004 at the Ridgeville Legion Hall. Defendants, Marckel, d/b/a/ Weddings by Design, were hired by the wedding party to decorate the hall. Among the decorations

supplied by Weddings by Design was a display located near the cake table referred to by the parties as a "pillar box" display, consisting, in essence, of two pillars standing in concreted flower pots with a top head-piece draped with curtains. It is alleged that Plaintiff, Buster Scott, a guest at the wedding of his granddaughter was struck and injured when the pillar box display fell. Plaintiffs claim the Defendants were negligent in the creation or assembly of the pillar box display. The moving Defendants deny any negligence.

Defendants rely upon the deposition testimony of Ann Marckel and Larry Marckel and the affidavits of Larry Marckel and one Allen Shook. It appears that Mr. Shook was a D.J. employed to provide music for the reception. The court also has before it the deposition of Mr. Shook, the affidavit of Plaintiff, Buster Scott, and the affidavit of one Douglas L. Oliver, Ph.D., PE., an engineer retained by the Plaintiffs as an expert witness.

In their motion, Defendants essentially contend that they breached no duty to Plaintiffs. Relying on the affidavit and deposition testimony of Mr. Shook, Defendants contend the one and only cause of the incident must have been unsupervised children playing near and swinging on or around the pillar box display. Plaintiffs argue in response that there exist inconsistencies in the affidavit and deposition testimony of Mr. Shook and Defendant, Marckel, and rely upon the opinion of Dr. Oliver in that "the

instability of the structure was the proximate cause of Buster Scott's injuries". Defendants attack the conclusory nature of Dr. Oliver's assertions and point out that he fails, in any respect, to address the child or children identified as being in contact with the structure prior to its fall.

In argument, Defendants point out that the same or similar structure had been used many times in the past by the decorators without incident, thus demonstrating its safety. Plaintiffs, on the other hand, point out that at a wedding reception that it would be reasonably foreseeable that children would be running and playing throughout the hall. Defendants' memoranda, laced with hyperbole, appears to argue that the affidavit of Dr. Oliver lacks adequate scientific basis and therefore ought not be considered on the principles of Daubert v. Merrill Dow Pharmaceuticals, Inc., (1993) 509 U.S. 579. Clearly, the defendant's argument in this regard, is misplaced. No novel or questionable scientific principles are called into question in the opinion of the expert. It is simply a matter of force, weight, stability, and gravity, none of which have been recently scientifically questioned. On the other hand, a close reading of the affidavit of Dr. Oliver discloses fatal flaws in the Plaintiff's case.

While the parties do discuss the concepts of duty, foreseeability and proximate cause, neither side addressed that which to the court appears to be the most significant issue. The instant case, in its essence, is akin to a

premises liability claim. The basis of the allegation is that Defendants caused, or permitted to exist, some unsafe condition resulting in injuries to the Plaintiff. Nowhere, however, is there any evidence supporting a finding that these Defendants knew, or should have known, that is, had actual or constructive knowledge of any dangerous conditions created by them. Significantly, Dr. Oliver does not address whether, from its appearance or otherwise, the Defendants knew, or should have known, that the display was a hazard.

The phraseology of Dr. Oliver's affidavit is both interesting and of some significance. By way of example, Dr. Oliver states in Paragraph 4:

"Defendant has not established that a 12 inch diameter base in (sic) sufficient for stability of a system..."

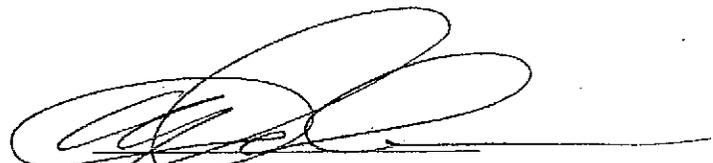
Further, Dr. Oliver opines at Paragraph 7:

"... Therefore it should have been designed such that it would be highly unlikely to fall. Even forty weddings, without a report of an accident, does not establish that the system was highly unlikely to fall. Clearly, at least one time, it did fall."

From these excerpts and the reading of Dr. Oliver's affidavit as a whole, it is apparent that his opinion relates to causation-in-fact rather than proximate cause. Nothing in his affidavit established the foreseeability which would be required to charge these defendants with negligence.

Based upon the evidentiary materials before the court, even construing those materials most strongly in favor of the non-moving party as required by Civil Rule 56, the court finds that reasonable minds could come to but one conclusion and that conclusion is adverse to the Plaintiffs. The evidentiary materials before the court do not create even a genuine issue of material fact that these defendants knew, or should have known, that the pillar box apparatus created a dangerous or hazardous condition under all of the attendant circumstances. It is apparent, therefore, that the Defendants' motion for summary judgment is well taken and must be granted.

Based upon the foregoing, it is ORDERED, ADJUDGED and DECREED that the within cause is hereby dismissed, with prejudice. Costs to the Plaintiffs.

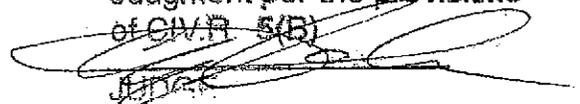


Joseph N. Schmenk
JUDGE

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TO THE CLERK:
Serve all parties with
Notice and Date of this
Judgment per the provisions
of CIV.R. 5(B)



JUN 11 2008

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

DEFIANCE COUNTY

MARY SCOTT, EXECUTOR OF THE ESTATE
OF BUSTER SCOTT, ET AL.,

FILED

PLAINTIFFS-APPELLANTS, IN COURT OF APPEALS, CASE NUMBER 4-07-27
DEFIANCE COUNTY, OHIO

v.

JUN 10 2008

JOURNAL

ANN MARCKEL, ET AL.,

ENTRY

119784

DEFENDANTS-APPELLEES

Jana Ziegler
CLERK OF COURTS

For the reasons stated in the opinion of this Court rendered herein, the assignment of error is overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs to appellants for which judgment is rendered and the cause is remanded to that court for execution.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

[Signature]
[Signature]
JUDGES

DATED: June 9, 2008

COURT OF APPEALS
THIRD APPELLATE DISTRICT
DEFIANCE COUNTY

MARY SCOTT, EXECUTOR OF THE ESTATE
OF BUSTER SCOTT, ET AL.,

FILED
PLAINTIFFS-APPELLANTS, COURT OF APPEALS, CASE NO. 4-07-27
DEFIANCE COUNTY, OHIO

v.

ANN MARCKEL, ET AL.,

JUN 10 2008

DEFENDANTS-APPELLEES.

James Ziegler
CLERK OF COURTS

OPINION

CHARACTER OF PROCEEDINGS: Appeal from Common Pleas Court

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: June 9, 2008

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ROGERS, J.

{¶1} Plaintiff-Appellant, Mary K. Scott, individually and as representative of the Estate of Buster Scott, deceased, appeals the judgment of the Defiance County Court of Common Pleas granting summary judgment in favor of Defendants-Appellees, Ann (aka Leanna) and Larry Marckel, dba “Weddings By Design.” On appeal, Scott asserts that the trial court erred in finding that there were no genuine issues of material fact. Based upon the following, we affirm the judgment of the trial court.

{¶2} Ann and Larry Marckel (hereinafter jointly referred to as “the Marckels”) operated a part-time business providing decorations for weddings and receptions. In November 2004, they provided and set up the decorations for a wedding reception at the Ridgeville Legion Hall. One of the decorations the Marckels provided was a large, eight to nine foot tall, pillar box display that served as a backdrop for the wedding cake table. The backdrop display consisted of two tall pillars, standing about six feet apart in concrete filled flower pots, supporting a top wooden header-piece draped with floor-length curtains. Buster Scott was the grandfather of the bride, and was talking to his daughter while standing near the wedding cake table. At this time, several children were seen running and playing near the pillar box display. The display then toppled over and landed on the cake table, striking Buster as it fell.

{¶3} In October and November 2006, Buster and Mary (hereinafter jointly referred to as “the Scotts”) filed suits against the Marckels, and/or Weddings by Design, the Ridgeville Legion Hall, and/or American Legion Post 454, seeking to recover for the injuries Buster claimed he incurred as a result of the falling display and for the loss of consortium suffered by Mary. The two cases were consolidated and the suit against Ridgeville Legion Hall was voluntarily dismissed without prejudice.¹

{¶4} In March 2007, the Marckels moved for summary judgment, asserting that the Scotts had set forth no evidence that the Marckels had breached any duty owing to the Scotts. The Marckels pointed to deposition testimony and affidavits stating that the pillar box display was knocked over by unsupervised children swinging around on the pillars and that this was the sole cause of the pillar box display falling.

{¶5} The Scotts filed a memorandum in opposition to summary judgment, claiming that children playing at the wedding reception was foreseeable and that this was a question for the jury to decide. The Scotts also provided an affidavit

¹Case Number 06-CV-38133, filed in October 2006, and Case Number 06-CV-38231, filed in November 2006, were consolidated in December 2006 using Case Number 06-CV-38133. There were also several unnamed “John Does” (children and their parents who attended the wedding) named as defendants in Case No. 06-CV-38231, who were never served. In December 2006, the Ridgeville Legion Hall and American Legion Post 454 (whose correct name is Ward L. Adams Post 454 of the American Legion) filed a third party complaint against Kaycie Deming, nka Kaycie Wachtman, who was the bride and person who contracted with the Ridgeville Legion Hall for the reception. The third party plaintiffs dismissed this third party complaint without prejudice in April 2007.

from a professional engineer who stated that the instability of the structure was the proximate cause of Buster's injuries.

{¶6} Before issuing its decision, the trial court reviewed the following evidence: the depositions of Ann, Larry, and Alvin Shook (the disc jockey at the wedding reception), and the affidavits of Buster, Larry, Shook, and Douglas L. Oliver, the Scott's expert witness.

{¶7} Ann, in her November 2006 deposition, stated that she had provided decorations for approximately one hundred weddings over a four-year period, and for at least twenty weddings at this particular hall; that Larry helped her construct, set up, and tear down the displays; that the pillar box displays were used primarily as a backdrop to provide a nice picture setting and to highlight an area; that they have used these displays at least eighty times, often using multiple sets at a wedding; and, that at this particular wedding, the pillar box display was angled into a corner behind the cake table, near the wall, and just a few feet behind the cake table.

{¶8} Larry was deposed on the same day, and stated that he designed and constructed eight to ten sets of pillar box displays that they regularly used; that the pillars were made of white, eight-inch diameter plastic drain pipe; that each pillar was permanently anchored in a large, decorative flower pot filled with fifty pounds of concrete; that the pillars supported a hollow, laminated particleboard

top box that was eight-and-one half feet long and one-foot high and wide; that the top box part contained lighting and curtain rods; and, that he estimated the top box weighed approximately fifty to sixty-five pounds. Larry further stated that, when he returned to the reception hall at the end of the evening, he was told that the display had fallen, but that it had not come apart; that it had been set back up again right after it fell; and, that it was not damaged in any way.

{¶9} In a March 2007 affidavit, Larry further described the pillar box display, stating that the pillars were set inside a standard one and one-half foot diameter flower pot in twelve inches of concrete, and they extended eight inches into the top box, where there were cross pieces to further stabilize the cross beam and that the box set was locked in and did not move. In his affidavit, Larry stated that he had used that display, or similar ones, probably eighty to one-hundred times at other wedding receptions; and, that no display box ever fell or was inadvertently knocked over. In both his deposition and his affidavit, Larry stated that the Ridgeville Hall would not permit him to “brace” the display or secure it to the ceiling in any way.

{¶10} In support of their motion for summary judgment, the Marckels submitted the affidavit of Shook, the disc jockey at the wedding reception, who stated:

I saw Buster Scott get hit by a pillar box display there that evening. I had just gone on break and I was standing

approximately six feet from the "Roman-Ruins" pillar box display. I saw the entire event from start to finish. Some children who appeared to be 8-10 years of age were chasing each other and one or both of these children grabbed a side pole of the pillar box and swung around. When the child did that, the entire display fell forward at a slow speed, and to my eye, the pillar box just barely grazed a man (Buster Scott) who was standing near the display. Mr. Scott was not knocked down. Mr. Scott declined treatment from people who ran up to him, stating "I'm fine."

(Shook Affidavit, ¶2).

{¶11} In May 2007, Shook was deposed and stated that he had worked as a disc jockey for approximately twenty years, doing an average of two weddings each month; that this wedding was a fun wedding with a large crowd, and, like most weddings, had a variety of ages from young to old. He stated that he observed two or three children chasing each other around the pillar and using the pillar "to take a hold of it and spin themselves around while they were playing and chasing each other." (Shook Depo., p. 51-52). Shook further stated that "I watched the children physically knock this display over by swinging on it." (Shook Depo, p. 58).

{¶12} Buster submitted photographs of the pillar box display set up behind the cake table, along with an affidavit verifying the authenticity of the photographs and the fact that it was that display that fell and injured him.

{¶13} In support of their memorandum in opposition to summary judgment, the Scott's included an affidavit from Douglas L. Oliver. Dr. Oliver

included his resume which showed that he had a Ph.D. in mechanical engineering; that he was a professional engineer; that he worked as an associate professor; and, that he was an attorney. He stated that his investigation of the accident consisted of reviewing the depositions, photographs and documents that had been filed in this case. Dr. Oliver stated that the Marckels had not established that the inward tapering twelve-inch diameter base was sufficient for the stability of the backdrop system; that “[f]lower pots are not intended to give structural stability to tall, heavy structures”; that using a broader base would have provided more stability to the system; that the display should have been designed so that it would be highly unlikely to fall; and that “[t]he negligent design of the display at issue made the structure unreasonably dangerous because the structure was, in layman’s terms, ‘top heavy’” and “was the proximate cause of Buster Scott’s injuries.” (Oliver Affidavit, pp. 2-3).

{¶14} In November 2007, the trial court granted the Marckels’ motion for summary judgment and dismissed the case finding that the evidentiary materials before the court did not create a genuine issue of material fact that the Marckels knew, or should have known, that the pillar box display created a dangerous or hazardous condition under the circumstances.

{¶15} It is from this judgment that the Scotts filed their notice of appeal on December 12, 2007. On December 29, 2007, Buster Scott died.² Shortly thereafter, Plaintiffs/Appellants filed a Suggestion of Death and a Motion to Substitute Party. In February 2008, the trial court granted the motion and ordered Mary, Administrator of the Estate of Buster Scott, substituted as the party plaintiff for Buster. This appeal presents the following assignment of error for our review.

**THE TRIAL COURT ERRED BY GRANTING DEFENDANT/
APPELLEE'S [sic] MOTION FOR SUMMARY JUDGMENT.**

{¶16} Mary argues that the trial court erred in granting the Marckels' motion for summary judgment because it was foreseeable that children would be playing at a wedding reception; that a genuine issue of material fact was created by Dr. Oliver's affidavit stating that the Marckels were negligent in the construction of the display; and, that there were inconsistencies in the affidavits and depositions which would preclude summary judgment. We disagree.

Standard of Review

{¶17} An appellate court reviews a summary judgment order de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co.* (1999), 131 Ohio App.3d 172, 175. Accordingly, a reviewing court will not reverse an otherwise correct judgment merely because the lower court utilized different or erroneous reasons as the basis

² There is no indication in the record that Buster Scott's death was related to injuries received in this incident.

for its determination. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distr. Co.*, 148 Ohio App.3d 596, 2002-Ohio-3932, at ¶25, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Ed.*, 69 Ohio St.3d 217, 222, 1994-Ohio-92. Summary judgment is appropriate when, looking at the evidence as a whole: (1) no genuine issues of material fact remain to be litigated; (2) construing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds could only conclude in favor of the moving party, and (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56(C); *Horton v. Harwick Chemical Corp.*, 73 Ohio St.3d 679, 686-687, 1995-Ohio-286. If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95.

{¶18} The party moving for summary judgment has the initial burden of producing some evidence which affirmatively demonstrates the lack of a genuine issue of material fact. *State ex rel. Burnes v. Athens City Clerk of Courts*, 83 Ohio St.3d 523, 524, 1998-Ohio-3; see, also, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; they may not rest on the mere allegations or denials of their pleadings. *Id.* In order to defeat summary judgment, the nonmoving party must produce evidence beyond allegations set forth in the

pleadings and beyond conclusory statements in an affidavit. *Gans v. Express-Med, Inc.* (2001), 10th Dist. No. 00AP-548, 2001 WL 214094.

Negligence Standard

{¶19} It is well-settled that in a negligence suit between private parties, the plaintiff must prove (1) the existence of a legal duty, (2) the defendant's breach of that duty, and, (3) that the breach was the proximate cause of harm and damages. *Nationwide Mut. Ins. Co. v. Am. Heritage Homes Corp.*, 167 Ohio App.3d 99, 2006-Ohio-2789, ¶12. "The existence of duty in a negligence action is a question of law," *Mussivand v. David* (1989), 45 Ohio St.3d at 314, 318, and depends on the foreseeability of the injury. *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 218. Injury is foreseeable if a defendant knew or should have known his actions were likely to result in harm. *Id.* Furthermore, negligent conduct is the proximate cause of injury if the injury is the natural and probable consequence of the conduct, that is, if it was foreseeable. *State Farm Mut. Auto. Ins. Co. v. VanHoessen* (1996), 114 Ohio App.3d 108, 111. "The lack of foreseeability negates both the existence of an underlying duty and the element of proximate cause necessary to establish a prima facie case of negligence." *Stepanyan v. Kuperman*, 8th Dist. No. 88927, 2007-Ohio-4068, ¶7.

Analysis

{¶20} Mary argues that it was foreseeable that wedding receptions often take place in a darkened room with large crowds, alcoholic beverages, loud music, and children running around, and therefore, the display should have been designed and constructed so that “the slightest bump” would not cause it to fall over.

{¶21} We agree that it was foreseeable that there would be crowds and perhaps children running around at weddings, and that displays and furnishings might be inadvertently bumped and jostled. However, in this case, Mary did not present any evidence that the display fell down after receiving “the slightest bump.” In their motion, the Marckels pointed to the uncontroverted sworn statements of the eye-witness to the accident, Shook, who clearly stated that at least one child, if not more, grabbed and spun around and around on the pillar and physically knocked it down. Even with all this forceful activity, Shook explained that the display still did not fall right away, but only started to rock back and forth before it finally slowly fell.

{¶22} The Marckels had used displays just like this at eighty to one hundred weddings in the past, where they were likely subjected to similar crowds and children running around, and yet not one had ever fallen before, even when they were sometimes used in close proximity to crowds on the dance floor. The Marckels had no reason to believe that their display was in any way unstable.

{¶23} The display was weighted down with approximately one-hundred pounds of concrete, and set up close to the wall, in a corner behind the wedding cake table. It had been used on numerous occasions before, under similar conditions, without any incidents. We do not find that it was reasonably foreseeable that children would purposely misuse the pillar box display in this manner and cause it to fall.

Expert Affidavit

{¶24} Mary further contends that summary judgment should not have been granted because Dr. Oliver's affidavit created a genuine issue of material fact. We find that Dr. Oliver's conclusory allegations were not sufficient to overcome the motion for summary judgment.

{¶25} "[I]t is improper for an expert's affidavit to set forth conclusory statements and legal conclusions without sufficient supporting facts." *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App.3d 313, 335-336, Evid.R. 705. A court may correctly disregard legal conclusions contained in an expert's summary judgment affidavits. *Mitchell v. Norwalk Area Health Serv.*, 6th Dist. No. H-05-002, 2005-Ohio-5261, ¶61.

{¶26} Generally, Evid.R. 702 governs the admissibility of expert testimony and provides, in pertinent part:

A witness may testify as an expert if all of the following apply:

- (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
- (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
- (C) The witness' testimony is based on reliable, scientific, technical, or other specialized information.* * *

The party seeking to admit expert testimony bears the burden of establishing the witness' qualifications. *State v. Wegmann*, 3d Dist. No. 1-06-98, 2008-Ohio-622, ¶44; *Crawford v. Crawford*, 3d Dist. No. 14-06-42, 2007-Ohio-3139, ¶55.

{¶27} In determining whether an expert's testimony is reliable, courts must focus their inquiry "on whether the opinion is based upon scientifically valid principles, not whether the expert's conclusions are correct or whether the testimony satisfies the proponent's burden of proof at trial." *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 1998-Ohio-178, at paragraph one of the syllabus (adopting standard and factors set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579). Additionally, to be admissible, the expert testimony must also assist the trier of fact in determining a fact issue or understanding the evidence. *Miller*, 80 Ohio St.3d at 611 (citations omitted).

{¶28} Although several factors should be considered in evaluating the reliability of scientific evidence, the inquiry remains flexible. *Id.* at 611-613. The "ultimate touchstone is helpfulness to the trier of fact, and with regard to

reliability, helpfulness turns on whether the expert's technique or principle [is] sufficiently reliable so that it will aid the jury in reaching accurate results." Id. at 614, quoting *DeLuca v. Merrell Dow Pharmaceuticals, Inc.* (C.A.3, 1990), 911 F.2d 941, 956, (citation omitted).

{¶29} Dr. Oliver based his affidavit solely upon his review of the depositions, affidavits, and pleadings. He did not personally see the pillar box display, nor did he conduct any experiments or tests or submit any type of scientific report. Dr. Oliver did not state how he arrived at his conclusions or what scientific methodology he used to form his opinions. He did not set forth any standards against which we could judge or measure the performance of the display in question. Dr. Oliver stated that the base of the display should have been "broader," but he did not provide any calculations or specify how broad it should have been. He claimed that the display was, "in layman's terms," top-heavy, but did not provide any diagrams or scientific measurements to inform us as to what may have provided increased stability. Dr. Oliver did not provide any evidence concerning how much or how little force would be necessary to knock down the display or cause it to fall over.

{¶30} In summary, we did not find that Dr. Oliver's conclusory statements were based upon any scientific, technical or other specialized information that was beyond the knowledge or experience of lay persons. His affidavit left open more

questions than it answered and would not be helpful to the trier of fact. Unsupported, conclusory statements and legal conclusions do not provide sufficient evidence to overcome a motion for summary judgment.

Alleged Inconsistencies

{¶31} Finally, Mary complains that the affidavits and depositions contained inconsistencies which would preclude summary judgment. We did not find that there were any inconsistencies of material fact that would affect the final outcome. The few inconsistencies that Mary raised did not affect the credibility of the witnesses, but merely reflected minor uncertainties that could occur when a witness is questioned about events that happened more than two years earlier. In any case, even if there were minor discrepancies, we interpreted the facts in the manner most favorable to Mary.

{¶32} Mary has not met her burden of pointing to any specific facts showing the existence of a genuine triable issue. Accordingly, we overrule her sole assignment of error.

{¶33} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

SHAW, P.J. and WILLAMOWSKI, J., concur.

/jlr