

IN THE SUPREME COURT OF OHIO

MARY SCOTT, EXECUTOR OF THE	:	
ESTATE OF BUSTER SCOTT, ET AL.,	:	
	:	On Appeal from the
APPELLANTS,	:	Defiance County
	:	Court of Appeals,
V.	:	Third Appellate District
	:	
ANN MARCKEL, ET AL.,	:	Supreme Court
	:	Case No. 2008-1462
	:	
APPELLEES.	:	Court of Appeals
	:	Case No. 04-07-027
	:	
	:	
	:	

**MEMORANDUM OF APPELLEES
IN RESPONSE TO APPELLANTS'
MEMORANDUM IN SUPPORT OF JURISDICTION**

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**WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST
AND INVOLVES NO SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case involves a decorative background or display that allegedly fell over during a wedding reception. Ann and Larry Marckel, appellees, had placed the display behind the cake at the wedding reception of Buster Scott's granddaughter. The plastic pillars were toppled when misused by active children, allegedly causing injury to Mr. Scott. Both the trial court and the court of appeals found that the appellees breached no duty toward Mr. Scott because it was not foreseeable as a matter of law that the unsupervised children would hang and swing on the display as they did, causing it to slowly fall over.

Appellants claim that there is a substantial question of fact as to the cause of the alleged injury, thus making summary judgment inappropriate. They ask the court to take jurisdiction “to shed light on the correct interpretation of this law.” However, merely asking that this court “shed light” on an issue does not meet their burden of demonstrating proper grounds for this court to take jurisdiction.

Appellants point to no facts or legal concepts that are of public or great general interest. Nor have they identified a substantial Constitutional question. The basic legal principles of negligence, duty and the proximate cause of an injury are well settled. No unique facts or novel legal concepts are identified that would be of interest to others. As to the merits of this particular case, the issues have been thoroughly analyzed by both the trial and appellate courts. No

concepts identified by appellants relating to the proximate cause of an injury warrant further review.

A second issue that appellants claim has great public interest, involves whether the lower courts should have found that the affidavit of a university physics professor regarding the design of the display created genuine issues of fact that warranted a trial. After reviewing photos of the display and the witnesses' depositions, he opined that if the display had been constructed differently it might not have been knocked over by the children. Neither the trial court nor the court of appeals found that this affidavit created a genuine issue of fact regarding the foreseeability of Mr. Scott's alleged injury. Appellants identify as the issue of great public interest the concept that when one gives an expert opinion he need not "lay out every particular for opinion where foundation is a matter of common experience." However, appellants cite no significant issues in this litigation regarding the rules for the admissibility of evidence in the form of an expert's opinion. No unique rulings regarding expert testimony were made. The issues appellants discuss regarding facts suitable as a foundation for the opinions of an expert regarding the proximate cause of an injury have little significance to the greater public.

Therefore, none of the issues identified by appellants are of great general interest. The facts and issues of this specific incident were properly and thoroughly analyzed by the trial court and the court of appeals. Thus, this court should decline to accept jurisdiction for this appeal.

Statement of the Case and Facts

In November, 2004, Appellees Ann and Larry Marckel provided decorations for a wedding reception at the Ridgeville Legion Hall, including a large pillar box display that served as a backdrop for the wedding cake table. Two tall plastic pillars in concrete filled flower pots supported floor-length curtains. According to the Marckels this exact display set had been used on 35 to 40 prior occasions without any signs of instability. (Marckel Aff. ¶¶3-4.) This display set had never been inadvertently knocked over at a reception. Very similarly constructed pillar box displays had been used from 80 to 100 times without incident.

At the time of the alleged injury, children attending the affair abused the display by swinging around as if it was a piece of playground equipment. Because of the children's swinging on the side pillars the display slowly toppled over and struck Buster Scott, the bride's grandfather.

Buster and Mary Scott filed suits against the Marckels, and/or Weddings by Design, seeking to recover for the injuries Buster Scott claimed he incurred as a result of the display's fall. A claim against Ridgeville Legion Hall was voluntarily dismissed without prejudice.

Appellees moved for summary judgment, supported by deposition testimony and affidavits stating that the decorative display had been knocked over by unsupervised children swinging around on the pillars. The Marckels asserted that they had set forth undisputed

evidence that they had breached no duty owing to the Scotts. Appellants responded by claiming that the children's actions at the wedding reception were foreseeable and that the cause of the injury was a question for the jury to decide.

The trial court reviewed the depositions of both defendants and Alvin Shook, a witness, plus the Affidavit of Dr. Douglas L. Oliver, appellants' expert witness. In his affidavit, Alvin Shook, the disc jockey at the wedding reception, stated that he watched as young children chased each other when one or both grabbed a side pole of the pillar box and swung around, causing the entire display to slowly fall forward. (Shook Aff. ¶2.)

Appellant's expert, Douglas L. Oliver, works as an associate professor and has a Ph.D. in mechanical engineering. In his affidavit he stated that he reviewed the depositions, photographs and documents that had been filed in this case. (Oliver Aff. ¶2.) He did not personally examine the site of the accident, nor did he view or measure the pillar box display. He did not examine or perform any tests on the items that allegedly caused Mr. Scott's injuries. Nevertheless, he opined that the plastic pillars anchored by cement in large flower pots were unstable and top heavy, and could have been designed differently. (Oliver Aff. ¶8.)

The trial court granted appellees' motion for summary judgment, finding that they breached no duty owed to Buster Scott because the children's abusive behavior was not foreseeable. The conclusory affidavit of appellants' expert was deemed not relevant to the foreseeability and duty issues. Having conducted a de novo review, the court of appeals affirmed the trial court's summary judgment of dismissal, finding that given the undisputed facts appellees were not negligent as a matter of law.

**ARGUMENT IN RESPONSE TO
APPELLANTS' PROPOSITIONS OF LAW**

Appellants' Proposition of Law No. I:

“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.”

Appellants claim that summary judgment was not warranted under Civ.R. 56 because there are genuine issues of fact regarding the proximate cause of Bust Scott's alleged injuries that must be resolved by a trier of fact, citing cases where various courts of appeal found that a trial was warranted. However, appellants point to no admissible evidence in the record whereby the Marckels had any cause to foresee that the children's rough play would push over the display. Unlike the cases appellants cite, under these facts the trial court and the court of appeals properly found that appellees' motion for summary judgment was well taken.

To establish a negligence claim, appellants must show the existence of a duty, a breach of that duty, and an injury proximately resulting therefrom. *Meniffee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318. The duty element of negligence is a question of law for the court to determine. *Id.* The common-law duty of due care is that degree of care which an ordinarily reasonable and prudent person exercises, or is accustomed to exercising, under the same or similar circumstances. *Id.* at 319

This court has ruled that the foreseeability of the potential for harm remains paramount: “Under the law of negligence, a defendant's duty to a plaintiff depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position.” *Simmers v. Bentley Constr. Co.*, (1992), 64 Ohio St.3d 642, 645. The crucial legal issue of foreseeability is whether a reasonably prudent person should have known that someone would likely be injured. *Huston v. Koniczny*, (1990), 52 Ohio St.3d 214, 217.

Appellants argue that the trial court and the court of appeals improperly granted appellees' summary judgment motion on the issue of proximate cause. They claim that there is a genuine issue as to the cause of the injury, which can only be resolved by a trial. First, a court may properly grant summary judgment on the issue of proximate cause if the evidence is such that reasonable minds could not differ. For example, this court ruled that issues of comparative negligence need not be resolved by the trier of fact if the evidence is so compelling that reasonable minds can reach but one conclusion. *Simmers v. Bentley Constr. Co.*, *supra*, at 646.

More importantly, the courts in this case analyzed the facts in light of the foreseeability of the alleged injury. The court of appeal's decision at ¶19 quoted *Stepanyan v. Kuperman*, 8th Dist. No. 88927, 2007-Ohio-4068, ¶7: “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.” Accordingly, if the nature of the injury was not reasonably foreseeable to appellees, as a matter of law they owed no duty to Buster Scott. The issue of proximate cause need not be addressed. As stated, the existence of a duty is a question of law and, thus, appropriate for summary judgment. *Mussivand v. David*, *supra*.

There was no evidence that the appellees should have anticipated that an injury was likely to result from the erection and normal use of the pillar box display. Therefore, the duty element of negligence has not been satisfied as a matter of law. The trial court determined that given their lack of actual or constructive knowledge of any dangerous conditions created by them, as a matter of law appellants breached no duty owed to Buster Scott. The court of appeals affirmed the trial court's granting of summary judgment dismissing the cause, finding at ¶23 that: "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." Thus, given their relationship to Buster Scott and the fact that injury to someone in his position could not reasonably be foreseen, the Marckels were not negligent as a matter of law because they breached no duty.

Therefore, given that there was no evidence that appellees should have anticipated that an injury was likely to result from the erection and normal use of the pillar box display, the trial court and the court of appeals properly found that appellees breached no duty to Buster Scott. Given the lack of any previous incidents with the display in many similar settings, together with its gross abuse by unsupervised children at the time at issue, as a matter of law the incident and alleged injury were not reasonably foreseeable by appellees. Thus, because the granting of appellees' motion for summary judgment was proper, appellant's first proposition of law is without merit.

Appellants' Proposition of Law No. II:

“In Granting a Motion for Summary Judgment, a Court Cannot Disregard a Expert Affidavit Because it Fails to Detail Every Single Step in the Expert's Scientific Analysis.”

Appellants attempt to rebut the evidence submitted in support of appellees' motion for summary judgment with the affidavit of a college professor. He looked at the pictures of the display and the descriptions given in the depositions and opined that the pillar box display was unstable. However, he did not perform any tests on the items that allegedly caused Mr. Scott's injuries. He did not even personally inspect the pillar box display. Neither the trial court nor the court of appeals found that the facts and opinions expressed rebutted the undisputed facts that appellees had no reason to foresee the incident that allegedly caused Mr. Scott's injuries.

It is not enough for an expert to state a conclusory opinion as to the ultimate legal issue in a given case. Rather, the expert must recite the admissible facts that he has considered, and explain his opinion in a manner that will assist the trier of fact. Evid.R. 703 limits the nature of the facts upon which such an opinion can be based:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing.

Further, Evid.R. 705 provides:

The expert may testify in terms of opinion or inference and give his reasons therefore after disclosure of the underlying facts or data. * * *

This court has determined that there is compliance with Evid.R. 703 where the expert's opinion is based either upon facts or data perceived by him or admitted in evidence. *State v. Craig* (2006), 110 Ohio St. 3d 306, ¶77. Disclosure of the facts or data that were relied upon must precede the statement of the expert's opinion.

The trial court in its judgment entry of November 14, 2007, dismissed the opinions in Dr. Oliver's Affidavit as being conclusions based upon causation in fact only, finding that: "Nothing in his affidavit established the foreseeability which would be required to charge these [appellees] with negligence."

The court of appeals described Dr. Oliver's expert opinion at ¶29 as follows:

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.

Thus, the court of appeals found that the affidavit did not create a question of fact regarding the foreseeability of the injury. Like the trial court, it found that his bare conclusory statements were

not sufficient to overcome appellees' evidence in support of their motion for summary judgment.

Courts have held that merely submitting an affidavit from a purported expert does not preclude the granting of otherwise appropriate summary judgment. For example, it was stated that "a conclusory averment in an affidavit is not sufficient to raise a factual dispute in a summary judgment exercise. [citations omitted]." *Peterson, Ibold & Wantz v. Whiting* (Geauga County 1996), 109 Ohio App. 3D 738, 742. Likewise, the Tenth District Court of Appeals upheld the granting of the defendant's summary judgment motion in an elevator injury case even though the plaintiffs submitted the affidavit of an engineer. The court found that an engineer's affidavit could not defeat a motion for summary judgment if it did not set forth specific facts that identified a dispute requiring resolution by a trier of fact:

Paragraph one of the Harkness affidavit merely states Harkness received a Ph.D. and was a registered professional mechanical engineer retained by plaintiffs to issue an opinion in this case. * * *

Moreover, this defect of the Harkness affidavit in failing to establish a sufficient foundation for his testimony as an expert is compounded by the perfunctory nature of the statements contained in the following five paragraphs of the affidavit. It is axiomatic that even a properly qualified expert may not give testimony which merely contains conclusions of law without supporting facts. [citation omitted.] *Davis v. Schindler Elevator Corp.* (Cuyahoga Co. 1994), 98 Ohio App. 3D 18, 21.

Thus, to properly place material facts at issue the expert must give an opinion on the specific facts that are relevant to the cause before the court. An expert's affidavit cannot defeat a motion for summary judgment by merely focusing on the ultimate legal issue.

Likewise, the affidavit in this case mainly contains perfunctory statements and

conclusions of law, with few if any supporting facts. The crucial issue in this case is whether appellees should have known that the pillar display created an unreasonable danger if it was used as intended. The trial court and the court of appeals considered the fact that this or similar displays had been used at dozens of wedding receptions without incident. Without making any tests, appellants' expert merely said that it looked top heavy. He proffered no facts that would have caused a reasonable person to believe that the display was unreasonably dangerous when used as it was intended. Dr. Oliver made some obvious common-sense observations, such as that an item that tapers inward, like the flower pot at issue, is less stable than an item that tapers outward. (Oliver Aff. ¶¶5-6.) He did not explain the nature or extent of the force needed to upset this particular pillar, facts that could assist the trier of fact in determining whether there was a legitimate issue as to whether the fall was foreseeable. He also stated that nothing prevented appellees from using a broader diameter base, another "opinion" easily understood by the average juror without the aid of an expert. (Oliver Aff. ¶5.) However, he points to no facts which would cause appellees to have had any reason to believe that a different base for the flower pots was warranted. Instead, Dr. Oliver merely offered his legal opinion and conclusion as to the "proximate cause" of the injury, all but ignoring the central issues of duty and the foreseeability of the alleged injury.

Appellants discuss the nature of expert testimony, and the basis required for such an opinion in Evi.R. 703. However, neither the trial court nor the court of appeals made an evidentiary ruling regarding the expert's affidavit. Both courts properly found that the affidavit did not create a genuine issue as to a material fact that warranted a trial. Despite their many

pages of argument, appellants can point to no part of their expert's affidavit that creates a genuine issue as to a material fact regarding the foreseeability of the harm and the breach of any duties owed by appellees.

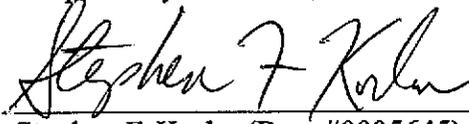
Both the trial court and the court of appeals based their decisions on the issue of foreseeability. Dr. Oliver's expert's affidavit does not set forth facts on this issue that require consideration at trial. Thus, both the trial court and the court of appeals properly found that the affidavit created no sufficient question of a material fact so as to defeat the motion for summary judgment.

Conclusion

In conclusion, the issues in this cause were fully and correctly determined by the trial court and the court of appeals. Both courts properly found that no genuine issue exists as to any material fact. As there is no evidence that the appellees should have anticipated that an injury was likely to result from the erection and normal use of the pillar box display, the duty element of negligence has not been satisfied as a matter of law.

The rights of the parties to this suit have been given due and proper consideration. No issues of greater significance have been presented. Therefore, this court must decline to accept jurisdiction for this appeal.

Respectfully submitted,

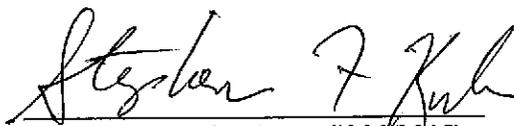


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Certificate of Service

I certify that on the 8th day of August, 2008, a true copy of the foregoing MEMORANDUM OF APPELLEES IN RESPONSE TO APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION was served upon appellants' attorneys by regular U.S. Mail addressed as follows:

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