

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
FAYETTE COUNTY

NATIONWIDE AGRIBUSINESS INSURANCE COMPANY,	:	
Plaintiff-Appellant,	:	CASE NO. CA2011-06-012
	:	<u>OPINION</u>
- vs -	:	1/23/2012
	:	
J.D. EQUIPMENT, INC., et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS  
Case No. 09 CVH 00354

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**PIPER, J.**

{¶1} Plaintiff-appellant, Nationwide Agribusiness Insurance Co. (Nationwide), appeals the decision of the Fayette County Court of Common Pleas, granting summary

judgment in favor of defendant-appellee, J.D. Equipment, Inc. (Equipment) and defendant-appellee, J&D Implement, Inc. (Implement). We affirm the decision of the trial court.

{¶2} Ray Sponcil and his father, Ollie Sponcil, each farm more than 1,000 acres, divided among several parcels of land. On one of the parcels owned by Ollie, the Sponcils have a storage facility, straw barns, and grain bins. The Sponcils also stored large farm equipment in a barn on the property. One such piece of equipment was a John Deere telehandler, used to load and unload bales of hay and straw. Ray purchased the telehandler used from Equipment in April 2006. Equipment had located the telehandler at Implement's store in Michigan, purchased the telehandler from Implement, and then sold the telehandler to Ray Sponcil "as is" and without any warranties.

{¶3} On August 11, 2007, the barn in which the Sponcils stored the telehandler caught fire. Ray arrived at the barn, and tried to extinguish the fire, which he stated was emanating from the rear engine compartment of the telehandler. Ray was unsuccessful at extinguishing the fire or stopping it from spreading, but was able to remove several pieces of farm equipment from the barn before it was engulfed by the fire.

{¶4} An investigation revealed that the fire started in the left side of the telehandler's engine compartment, attributed to failure of the positive battery cable. Over time, vibration during the telehandler's operation caused the positive battery cable to move against the left side of the engine block, causing damage to the protective plastic sleeve. Once the sleeve melted, the wire inside became contaminated with debris and caused leakage between the damaged positive battery cable and the left side of the engine block. Eventually, the resulting "contact-heat" ignited combustible material within the telehandler and surrounding hay and agricultural products in the Sponcil barn. The fire resulted in \$402,768.84 in damages to the Sponcils' farming businesses.

{¶5} An engineer from John Deere testified that at the time of the fire, the location of

the telehandler's positive battery cable was not in accordance with design plans, and that the cable had been rerouted at some point after leaving John Deere's manufacturing plant. Service records indicated that Equipment serviced the telehandler on four occasions after Ray purchased it, but that none of the four service procedures involved the battery cables. Records also indicated that Implement replaced the battery in the telehandler sometime prior to selling it to Equipment. However, deposition testimony established that the technician changing the battery would not see the positive battery cable where it connects to the starter. While the Sponcils performed regular maintenance on the telehandler, such as oil changes and adding fluids, the Sponcils never repaired the telehandler or touched the positive battery cable.

{¶6} Nationwide paid the Sponcils' claim, and then sought subrogation from Equipment and John Deere. During initial discovery, Nationwide discovered that Implement had serviced the telehandler before selling it to Equipment. Nationwide was therefore given leave to file an amended complaint to include Implement as a party. In the amended complaint, Nationwide alleged that John Deere defectively designed, manufactured, and constructed the telehandler. Nationwide alleged that Equipment negligently failed to repair a defective component, negligently failed to detect and replace the defective component, and should have known that the telehandler was unfit for its intended use and was therefore not merchantable. Nationwide alleged that Implement negligently failed to detect and replace the defective component and that the telehandler did not conform to representations Implement made at the time it sold the telehandler to Equipment.

{¶7} Implement and Equipment filed motions for summary judgment, and the trial court granted the motions after finding that Nationwide failed to identify genuine issues of material fact regarding Implement and Equipment's negligence. Nationwide then dismissed John Deere from the suit in order to appeal the trial court's grant of summary judgment

specific to Implement and Equipment. In support of its appeal, Nationwide now raises two assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "[sic] TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT BECAUSE QUESTIONS OF MATERIAL FACT EXIST."

{¶10} Nationwide argues in its first assignment of error that the trial court erred in granting summary judgment in favor of Implement and Equipment because genuine issues of material fact remain regarding the companies' negligence.

{¶11} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d 881, 887. Civ.R.56 sets forth the summary judgment standard and requires that (1) there be no genuine issues of material fact to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶12} The nonmoving party "may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue." *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389. A dispute of fact can be considered "material" if it affects the outcome of the litigation. *Myers v. Jamar Enterprises* (Dec. 10, 2001), Clermont App. No. CA2001-06-056, 2001 WL 1567352 at \*2. A dispute of fact can be considered "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. *Id.*

{¶13} To avoid summary judgment in a negligence action, a plaintiff must show that (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty of

care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. Thus, in order to avoid summary judgment in Implement and Equipment's favor, Nationwide was required to set forth specific facts to demonstrate that Implement and Equipment owed and breached a duty of care.

{¶14} The record is clear that Nationwide failed to set forth any genuine issues of material fact because it is unable to demonstrate that any one party was responsible for altering the telehandler, or that any party breached a duty it may have owed the Sponcils. Even if we construe the facts in a light most favorable to Nationwide and assume that the battery cable had in fact been altered, and that the misrouted cable was the cause of the fire, the record does not contain any evidence to establish which party was responsible for re-routing the battery cable.

{¶15} The record contains the depositions of several witnesses, all of whom testified that they did not have *any* knowledge regarding a possible rerouting of the positive battery cable, or any servicing or use of the telehandler that would cause the battery to start a fire.

{¶16} Both Ray and Ollie Sponcil testified that they did not perform any service on the telehandler that would have required moving or even touching the battery cables. Instead, the Sponcils limited their contact with the telehandler to its normal usage for lifting and moving bales of hay, and to regular maintenance that did not require contact with the battery.

{¶17} Several Equipment employees were also deposed, but had no knowledge of the battery cable being rerouted, or how the telehandler caught on fire. Terry Lee Atherton, a service manager for Equipment, testified he had no knowledge of whether the battery cable was improperly placed at the time the telehandler was sold to Ray Sponcil, or in what position the battery cable was after it had been serviced by Implement. Bryan VanDyne, another service manager with Equipment, testified that he could offer no opinion regarding the cause

of the fire, and that he had no knowledge of whether Implement or Equipment did anything to the engine or battery that would cause the fire.

{¶18} William Floyd Anderson, a technician who works for Equipment, testified that he was not present when the telehandler was sold to Ray, and that he had never personally inspected the machine. Anderson also testified that he neither had any particular knowledge as to what caused the fire, nor had serviced the telehandler in any way that would require moving the battery cables.

{¶19} John Rolfe, a salesman with Equipment, testified that he sold the used telehandler to Ray, and that the sale was "as is" with no warranties attached to the transaction. Rolfe also stated that he did not know whether the Sponcils had ever adjusted the battery on the telehandler, and did not have any knowledge of the various positioning of the components of the telehandler's engine in order to state whether the battery cable had been rerouted.

{¶20} The parties also deposed a witness from John Deere in order to establish whether or not the engine cable had been moved. Marlin Onnen, an engineer with John Deere, testified that he believed the battery cable had been rerouted since its manufacture in the John Deere plant based on manufacturing plans regarding where the cable was designed to be. However, Onnen had no knowledge regarding Spocils' specific telehandler, any knowledge regarding any rerouting that may have occurred, or who was responsible for such rerouting. Onnen also stated that he had not seen photographs of the positioning of the battery cable prior to the fire.

{¶21} To advance its argument in the face of no evidentiary support, Nationwide asks this court to make inferences that the fire was caused by an improperly rerouted cable, and that someone had to have rerouted the cable. Nationwide asserts that the "someone" could

be Implement or John Deere and asks this court to infer as much.<sup>1</sup> However, the summary judgment standard does not permit such inference stacking, and "an inference of negligence can arise only upon the proof of some fact from which such inference can be reasonably drawn and it can never arise from mere guess, speculation, or wishful thinking." *Parras v. Standard Oil Co.* (1953), 160 Ohio St. 315, paragraph two of the syllabus.

{¶22} While Nationwide has offered its speculation that someone altered the telehandler's battery cables at some point before the fire began, the record does not contain any evidence that either Implement or Equipment is that party. Moreover, the witnesses deposed had no knowledge of any altering of the battery cables, and not one witness could state when the rerouting occurred. The record is clear that the telehandler was purchased used, and was sold "as is." The witnesses had no knowledge regarding whether the rerouting happened before or after Implement accepted the telehandler from the original owner, what the original owner did with the telehandler before Implement possessed it, or what service was performed by outside parties during the original owner's possession period.

{¶23} Nationwide also argues that an issue of genuine fact arises based on the legal principle of *res ipsa loquitur*, translated as "the thing speaks for itself." Nationwide asserts that the doctrine applies because the cable being rerouted must be attributed to an action of *some party*, and because the rerouted cable is circumstantial evidence that *someone* was negligent. However, the fact remains that there is nothing in the record but Nationwide's speculation as to who rerouted the cable. For *res ipsa loquitur* to apply, however, the party whose negligence leads to injury must be readily identifiable.

{¶24} "A plaintiff must establish two elements for the doctrine of *res ipsa loquitur* to

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1. During oral arguments before this court, Nationwide conceded that the record did not contain any evidence that Equipment was negligent in rerouting the cable, and therefore opined that either Implement or John Deere had to have been the party to negligently reroute the cable.

apply: '(1) [t]hat the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, *under the exclusive management and control of the defendant*; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed.'" (Emphasis added.) *Estate of Hall v. Akron General Medical Center*, 125 Ohio St.3d 300, 2010-Ohio-1041, ¶ 27, quoting *Hake v. The George Wiedemann Brewing Co.* (1970), 23 Ohio St.2d 65, 66-67. As previously stated, the record does not indicate who rerouted the cable, when the cable was rerouted, or who had exclusive control of the telehandler when the cable was rerouted. Res ipsa loquitur is inapplicable to the case at bar.

{¶25} Nationwide next argues that genuine issues of material fact remain as to whether Equipment and Implement were engaged in a joint venture. Nationwide asserts that because Equipment and Implement are a joint venture, either party's liability is sufficient to establish genuine issues of material fact.

{¶26} According to the Ohio Supreme Court, a joint venture is "an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill and knowledge, without creating a partnership, and agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each co-adventurer shall stand in the relation of principal, as well as agent, as to each of the other co-adventurers." *Al Johnson Construction v. Kosydar* (1975), 42 Ohio St.2d 29, paragraph one of the syllabus.

{¶27} While the record indicates that Equipment and Implement are both authorized John Deere dealers and cooperated with each other in order to be more profitable individually, such cooperation does not raise any issues of fact regarding whether the two companies were a joint venture. The record establishes that the two companies share a



common owner, use the same law firm, the same accounting firm, the same 401(k) program, and used the same medical insurance provider. The companies could access the other company's inventory information, and could call each other directly through the phone system without acquiring an outside line. Nevertheless, these similarities or shared resources simply made the business relationship the two companies shared more efficient and made customer service for each company more effective. Similarity in individual business pursuits does not establish the intent to create a single business venture. Mere cooperation and usage of common resources are equally insufficient to establish joint venture.

{¶28} The two companies did not share any profits or expenses, nor did either company stand in the relation of principal or agent to the other company. The deposition testimony established that Equipment had to first purchase the telehandler from Implement before it could sell the machine to Ray Sponcil. The testimony also established that the business relationship between Equipment and Implement required the purchasing company to pay full price to the other company, absent any profit sharing or discounts. The companies did not share employees, had separate states of incorporation, and operated as separate entities. Equipment also sought management services from Implement, and Implement charged Equipment for such services. The record is clear that the two companies were not a joint venture as defined by the Ohio Supreme Court.

{¶29} Having found that there are no genuine issues of material fact to be litigated, and that Equipment and Implement are entitled to judgment as a matter of law, Nationwide's first assignment of error is overruled.

{¶30} Assignment of Error No. 2:

{¶31} "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT GRANTED SUMMARY JUDGMENT."

{¶32} In Nationwide's second assignment of error, it claims that the trial court erred in

granting summary judgment because the exclusion of the implied warranty of merchantability cannot include latent defects, and because the Sponcils' damages occurred within the four-year statute of limitations.

{¶33} During oral arguments, however, Nationwide conceded that "in good conscious" it could not pursue the implied warranty issue. Nationwide's counsel stated that once he reviewed the record, the evidence established that Equipment's "as is" sale "would in fact get them off this case" unless this court were to find that Equipment and Implement were a joint venture. Our analysis under the first assignment of error established that Implement and Equipment are not a joint venture. Nationwide also conceded that it had not made the latent defect argument to the trial court. Therefore, Nationwide's implied warranty argument is considered withdrawn. Moreover, there is nothing in the record to demonstrate that a latent defect argument would have succeeded. Nothing in the record suggests that Equipment or Implement breached a duty to warn of a latent defect, as the record is void of any evidence that Equipment or Implement knew of the rerouted battery cable.

{¶34} The remaining issue within the second assignment of error is whether Nationwide's suit is barred by the applicable statute of limitations. However, our disposition of the first assignment of error renders Nationwide's argument moot because our previous discussion demonstrates that Equipment and Implement are entitled to judgment as a matter of law, regardless of the timing of the suit.

{¶35} The second assignment of error is overruled.

{¶36} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.