[Cite as *Fink v. J-II Homes, Inc.*, 2006-Ohio-3083.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

MELISSA J. FINK, et al.,	:	
Plaintiff-Appellants,	:	CASE NO. CA2005-01-021
vs.	:	O P I N I O N 6/19/2006
J-II HOMES, INC., et al.,	:	
Defendant-Appellees.	:	

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CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV03-01-0088

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BROGAN, J. (By Assignment)

{¶1} In this case, plaintiffs-appellants, Melissa and John Fink, appeal from a trial court decision granting summary judgment in favor of defendants, J-II Homes, Inc. (J-II), Pennco, Inc. (Pennco), and United Sash and Door Co. (United Sash). The Finks also appeal from summary judgments granted to third-party defendants, Donna Spurlock Windows (Spurlock) and Texler Construction Co. (Texler).

{¶2} On January 10, 2003, the Finks filed a complaint against the above defendants, as well as Jeff and Staci Rutherford, based on an injury Melissa Fink sustained at the Rutherfords' home on January 13, 2001. The facts, construed most strongly in the Finks' favor, indicate that Melissa fell from a ladder while helping Staci "faux-paint" the Rutherfords' family room. Melissa claimed that she only "brushed" a window next to the ladder as she fell. However, the window broke and caused a severe injury to Melissa's right forearm. The broken glass was apparently discarded by a neighbor, who cleaned up the debris while everyone was at the hospital with Melissa. The Rutherfords' insurer also repaired the window within a few days after the accident. Consequently, there was no physical evidence that could be examined. Staci also had her back turned when the accident occurred, and did not see how it happened.

{¶3} The window that broke was a double-pane window manufactured by Pennco and distributed by United Sash. It was placed in the Rutherford home as part of the home's original construction in 1999. J-II was the general contractor for the construction, Texler performed framing work, and Spurlock installed the windows. There is no evidence in the record about who actually selected the windows. For purposes of evaluating the summary judgment, we will assume that J-II chose the window manufacturer.

{¶4} Jeff and Staci Rutherford moved into the house on March 10, 1999, when construction was complete. On the six-month "punch list," Staci noted that there was a crack in a large window in the basement. Staci testified that she did not know if her children had thrown

a toy at the window or if they had simply missed the crack during inspection. In any event, J-II replaced the window. After that time, Staci had one other problem with a window pane cracking. In December 1999 or January 2000, Staci saw a pane in a family room window spontaneously crack into pieces that looked like a spider's web. The pieces did not fall out of the window. J-II sent a repairman, who told Staci that windows sometimes break due to differences in indoor and outdoor temperatures.

{¶5} Staci also notified J-II about some windows that weren't opening and shutting correctly, but the problem ended up being that concrete had gotten into the tracks of the windows during construction. This issue was readily fixed when the concrete was removed, as was a problem with a window sill in the study, which was replaced. Between January 2000, and the accident on January 13, 2001, the Rutherfords did not have any further problems with the windows. Apparently, one window in a neighbor's house had also cracked when the neighbor tapped on the window.

{¶6} On the day in question, Staci and Melissa worked from about 10:30 a.m. until 4:30 p.m., doing faux painting in the family room. They took about an hour break for lunch, and were almost finished when Melissa fell. At the time, Melissa was about 5'9" and weighed about 200 pounds. Melissa was several rungs up on a ladder that was located about a foot to the right of the window. She had her left hand on the ladder and was using her right hand to hold an object called a "woolly." Melissa was tapping the woolly against wet paint on the walls to create a wallpaper-like effect.

{¶7} During her deposition, Melissa said she did not know how she fell, but just felt the ladder give. She did not recall telling hospital personnel that she fell because she was leaning over too far. In any event, when she fell, she tried to brace herself against the top of the window sill. She said her hand "brushed up" against the window and her forearm went through the inner pane, cutting her arm. The inner pane was broken, but the outer pane of the window was still

intact. This was the same window in which Staci had previously seen a spontaneous crack. However, that crack was in a lower pane, while this incident involved the top part of the window.

{¶8} After the injury, the Finks sued J-II, Pennco, and United Sash, claiming negligent construction of the Rutherford home, breach of warranty in failing to construct the home in a workmanlike manner, and negligent manufacture and installation of the windows. They also included a products liability claim against Pennco and United Sash for defective manufacture, design, and construction of the window. And finally, they sued the Rutherfords, for negligently failing to warn of the unreasonably dangerous nature of the window. After suit was filed, J-II added Texler and Spurlock as third-party defendants.

{¶9} Sal Malguarnera was an expert retained by the Finks. Malguarnera inspected the Rutherford home on May 24, 2001. However, because the glass had been replaced, Malguarnera could not determine what caused the glass to break. He also did not know if the window that broke in the incident was the original manufactured window or whether it may have been replaced.

{¶10} Malguarnera stated that the possibilities for the problem with the window were: (1) a defect in the window components; (2) improper manufacturing or assembly of the windows; (3) improper installation of the windows; or (4) improper construction of the house. Malguarnera said, however, that it was impossible to determine precisely which defect or defects were responsible for the failure of the window because the remains of the pane had been discarded. In his deposition, Malguarnera additionally said that he could not find one alleged defect more probable than the others.

{¶11} After considering the evidence, the trial court granted summary judgment in favor of the third-party defendants and all defendants except the Rutherfords, who were subsequently dismissed without prejudice to a new action. The trial court found that the inability to show individual negligence precluded the Finks from relying on the theory of alternative liability. The

court also rejected the application of R.C. 2307.73 because the case did not involve only the type of defect mentioned in the statute. Further, the court found that the Finks could not rely on *res ipsa loquitur* because some of the possible causes may not have been actual causes of the window's condition.

{¶12} On appeal, the Finks contend, in a single assignment of error, that the trial court erred in granting summary judgment to J-II, Texler, Spurlock, Pennco, and United Sash. The Finks have included four sub-arguments within the assignment of error, and we will discuss each argument separately.

{¶13} After considering the facts and applicable law, we find the sub-arguments and assignment of error without merit. Accordingly, the judgment of the trial court will be affirmed.

I

{¶14} In the first sub-argument, the Finks claim that there are genuine issues of material fact for trial on the issue of J-II's liability under the warranty of workmanlike performance. As we have noted many times, our review of trial court decisions on summary judgment is *de novo*, which means that "we apply the standards used by the trial court." *Brinkman v. Doughty* (2000), 140 Ohio App.3d 494, 496. Trial courts will appropriately grant summary judgment where they find "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶15} The Finks claim that J-II should not have received summary judgment because builders in Ohio are liable for injuries caused by the builder's choice of incompetent subcontractors and defective materials. In this regard, the Finks rely on the following excerpt from *Mitchem v. Johnson* (1966), 7 Ohio St.2d 66, in which the Ohio Supreme Court said that:

{¶16} "[a] duty is imposed by law upon a builder-vendor of a real-property structure to construct the same in a workmanlike manner and to employ such care and skill in the choice of materials and work as will be commensurate with the gravity of the risk involved in protecting the structure against faults and hazards, including those inherent in its site. If the violation of that duty proximately causes a defect hidden from revelation by an inspection reasonably available to the vendee, the vendor is answerable to the vendee for the resulting damages." Id. at paragraph three of the syllabus.

{¶17} *Mitchem* was an action between a builder and purchaser of a home where the purchaser sued because of alleged defects in workmanship. The Supreme Court rejected the idea that the builder was an insurer, and held that builders are not responsible for an implied warranty to vendees that uncompleted buildings will be suitable for the intended purpose when they are finished. Instead, the court held that builders are liable to vendees for failing to disclose what they should have known, i.e., "a fault hidden from revelation by an inspection reasonably available to the vendee and caused by poor workmanship or materials or both." Id. at 66. The court stressed that the plaintiff had the burden of showing "a lack of good workmanship, that is, ordinary care employed by the builder under all of the circumstances, and that such lack of good workmanship proximately caused the damage." Id. at 72.

{¶18} In *McMillan v. Brune-Harpenau-Torbeck Builders, Inc.* (1983), 8 Ohio St.3d 3, syllabus, the Ohio Supreme Court held that privity of contract is not a necessary element of negligence actions by vendees against builder-vendors. While this extended the duty in *Mitchem* to subsequent vendees, the court again stressed that vendors are not strictly liable for defects, and that vendees are required to prove "traditional negligence elements." Id. at 4.

{¶19} The cases applying *Mitchem* typically have involved claims by vendees based on construction defects. This does not mean that a contractor has no liability for injury to third parties; it simply means that *Mitchem* is not particularly relevant. In *Jackson v. City of Franklin*

(1988), 51 Ohio App.3d 51, 53, we noted that:

{¶20} "It is now the almost universal rule that the contractor is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done. * * * This applies not only to contractors doing original work, but to supervising architects and engineers as well."

{¶21} *Jackson* was a wrongful death action brought by the mother of a child who had died while swimming in a municipal pool. The mother sued the contractor, alleging that the contractor was negligent in constructing the pool because the placement of the lifeguard chairs created a dangerous condition in that guards did not have a clear, unobstructed view of the pool bottom. We held that the contractor, who had followed specifications and designs provided to it, was not liable in the absence of an obvious defect such that no reasonable contractor would have built the pool and appurtenances as designed. Id. at 55.

{¶22} The problem in the present case is that there is no evidence indicating why the window broke. It could have been a manufacturing defect or defect in design that would not have been obvious to the contractor, and for which the contractor would not be liable. Unfortunately, there is simply a lack of evidence to indicate which party, if any, committed an act that proximately caused the injury. Accordingly, the first sub-argument is without merit.

II

{¶23} In the second sub-argument, the Finks contend that there were genuine issues of material fact regarding the liability of Pennco and United Sash under the products liability statute. Specifically, the Finks claim that they have presented sufficient circumstantial evidence to establish under R.C. 2307.73 that the windows were defective.

{¶24} Under R.C. 2307.73(A), manufacturers may be held liable for compensatory damages if a claimant establishes by a preponderance of the evidence that a product is defective in one of four ways, including manufacture or construction, design or formulation, or

inadequate warnings. The defect must also proximately cause the injury to the plaintiff. Subsection (B) of R.C. 2307.73 further provides that:

{¶25} "If a claimant is unable because a product in question was destroyed to establish by direct evidence that the product in question was defective or if a claimant otherwise is unable to establish by direct evidence that a product in question was defective, then, consistent with the Rules of Evidence, it shall be sufficient for the claimant to present circumstantial or other competent evidence that establishes, by a preponderance of the evidence, that the product in question was defective * * *."

{¶26} The ability to use circumstantial evidence does not relieve parties from establishing causation. See *State Farm Fire & Casualty Co. v. Chrysler Corp*. (1988), 37 Ohio St.3d 1, 7. In *Chrysler*, an auto that was only six months old caught fire when it was parked, turned off, and left unattended in the owners' garage. Id. at 2. Between the date of purchase and the fire, the auto had a history of electrical repairs, and the owner had also complained to the dealer about a burning smell and trouble with the auto within a few days of the fire. Id. at 2-3. Experts testified that the fire was electrical and originated in the area of the dashboard or instrument panel. However, due to the damage to the car, the experts were not able to identify the particular wires that were energized. The defendants ultimately received a directed verdict, based on plaintiffs' failure to prove that a specific defect caused the fire. In addition, the trial court held that proof of repairs made pursuant to the warranty did not permit an inference of negligent repair or that something was inherently defective in the electrical system. Id. at 4.

{¶27} On appeal, the Ohio Supreme Court noted that,

{¶28} "[a]s applied to manufacturing defect cases, evidence of unsafe, unexpected performance of a product, while sufficient to infer the existence of a defect, satisfies but one of the three elements necessary for recovery. Plaintiffs are still required to demonstrate by a preponderance of direct or circumstantial evidence that the claimed defect was present when

the product left the hands of the manufacturer and proximately caused the accident." Id. at 6-7.

{¶29} The court found that plaintiffs had not satisfied this burden, because absent speculation, reasonable minds could not differ on whether some defect was present when the vehicle left the manufacturer. In this regard, the court observed that "[i]t is equally likely that the defect arose as the result of negligent repair" when the dealer removed the dashboard of the car. Id. at 9. The court also rejected the negligence claim against the dealer, because there was no evidence that the car had been rendered defective by the dealer's repair efforts. Id. at 10.

{¶30} As in *Chrysler*, the expert in the present case could not determine the cause for the breakage. While the expert gave four general causes, such as a defect in the window components, improper manufacturing or assembly of the windows; improper installation of the windows; or improper construction of the house, these choices were all equally likely. Therefore, choosing one cause over the others would be nothing more than resorting to sheer speculation, which is not permitted in the law. As the Ohio Supreme Court has stressed, causation is critical because it "maintains the distinction between strict liability based on design defects and absolute liability based upon injury." Id. at 8.

{¶31} Based on the above discussion, the trial court did not err in granting summary judgment to Pennco and United Sash on the products liability claims.

III

{¶32} In the third sub-argument, the Finks claim that there are genuine issues of material fact on the issue of the negligence of all appellees. In this regard, the Finks first rely on authority from California that has allowed recovery where the cause of an injury cannot be assigned to either of two concurrent tortfeasors. *Summers v. Tice* (1948), 33 Cal.2d 80, 87-88, 199 P.2d 1. In *Summers*, two hunters negligently shot in the direction of the plaintiff, at the same time, using the same type of gun and ammunition. Although the plaintiff could not prove

which individual's shot had caused the injury, the trial court held both defendants jointly liable. The California Supreme Court later affirmed the judgment against both defendants, finding that the defendants had the burden of absolving themselves from responsibility. 33 Cal. 2d at 86-87. The Finks believe we should apply the same theory to their claims.

{¶33} We decline to apply *Summers*, because it involves a situation that differs factually from the present case. As the California Supreme Court stressed, both defendants in *Summers* were wrongdoers toward the plaintiff. That much was conceded, since the defendants both negligently shot towards the plaintiff at the same time. In contrast, there is simply no proof in the present case that all the parties were negligent. To hold all defendants liable in such a situation would make them insurers, since they would be responsible regardless of fault. As we have already indicated, that is not the law in Ohio. Furthermore, the negligence, if any, in the present case, was not concurrent. Unlike the defendants in *Summers*, the parties in this case did not act at the same time to create an injury.

{¶34} For the same reasons, we decline to apply "alternative liability." The theory adopted in *Summers* has been referred to as alternative liability, and *Summers* has been described as the "seminal case" on the point. *Goldman v. Johns-Manville Sales Corp*. (1987), 33 Ohio St.3d 40, 45. Ohio adopted the alternative liability theory in *Minnich v. Ashland Oil Co., Inc.* (1984),15 Ohio St.3d 396, syllabus, and continues to follow that rule. However, the Ohio Supreme Court stressed in *Goldman* that the "key point in alternative liability * * * is that the plaintiff must still prove that all the defendants acted tortiously." 33 Ohio St.3d at 45. The burden of proving negligence, therefore, is still on the plaintiff and does not shift to the defendants. Accord, *Peck v. Serio*, 155 Ohio App.3d 471, 474-75, 2003-Ohio-6561 (discussing *Summers*, and noting that "even in its nascent form, the doctrine of alternative liability shifted only the burden of proof of causation away from the plaintiff in situations where two defendants acted negligently toward him or her, and the negligence of only one of the tortfeasors could have

caused the plaintiff's injuries." Thus, Ohio shifts the burden of proof of causation when the negligence of two parties is established, but does not shift the burden of proving negligence.).

{¶35} Because the Finks were unable to establish that all the defendants acted negligently, there was no basis for applying alternative liability. As we mentioned before, the Finks' expert testified about various theories of negligence, but the theories were all equally likely – or equally unlikely. In contrast to *Summers*, there was no specific evidence of any party's negligence.

{¶36} By the same token, the doctrine of *res ipsa loquitur* does not apply. "*[R]es ipsa loquitur* is an evidentiary, as opposed to substantive, rule of law, which allows the jury to infer negligence in cases where the prerequisites for its application are met." *Gayheart v. Dayton Power & Light Co.* (1994), 98 Ohio App.3d 220, 230. The application of this doctrine "does not change the plaintiff's claim, but merely allows the plaintiff to prove his case through circumstantial evidence." Id. In this regard, the Ohio Supreme Court has said that:

{¶37} "'[t]o warrant application of the rule a plaintiff must adduce evidence in support of two conclusions: (1) That 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.'" *Jennings Buick, Inc. v. Cincinnati* (1980), 63 Ohio St.2d 167, 170, quoting from *Hake v. Wiedemann Brewing Co.* (1970), 23 Ohio St.2d 65, 66-67.

{¶38} The Finks contend that we should apply *res ipsa loquitur* because the windows were in the exclusive management and control of the defendants. However, that is not true. In the first place, due to the lack of information about the cause of the breakage, there is no way to tell which defendant or third-party defendant had possession of the window when any condition was created that may have caused the injury. Furthermore, the allegations about cause indicate

that there are several equally efficient and probable causes of the injury. In *Jennnings Buick*, the Ohio Supreme Court stressed that:

{¶39} "[w]here it has been shown by the evidence adduced that there are two equally efficient and probable causes of the injury, one of which is not attributable to the negligence of the defendant, the rule of res ipsa loquitur does not apply. In other words, where the trier of the facts could not reasonably find one of the probable causes more likely than the other, the instruction on the inference of negligence may not be given." 63 Ohio St.2d at 171.

{¶40} As a final matter, we should note that even if the above points were not fatal to the Finks' claims, there is no evidence that the windows were in the exclusive control of appellees. The windows were installed in 1999, and the Rutherfords had exclusive control of the windows for almost two years before the accident. In this regard, we note Mrs. Rutherford's testimony that a prior crack in a basement window may have been caused by her children throwing toys. We are not necessarily implying that this is what occurred with the window where the injury occurred – but it does indicate that other actions could have caused a problem with the window after it left the control of any defendant.

{¶41} Unfortunately, the evidence is such that no one will ever know why the window broke. The break could even have been due to Melissa Fink's own actions when she fell. The Finks claim the facts were undisputed in this regard, due to Melissa's testimony that she "brushed" the window and the lack of any other witness who saw the fall. However, Melissa did testify that she tried to brace herself when she fell by putting her hand onto the top of the window sill. She also said in her deposition that her hand "hit" the window. Thus, while Melissa said that her hand "brushed" the window, there is an issue in our minds about whether Melissa's own actions may have caused the window to break.

{¶42} For purposes of ruling on summary judgment, we have assumed the facts in Melissa's favor and have not considered her own possible contribution to the injury.

Nonetheless, the window was clearly not under the exclusive control of the manufacturer or the contractors after it was installed.

{¶43} Because there is no basis for applying either alternative liability or *res ipsa loquitur* to the present case, the third sub-argument is without merit. The trial court did not err in granting summary judgment in favor of appellees on the issue of negligence.

IV

{¶44} In the final sub-argument, the Finks claim that there are genuine issues of material fact on the issue of J-II's ultimate responsibility for the acts of its sub-contractors. The argument in this context is that J-II should be held liable for any injury because it chose all the sub-contractors and also selected Pennco as the manufacturer of the windows to be installed. Again, we disagree. As we stressed earlier, J-II would have been liable for selecting a defective product only if it knew or should have known the product was defective. *Jackson*, 51 Ohio App.3d at 53. There was simply no evidence of such a fact, because there was no specific evidence that the product, itself, was defective.

{¶45} We note that even in strict liability actions based on failure to warn, plaintiffs must prove that in the exercise of ordinary care, manufacturers knew or should have known of risks or failures about which they failed to warn. *Falkner v. Para Chem*, Summit App. No. 21788, 2003-Ohio-3155, at ¶13. Obviously, nothing less should be required to show liability on the part of contractors who purchase materials for use and may rightly assume that products are safe for their intended purpose, in the absence of evidence to the contrary.

{¶46} Similarly, there must have been evidence indicating that a particular sub-contractor was negligent in installation or construction, and that J-II knew or should have known of the negligence. As we have repeatedly said, there is no proof that any party was negligent. Instead, there are several equally efficient proximate causes, and no reason to assign liability to any specific party. The fourth sub-argument, therefore, is without merit.

{¶47} In light of the preceding discussion, the single assignment of error is overruled and the judgment of the trial court is affirmed.

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WOLFF, J., and GLASSER, J., concur.

Brogan, J., and Wolff, J., of the Second Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

Hon. George Glasser, retired from the Sixth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.