[Cite as *Lovegrove v. Stapleton*, 2015-Ohio-1669.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

MICHAEL LOVEGROVE, et al.	:	
	:	
Plaintiffs-Appellants	:	C.A. CASE NO. 2014-CA-96
	:	
v.	:	T.C. NO. 13CV585
	:	
JOSHUA STAPLETON	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

. . . . . .

O P I N I O N

Rendered on the ___1st___ day of ____May___, 2015.

. . . . . .

JOHN A. SMALLEY, Atty. Reg. No. 0029540, 131 N. Ludlow Street, Suite 1400, Dayton, Ohio 45402
Attorney for Plaintiffs-Appellants

KEVIN C. CONNELL, Atty. Reg. No. 0063817 and LISA A. HESSE, Atty. Reg. No. 0042120, 1 S. Main Street, Suite 1800, Dayton, Ohio 45402
Attorneys for Defendant-Appellee

. . . . . .

FROELICH, P.J.

{¶ 1} Michael Lovegrove appeals from a judgment of the Clark County Court of Common Pleas, which granted summary judgment to Joshua Stapleton on Lovegrove's negligence and recklessness claims. For the following reasons, the trial court's judgment will be affirmed in part, reversed in part, and remanded for further proceedings.

{¶ 2} The evidence before the trial court regarding the motion for summary judgment consisted of Lovegrove's deposition testimony, which established the following facts.[1]

{¶ 3} Lovegrove has handled firearms since he was six years old. He received gun training in the military, took a hunter safety course, and completed a range officer safety course. Lovegrove has a permit to carry a concealed weapon. In 2009, Lovegrove became involved with competitive shooting, and he has participated in events using handguns, rifles, and shotguns.

{¶ 4} Lovegrove met Stapleton in 1999, and the men share a common interest in competitive shooting. Both Lovegrove and Stapleton participate in a Tuesday night shooting league, and they would sometimes go together to Miami Valley Shooting Grounds to shoot on weekends. The two discussed guns on a regular basis.

{¶ 5} In June 2012, Lovegrove purchased a Kimber 1911 handgun with an aluminum frame and a rubber grip. The gun had two safeties – a grip safety and a slide safety. A couple of weeks after purchasing the gun, Lovegrove made a few modifications to the weapon, including changing the grip from a rubber grip to a Micarta grip.

{¶ 6} In the evening of July 13, 2012, Lovegrove drove to Stapleton's home to have Stapleton, a notary public, notarize papers for him. Lovegrove brought his Kimber 1911 with him, carrying it in a holster that he wore on his waist. Before exiting his truck, Lovegrove removed the magazine from the gun and placed it in his back pocket.

---

[1] In his appellate brief, Lovegrove cites to the transcript of Stapleton's deposition. However, this transcript was not before the trial court when the court ruled on the motion for summary judgment. Accordingly, we cannot consider it. *See Wallace v. Mantych Metalworking*, 189 Ohio App.3d 25, 2010-Ohio-3765, 937 N.E.2d 177, ¶ 10-11 (2d Dist.).

Lovegrove stated that he did so because he "knew [Stapleton] was going to look at the gun." Lovegrove explained, "We always – usually always looked at whatever anybody else had." Lovegrove stated that the "culture" of the competitive shooting community includes looking "to see what everybody else's got" and swapping out guns with other competitive shooters.

{¶ 7} When Lovegrove arrived, Stapleton was in his attached garage, where he had a workbench for working on guns. Lovegrove told Stapleton that he had some papers that needed to be notarized and that he had put a new grip on his gun. Lovegrove removed the gun and holster from his waistband, checked the chamber, and set the gun (in the holster) on the workbench. At that juncture, the magazine had been removed, and there was no round in the chamber.

{¶ 8} After notarizing Lovegrove's papers, Stapleton "checked out" the handgun. He looked at the rack and the slide, and "dry fired" the gun multiple times. Stapleton checked the chamber to make sure it was empty before doing so. After he had dry fired the gun eight to ten times, Stapleton's children came into the garage. The men sent them back inside the house for their safety. The men then continued to talk about the gun, and Stapleton dry fired it again. The children again came into the garage, and they again were sent back into the house.

{¶ 9} After the children were sent back inside for the second time, Stapleton told Lovegrove that he needed to check on his wife, who was in the backyard, and Stapleton left the garage. Lovegrove picked up his paperwork and the gun, and he put the magazine back in the gun. Because no round was chambered, he could not put on a safety. Lovegrove turned around and saw Stapleton's children standing in front of him,

wanting to show him a trophy. Lovegrove placed the gun back on the workbench, and he told the children that he would put his things in his truck and then come inside.

{¶ 10} Lovegrove ushered the children back into the house and closed the door. As Lovegrove was turning around, he heard the gun go off. Stapleton had returned and fired the gun; Lovegrove stated that Stapleton had been gone for "seconds," estimating 30 to 40 seconds. The bullet hit the workbench and ricocheted, hitting Lovegrove in the abdomen. Stapleton made a remark that he did not realize the gun was loaded, removed the magazine from the gun, ejected a bullet from the chamber, and put the gun down. Lovegrove informed Stapleton that he had been shot.

{¶ 11} Stapleton's wife called 911. Lovegrove was taken to Miami Valley Hospital, where he was treated for the gunshot wound.

{¶ 12} In June 2013, Lovegrove brought suit against Stapleton alleging that Stapleton acted "negligently and/or recklessly" in shooting the gun. On July 3, 2014, Stapleton moved for summary judgment, claiming that he and Lovegrove were engaged in a recreational activity at the time of the shooting and that primary assumption of risk precluded Lovegrove's negligence claim. Stapleton further argued that there was no evidence that he had acted recklessly or intentionally. Lovegrove did not respond to Stapleton's motion.

{¶ 13} On July 23, 2014, the trial court granted Stapleton's motion for summary judgment. The trial court found that the parties "were engaged in a recreational activity at the time of the incident. The undisputed facts demonstrate that plaintiff was injured by a danger inherent to the activity and that defendant was not acting intentionally or recklessly such that liability may be imposed upon him." The trial court concluded that,

as a matter of law, Stapleton was entitled to judgment on Lovegrove's claims.

{¶ 14} Lovegrove appeals from the trial court's judgment, claiming that the trial court erred in granting the motion for summary judgment.

{¶ 15} Pursuant to Civ.R. 56(C), summary judgment is proper when (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds, after construing the evidence most strongly in favor of the nonmoving party, can only conclude adversely to that party. *Zivich v. Mentor Soccer Club, Inc.,* 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998). The moving party carries the initial burden of affirmatively demonstrating that no genuine issue of material fact remains to be litigated. *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988). To this end, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). Those materials include "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, filed in the action." *Id.* at 293; Civ.R. 56(C).

{¶ 16} Once the moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the party's pleadings. *Dresher* at 293, 662 N.E.2d 264; Civ.R. 56(E). Rather, the burden then shifts to the nonmoving party to respond, with affidavits or as otherwise permitted by Civ.R. 56, setting forth specific facts that show that there is a genuine issue of material fact for trial. *Id.* Throughout, the evidence must be construed in favor of the nonmoving party. *Id.*

{¶ 17} We review the trial court's ruling on a motion for summary judgment de

novo. *Schroeder v. Henness,* 2d Dist. Miami No. 2012 CA 18, 2013-Ohio-2767, ¶ 42. "*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. of Edn.,* 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal Co., Inc.,* 64 Ohio St.2d 116, 119-20, 413 N.E.2d 1187 (1980). Therefore, the trial court's decision is not granted deference by the reviewing appellate court. *Powell v. Rion,* 2012-Ohio-2665, 972 N.E.2d 159, ¶ 6 (2d Dist.).

{¶ 18} A claim for negligence requires evidence of a duty, a breach of that duty, and an injury proximately resulting from the breach. *Hardy v. Hall*, 2d Dist. Montgomery No. 19751, 2003-Ohio-4978, ¶ 8. "When risks and dangers inherent in the relationship or incident to it may be avoided by the obligor's exercise of care, an obligor who fails to do so will be liable to the other person for injuries proximately resulting from those risks and dangers if the injuries were reasonably foreseeable." *Berdyck v. Shinde*, 66 Ohio St.3d 573, 578, 613 N.E.2d 1014 (1993).

{¶ 19} Assumption of the risk consists of a claimant's consent to or acquiescence in subjecting himself or herself to a known or appreciated risk. *Hardy* at ¶ 10. "Primary assumption of risk is a defense generally applied in cases in which there is a lack of duty owed by the defendant to the plaintiff, and it is a complete bar to recovery." *Harting v. Dayton Dragons Professional Baseball Club, L.L.C.*, 171 Ohio App.3d 319, 2007-Ohio-2100, 870 N.E.2d 766, ¶ 12 (2d Dist.). In contrast, implied (or secondary) assumption of risk "requires a showing that the plaintiff has consented to or acquiesced in an appreciated or known risk." *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379,

802 N.E.2d 1116. Implied assumption of risk and contributory negligence have merged into comparative negligence. *Anderson v. Ceccardi* , 6 Ohio St.3d 110, 451 N.E.2d 780 (1983); *Gallagher v. Cleveland Browns Football Co*., 74 Ohio St.3d 427, 431, 659 N.E.2d 1232 (1996).

{¶ 20} In Ohio, the doctrine of primary assumption of risk applies to recreational or sport activities. "Where individuals engage in recreational or sports activities, they assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant's actions were either 'reckless' or 'intentional' as defined in [2 Restatement of the Law 2d, Torts, Section 500, and 1 Restatement of the Law 2d, Torts, Section 8A (1965)]." *Marchetti v. Kalish*, 53 Ohio St.3d 95, 559 N.E.2d 699 (1990), syllabus; *see also, e.g., Horvath v. Ish*, 134 Ohio St.3d 48, 2012-Ohio-5333, 979 N.E.2d 1246; *Gentry*, *supra*; *Thompson v. McNeill*, 53 Ohio St.3d 102, 559 N.E.2d 705 (1990).

{¶ 21} On appeal, Lovegrove claims that the trial court improperly applied primary assumption of risk to the facts before it. Lovegrove argues (1) that he and Stapleton were not engaged in a recreational activity at the time of Lovegrove's injuries, (2) that the conduct in which they were engaged did not involve an inherent risk of injury, and (3) that Stapleton's conduct was negligent and reckless.

{¶ 22} First, Lovegrove asserts that he and Stapleton were not engaged in a recreational activity when he was shot. Lovegrove states:

> [T]he mere fact that Lovegrove engages in competitive shooting does not mean he was engaged in that activity at the time of his injury. Likewise, just because one is engaged in an activity inherent to the competitive target

> shooting community and/or culture, it does not automatically follow that they are engaged in the actual activity of competitive shooting. To find that any time a person handles a piece of equipment which is used on other occasions in a recreational activity, or participates in an activity remotely connected to the sport's culture, that he is engaging in a recreational activity, would greatly expand the primary assumption of risk doctrine in regards to recreational activities.

Lovegrove argues that Stapleton was merely admiring the handgun in his garage; the two men were not at a shooting range or practicing target shooting on Stapleton's property when the injury occurred.

{¶ 23} Stapleton responds that he was not simply admiring and chatting about the gun. He argues that his examination and testing of the handgun was an expected activity as part of the competitive shooting community and that he was actually firing and testing Lovegrove's handgun, similar to swinging a golf club in the backyard. Stapleton cites to *Booth v. Walls*, 3d Dist. Henry No. 7-12-23, 2013-Ohio-3190 (child injured when cleaning up targets after trapshooting); *Ickes v. Tille*, 110 Ohio App.3d 438, 674 N.E.2d 738 (6th Dist.1996) (child injured while hitting golf balls with clubs in the backyard); and *Dinnin v. Bencin*, 8th Dist. Cuyahoga No. 73141, 1998 WL 433831 (July 30, 1998) (child injured while hitting golf balls in grassy area) to illustrate that the primary assumption of risk applies when individuals practice or test equipment used in a sporting activity.

{¶ 24} At the outset, the parties do not dispute that competitive target shooting is a recreational activity. We emphasize that Stapleton's argument is that the parties were engaged in the recreational activity of competitive target shooting on July 13, 2012, when

Stapleton examined Lovegrove's gun at his (Stapleton's) home. Stapleton does not argue that the act of examining Lovegrove's gun was, itself, a recreational activity, and we will therefore not address whether it was.

{¶ 25} The exact boundaries of "recreational activity" have not been defined, and whether a particular activity falls within the meaning of "recreational activity" has been addressed on a case-by-case basis. As stated above, Stapleton asserts that practicing a recreational activity and testing equipment used during a recreational activity constitute engaging in the recreational activity, and he relies primarily on *Booth*, *Ickes*, and *Dinnin*.

{¶ 26} We do not find that the cases upon which Stapleton relies lead us to conclude that Stapleton's dry-firing of Lovegrove's gun in his (Stapleton's) garage falls within "recreational activity." *Booth* concerned whether children were engaged in clay target shooting when a child was struck in the face by the throwing arm of a clay target machine while at a cookout at the defendants' home. The children had shot trap for approximately an hour, stopped shooting when the food was ready, and returned outside after eating to gather unbroken clay targets and spent shells. The Third District noted that, even assuming that the children were done shooting for the day, several witnesses had stated in their depositions that the activity was not over until the spent shells and clay pigeons were cleaned up and put away. *Booth*, 3d Dist. Henry No. 7-12-23, 2013-Ohio-3190, at ¶ 52. The appellate court thus concluded that the child was injured during the recreational activity of trap shooting.

{¶ 27} Unlike in *Booth*, where the children shot trap before the accident occurred, Stapleton and Lovegrove had not been shooting their weapons at a target – either at a shooting range or at Stapleton's residence -- on July 13, 2012. The handling of

Lovegrove's weapon was not done as a direct extension of target shooting, either in preparation for shooting or during cleanup after shooting. Accordingly, the relationship between Stapleton's actions was more remote from the activity of competitive target shooting than the children's cleanup activities in *Booth*.

{¶ 28} *Ickes* and *Dinnin* both concerned injuries caused by being hit by a golf club. In *Dinnin*, two girls were hitting golf balls in a grassy field outside of their mothers' place of business. In *Ickes*, teenaged boys were hitting golf balls in the backyard; after one boy showed another how to grip the golf club, the boy with the club hit a third boy with his backswing. The Sixth District in *Ickes* stated that "the facts epitomize the type of recreational activity envisioned by the Ohio Supreme Court when it set forth the rule in *Marchetti.* That is, three teenagers engaged in an activity which, under the circumstances of this case, could be classified as a neighborhood game." *Ickes*, 110 Ohio App.3d at 442. Following *Ickes*, the Eighth District in *Dinnin* similarly found that the girls were engaged in a recreational activity. *Dinnin*, 8th Dist. Cuyahoga No. 73141, 1998 WL 433831, at *3. (In both cases, the appellate courts found no basis to conclude that one child was providing formal instruction to the other, which, if present, might suggest that the children were engaged in something other than a recreational activity.)

{¶ 29} In our view, the children's activities in *Ickes* and *Dinnin* would be analogous to Lovegrove and Stapleton shooting at cans in the backyard. While none of the children was engaged in a game of golf on a golf course, they were actively practicing the skills required for such a game. Stapleton asserts that he was actually firing and testing Lovegrove's handgun, but we see a distinction between dry-firing the handgun toward a workbench to see if he wanted to obtain a similar weapon and practicing the

skills required of target shooting. In our view, Stapleton's conduct was not analogous to practicing a golf swing in a backyard.

{¶ 30} This case is more analogous to *Thomas v. Strba*, 9th Dist. Medina No. 12CA80-M, 2013-Ohio-3869. In *Thomas*, the plaintiff was assisting his friend with the construction of tree stands on the friend's property in anticipation of hunting season, which opened the following day. The plaintiff was injured when a board nailed to a tree pulled away from the tree, and he fell to the ground. The trial court concluded that, at the time of the injury, the parties were engaged in the recreational activity of building a hunting stand to use while hunting on the property, and the court applied the primary assumption of risk doctrine. The Ninth District reversed, reasoning:

> Under the facts of this case, it is clear to this Court that Thomas was not engaged in a recreational activity at the time of his injury. Certainly, hunting qualifies as a recreational activity. Yet, Thomas was not hunting when he fell from the tree stand. Thomas was simply helping his friend prepare for the start of hunting season, which did not even commence until the following day.
>
> Any number of preparations might be necessary before one can engage in a recreational activity. For instance, a hunter's preparations undoubtedly would include buying a hunting license, readying his shotgun or bow, and selecting weather-appropriate attire. Those preparations might occur over any number of hours, days, or weeks before any actual hunting commenced. It would be an absurd result if the primary assumption of the risk doctrine barred the recovery of a hunter who slipped

> and fell in the store where he went to purchase his license or who was injured in a car accident while driving to his hunting destination. The doctrine would not bar those injuries because the recreational activity (i.e., hunting) had yet to begin when the injuries occurred. Moreover, those injuries would not be of the type that a hunter would ordinarily assume as inherent risks of the sport of hunting.
>
> There is no dispute that Thomas was injured while helping construct a tree stand in anticipation of hunting season. By law, no hunting could occur until the following day and there was no evidence that Thomas intended to hunt on the day he was injured. Moreover, there was no evidence that Thomas and Strba were engaged in tree stand building simply for the sake of it. The building of the tree stand was a means to an end. Were this Court to hold that Thomas was engaged in a recreational activity at the time of his injury, the definition of what constitutes a recreational activity would be greatly expanded.

(Citations omitted.) *Thomas* at ¶ 15-17.

{¶ 31} Lovegrove's deposition testimony establishes that it is the custom and "culture" of competitive target shooting to examine, test, and "swap" weapons with others in the target shooting community. Nevertheless, similar to constructing a tree stand to be used during hunting season, this conduct, by itself, does not lead to the conclusion that it is part of the recreational activity of competitive target shooting. Lovegrove and Stapleton were not engaged in target shooting in Stapleton's garage; they were not firing weapons at targets or actively preparing to do so. Lovegrove was simply showing his

modified weapon to his friend and fellow shooter, as is often done by people who engaged in competitive target shooting. Accordingly, we conclude that Stapleton's conduct of dry firing Lovegrove's gun was peripheral to the recreational activity of target shooting and did not constitute engaging in the recreational activity itself.

{¶ 32} The trial court erred in concluding that Lovegrove and Stapleton were engaged in a recreational activity at the time of Lovegrove's injury and that Lovegrove's negligence claim was precluded by the primary assumption of risk doctrine. In light of this conclusion, we need not address whether the conduct in which they were engaged involved an inherent risk of injury and whether Stapleton's conduct was negligent. The matter will be remanded for further proceedings on Lovegrove's negligence claim.

{¶ 33} In granting summary judgment to Stapleton, the trial court further concluded that Stapleton's conduct was not reckless. Lovegrove also challenges this conclusion.

{¶ 34} Recklessness is a high standard. *Rankin v. Cuyahoga Cty. Dept. of Children and Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521, ¶ 37. "Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 34, adopting 2 Restatement of the Law 2d, Torts, Section 500 (1965); *see also Argabrite v. Neer*, 2015-Ohio-125, 26 N.E.3d 879, ¶ 36 (2d Dist.), quoting *Moon v. Trotwood Madison City Schs*., 2014-Ohio-1110, 9 N.E.3d 541, ¶ 21 (2d Dist.).

{¶ 35} Under the specific facts of this case, we agree with the trial court that

Stapleton's conduct, as described in Lovegrove's deposition testimony, does not constitute recklessness. Lovegrove came to Stapleton's residence with the intention of showing Stapleton his Kimber 1911 handgun, which had a new grip. Before exiting his truck, Lovegrove removed the magazine from the handgun and placed it in the back pocket of his pants. The gun was unloaded when Lovegrove entered Stapleton's garage, where Stapleton was. After entering the garage, Lovegrove removed the gun and holster from his waistband, checked the chamber, and set the gun (in the holster) on the workbench.

{¶ 36} After notarizing Lovegrove's papers, Stapleton checked the chamber of the gun to make sure it was empty before inspecting it. Stapleton looked at the rack and the slide, and then dry fired the gun approximately a dozen times. When Stapleton stated that he needed to check on his wife, he placed the gun on his workbench. Stapleton was gone for approximately 30 to 40 seconds, and when he returned the gun was on the workbench. Stapleton again fired the weapon, with the weapon pointed toward the workbench. Stapleton's reaction indicated that he was unaware that Lovegrove had loaded the gun while he (Stapleton) was checking on his wife.

{¶ 37} Under these particular facts, the trial court properly concluded that Stapleton was not reckless. The gun was unloaded when it was brought into Stapleton's garage, and he checked the gun to ensure that it was unloaded prior to dry firing it. Stapleton was away from the gun for 30 to 40 seconds, and the gun was on the workbench both before and after he left the garage. Stapleton's conduct in failing to re-check the gun when he returned to the garage, while arguably negligent, does not rise to the level of "conscious disregard of or indifference to a known or obvious risk of harm to

another that is unreasonable under the circumstances and is substantially greater than negligent conduct."

{¶ 38} The trial court's judgment will be affirmed in part, reversed in part, and remanded for further proceedings.

. . . . . .

HALL, J. and WELBAUM, J., concur.

Copies mailed to:

John A. Smalley
Kevin C. Connell
Lisa A. Hesse
Hon. Douglas M. Rastatter