**[Cite as *Christian v. Wal-Mart Stores E., LP,* 2010-Ohio-3040.]**

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| NOEL D. CHRISTIAN, ADMR. ET AL.<br><br>Plaintiffs-Appellants<br><br>-vs-<br><br>WAL-MART STORES EAST, LP, ET AL.<br><br>Defendants-Appellees | JUDGES:<br>Hon. W. Scott Gwin, P.J.<br>Hon. Sheila G. Farmer, J.<br>Hon. John W. Wise, J.<br><br>Case No. 09CA014<br><br>O P I N I O N |
| CHARACTER OF PROCEEDING: | Appeal from the Court of Common Pleas, Case No. 08CV136 |
| JUDGMENT: | Reversed and Remanded |
| DATE OF JUDGMENT ENTRY: | June 29, 2010 |

APPEARANCES:

| | |
|---|---|
| For Plaintiffs-Appellants | For Defendants-Appellees |
| ROBERT W. KERPSACK<br>655 Metro Place South<br>Suite 255<br>Columbus, OH 43017 | PATRICK KASSON<br>Capitol Square Building<br>65 East State Street<br>4th Floor<br>Columbus, OH 43215 |

*Farmer, J.*

**{¶1}** On August 28, 2006, appellant, Katie Christian, and her three year old daughter, Civanna Christian, were involved in a pedestrian/motor vehicle accident at a Wal-Mart store. Civanna was struck and killed by a motor vehicle being driven by John Besancon.

**{¶2}** On August 27, 2008, appellant and Noel D. Christian, Administrator of the Estate of Civanna Christian, deceased, filed a complaint against appellee, Wal-Mart Stores East, LP, and Wal-Mart Real Estate Business Trust, Wal-Mart Stores East, Inc., Wal-Mart Stores, Inc., and several John Does. Appellants sought compensatory damages for the wrongful death of Civanna and the severe emotional distress of appellant Katie Christian.

**{¶3}** On September 15, 2009, appellee filed a motion in limine to exclude appellants' expert, John Messineo, P.E., and a motion for summary judgment on the issue of liability. By decision and judgment entry filed October 20, 2009, the trial court granted the motion for summary judgment.

**{¶4}** On October 26, 2009, appellants voluntarily dismissed without prejudice the remaining defendants.

**{¶5}** Appellants filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

**{¶6}** "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE MOTION IN LIMINE OF APPELLEE, WAL-MART STORES EAST, LP, TO EXCLUDE APPELLANTS' EXPERT, JOHN MESSINEO, P.E."

II

**{¶7}** "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE MOTION OF APPELLEE, WAL-MART STORES EAST, LP, TO STRIKE OR PRECLUDE THE ERRATA SHEET FOR THE DEPOSITION TRANSCRIPT OF APPELLANTS' EXPERT, JOHN MESSINEO, P.E."

III

**{¶8}** "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING, AS A MATTER OF LAW, THAT THE ACTIONS OF JOHN BESANCON WERE AN INTERVENING AND SUPERCEDING (SIC) CAUSE OF THE PEDESTRIAN/MOTOR VEHICLE COLLISION AT ISSUE."

IV

**{¶9}** "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING, AS A MATTER OF LAW, THAT THE ERECTION OF BOLLARDS OR CURBS BETWEEN THE WAL-MART PARKING LOT AND THE ADJACENT PEDESTRIAN SIDEWALK IN QUESTION WOULD NOT HAVE PREVENTED THE INJURY AND DEATH OF CIVANNA CHRISTIAN."

V

**{¶10}** "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING, AS A MATTER OF LAW, THAT THE ACTIONS OF APPELLEE, WAL-MART STORES EAST, LP, DID NOT CONSTITUTE GROSS NEGLIGENCE."

VI

**{¶11}** "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING, AS A MATTER OF LAW, THAT THE DANGER OF AN ERRANT VEHICLE

TRAVELING UNENCUMBERED ONTO THE PEDESTRIAN SIDEWALK AT ISSUE IS OPEN AND OBVIOUS."

VII

**{¶12}** "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING, AS A MATTER OF LAW, THAT THE PEDESTRIAN/MOTOR VEHICLE COLLISION AT ISSUE WAS UNFORESEEABLE."

VIII

**{¶13}** "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS, NOEL D. CHRISTIAN, ADMR., AND KATIE M. CHRISTIAN (AKA RABER), IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY IN FAVOR OF APPELLEE, WAL-MART STORES EAST, LP."

I

**{¶14}** Appellants claim the trial court erred in excluding the testimony of their expert, John Messineo, P.E., filed in opposition to appellee's motion for summary judgment.

**{¶15}** Appellee's motion for summary judgment specifically argued there was no evidence to establish that Wal-Mart breached any standard of care in the design and maintenance of their parking lot. Appellee further argued there was no evidence of gross negligence by Wal-Mart given the fact that the specific criminal acts of Mr. Besancon were the proximate cause of Civanna's death.

**{¶16}** The predicate issue of fact required by appellants to successfully defeat the summary judgment motion was the design of the parking lot. This is true whether the negligence is gross negligence as defined by the wrongful death statute or the

general duty owned to a business invitee as a breach of ordinary care to maintain the premises in a reasonably safe condition.

**{¶17}** In its October 20, 2009 decision and judgment entry granting the motion for summary judgment, the trial court found Mr. Messineo's testimony to be inadmissible:

**{¶18}** "The Plaintiffs have not produced any admissible expert testimony that the parking lot was designed in either a grossly negligent manner or below the standard of care. The Plaintiffs' expert, John Messineo's testimony was not considered pursuant to the Defendant's Motion in Limine and *Miller v. Bike Athletic Co.* (1998), 80 Ohio St. 3d 607; citing *Daubert v. Merrell Dow Pharmaceuticals* (1993), 509 U.S. 579, 589-590. Mr. Messineo has never designed a parking lot for a retail shopping establishment. Further, his testimony is not based upon a scientific theory as he was unable, in his deposition, to provide a general rule as to when bollards and curbs should be utilized in a retail shopping establishment. Mr. Messineo's Errata sheet was not considered in that it violated Civil Rule 30(E) because Mr. Messineo, while he characterized his changes, he did not provide a reason for them. Further, changes in Errata sheet – which completely change the deposition testimony – cannot be used to defeat a Motion for Summary Judgment. *Hambleton Brothers v. Balkn, Enterprises,* 397 F. 3d 1217, 1225 (9th Cir. 2005); *Burns v. Board of County Commissioners,* 330 F. 3d 1275, 1281-1282 (10th Cir. 2003)."

**{¶19}** The preliminary issue of admissibility of a witness's testimony rests upon the trial court:

**{¶20}** "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by the rules of evidence except those with respect to privileges." Evid.R 104(A).

**{¶21}** The admissibility of an expert is governed by Evid.R. 702 which states the following:

**{¶22}** "A witness may testify as an expert if all of the following apply:

**{¶23}** "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

**{¶24}** "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

**{¶25}** "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

**{¶26}** "(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

**{¶27}** "(2) The design of the procedure, test, or experiment reliably implements the theory;

**{¶28}** "(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

**{¶29}** We conclude the trial court's decision to exclude Mr. Messineo's testimony was based not only on his deposition, but also his affidavit filed with appellants' response to the summary judgment motion.

**{¶30}** As a predicate, admissibility is distinct and separate from credibility. Admissibility of testimony is determined by the trial court, and the evidence must be both relevant and reliable. Evid.R. 401 and 402. Credibility of testimony is determined by the trier of fact, and goes to the weight of the testimony. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881.

**{¶31}** In Mr. Messineo's affidavit, attached to appellants' October 14, 2009 Memorandum Contra as Exhibit3, he stated he was a licensed professional engineer in the state of Ohio, he was a civil engineer, and he was "familiar with the engineering building and design standards for pedestrian sidewalk/parking lot areas of commercial retail establishments." He opined at ¶10 the design standards for "big box" stores i.e., Wal-Mart, are the same or substantially similar to commercial lots:

**{¶32}** "In my opinion, the pedestrian/motor vehicle collision at issue in the present case was reasonably foreseeable. In this regard, it is a common practice in the civil engineering industry to design, build, and maintain the parking lots of commercial retail establishments with the expectation that errant vehicles will leave the traveled portion of the parking lot and enter adjacent pedestrian areas."

**{¶33}** The trial court found Mr. Messineo was not qualified as an expert because he never designed a parking lot for a retail establishment, and his opinion was not based upon any scientific theory as Mr. Messineo was unable to opine in his discovery deposition when bollard and curbs should be used.

**{¶34}** It is important to note that the deposition relied upon was a discovery deposition and Mr. Messineo was examined via cross-examination. There was no opportunity in the deposition to ask *Daubert*-type questions (pertaining to expert testimony) on direct. Therefore, the flavor and tenor of the deposition is colored against appellants' theory of the case.

**{¶35}** In his deposition, Mr. Messineo stated he has participated in the design of out-lots on big-box store lots. Messineo depo. at 37-38. However, he never personally participated in the sidewalk design of a Wal-Mart type store. Id. at 42. His experience related to the design of sidewalks and the placement of bollards at McDonald's, as well as sidewalk designs in Upper Arlington. Id. at 44-46. The design objectives for McDonald's were for pedestrian safety as well as protection to the property. Id. at 52. He opined that curbs are required whether it be a design of a Wal-Mart or a McDonald's, and pointed out that the Family Dollar store across the street from the incident was so designed with barrier curbs. Id. at 54. Mr. Messineo pointed out that his opinions were based upon the "Best Loss Control Engineering Manual":

**{¶36}** " 'It is a positive underwriting sign if the insured has separate walkways located out of driving lanes. All walkways and crosswalks should be separated from driving lanes by 6-inch curbs.' " Id. at 53.

**{¶37}** Despite the trial court's opinion, we find the testimony in the deposition, construed most favorably to the non-moving party under a summary judgment standard, is admissible for summary judgment purposes. Civ.R. 56. We find the qualifications given are within the parameters of Evid.R. 702, and Mr. Messineo based his opinion on a treatise and not on any scientific experiments. Further, Mr. Messineo did a calculation

from the deposition testimony of appellants' expert, Ronald Thayer, on the deflection ability of a bollard and curb on the issue of proximate cause. Messineo depo. at 98-100.

**{¶38}** Upon review, we find the trial court erred in rejecting Mr. Messineo's testimony, and remand the issue to the trial court to determine the summary judgment motion with Mr. Messineo's tetsimony.

**{¶39}** Assignment of Error I is granted.

II

**{¶40}** Appellant claims the trial court erred in striking Mr. Messineo's errata sheet.

**{¶41}** Civ.R. 30 governs depositions upon oral examination. Subsection (E) states the following:

**{¶42}** "When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless examination and reading are waived by the witness and by the parties. Any changes in form or substance that the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill, cannot be found, or refuses to sign. The witness shall have thirty days from submission of the deposition to the witness to review and sign the deposition. If the deposition is taken within thirty days of a trial or hearing, the witness shall have seven days from submission of the deposition to the witness to review and sign the deposition. If the trial or hearing is scheduled to commence less

than seven days before the deposition is submitted to the witness, the court may establish a deadline for the witness to review and sign the deposition. If the deposition is not signed by the witness during the period prescribed in this division, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part."

**{¶43}** The errata to the deposition included seventeen grammatical, semantic, and non-substantive changes. The substantive changes by Mr. Messineo were whether the curb should have been 8" or 6" in height and whether curbs alone or curbs and bollards were required in his judgment. Mr. Messineo noted these changes were clarifications. However, they are clearly substantive changes in his testimony. Mr. Messineo originally answered all the questions with the opinion that an 8" curb was required in order to meet the standard of care. He also changed his testimony and qualified his opinion on whether curbs and bollards were required or if curbs were in place, bollards were not necessary.

**{¶44}** We note the rule does permit substantive changes. "Substantive" is defined as "[s]ubstantial; considerable;***[o]f or pertaining to the essence or substance of something; essential." The American Heritage Dictionary (2 Ed.1985) 1213.

**{¶45}** Given the Supreme Court of Ohio's opinion in *Wright v. Honda of America Manufacturing, Inc*. (1995), 73 Ohio St.3d 571, syllabus, we find substantive changes

can be made, but are nonetheless subject to the unchanged opinions remaining in the record:

**{¶46}** "When a deponent reviews his or her deposition testimony under Civ.R. 30(E) and makes changes in the form and substance of such deposition testimony, both the original testimony as well as the changes remain in the record and are to be considered by the trier of fact."

**{¶47}** Based upon *Wright,* we find there was no showing of any prejudice to appellee with the errata sheet being accepted therefore, it was error not to permit it. As noted in *Bishop v. Ohio Bureau of Workers' Compensation*, 146 Ohio App.3d 772, 2001-Ohio-4274, ¶57, quoting *Lugtig v. Thomas* (N.D.Ill.1981), 89 F.R.D. 639, 642, the issue becomes the credibility of the witness:

**{¶48}** " 'The witness who changes his testimony on a material matter between the giving of his deposition and his appearance at trial may be impeached by his former answers, and the cross-examiner and the jury are likely to be keenly interested in the reasons he changed his testimony. There is no apparent reason why the witness who changes his mind between the giving of the deposition and its transcription should stand in any better case. [Citation omitted.]' "

**{¶49}** Assignment of Error II is granted.

III, IV, V, VI, VII, VIII

**{¶50}** Given our decision in Assignments of Error I and II, these assignments are moot.

**{¶51}** The judgment of the Court of Common Pleas of Holmes County, Ohio is hereby reversed.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

_s/ Sheila G. Farmer_____

_s/ W. Scott Gwin_____

_s/ John W. Wise_____

JUDGES

SGF/sg 604

IN THE COURT OF APPEALS FOR HOLMES COUNTY, OHIO

FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| NOEL D. CHRISTIAN, ADMR. ET AL. | : | |
| Plaintiffs-Appellants | : | |
| -vs- | : | JUDGMENT ENTRY |
| WAL-MART STORES EAST, LP ET AL. | : | |
| Defendants-Appellees | : | CASE NO. 09CA014 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Holmes County, Ohio is reversed, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellee Wal-Mart Stores East, LP.

_s/ Sheila G. Farmer_____

_s/ W. Scott Gwin_____

_s/ John W. Wise____

JUDGES