[Cite as *McGee v. Home Depot U.S.A., Inc.*, 2013-Ohio-4623.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Mike McGee, et al.	Court of Appeals No. L-12-1362
Appellants	Trial Court No. CI0201102647
v.	
Home Depot U.S.A., Inc., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: October 18, 2013

* * * * *

Jonathan Ashton and Kevin Boissoneault, for appellants.

G. Michael Curtin, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which granted summary judgment to appellees, Home Depot U.S.A., Inc., et al., in

a negligence action filed by appellants in connection to their purchase of a riding lawnmower from a Toledo area Home Depot retail location. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellants, Mike and Diane McGee, set forth the following two assignments of error:

"I. The trial court erred where it granted summary judgment in favor of Defendants-Appellees Home Depot, USA, Inc., at al.

"II. The trial court erred in failing to consider the expert testimony of Robert R. Reed."

{¶ 3} The following undisputed facts are relevant to this appeal. On May 9, 2009, appellants went to the Home Depot located on Airport Highway in Toledo. Appellants were interested in purchasing a riding lawnmower and wanted to view the product offerings available. Appellants ultimately selected and purchased a sizeable Cub Cadet brand riding lawn tractor. Upon purchasing the lawn tractor, appellants had several options to choose from in order to have it delivered to their home. Delivery options included having the product shipped to their home, paying an extra charge for Home Depot personnel to deliver the product to their home, or self-delivery via utilization of a "load and go" delivery truck available at Home Depot. Appellants selected self-delivery and the usage of the truck was incorporated into the purchase deal for the lawn tractor.

{¶ 4} Appellants observed as Home Depot personnel safely loaded the lawn tractor onto the truck by manually pushing the tractor up the attached loading ramps

while the lawn tractor was in neutral gear and the engine was turned off. In conjunction with this, appellants were also furnished with an operator's manual at the time of purchase. The Cub Cadet operator's manual explicitly and emphatically stated that the product must be loaded and unloaded manually due to a risk of tip over and serious injury if attempting to load or unload the lawn tractor by driving it. The manual expressly cautioned, "Use extra care when loading or unloading the machine onto a trailer or truck. This machine could tip over causing serious personal injury. The machine must be pushed manually on ramps to load or unload properly."

{¶ 5} Although appellants state that they are typically conscientious regarding the review of product manuals, in this instance they felt that they did not have the time to review the manual prior to unloading the lawn tractor. It is unclear why appellants believed they were constrained by time in connection to reviewing the manual prior to unloading the lawn tractor. The record is devoid of any indication that they were under any set, approaching deadline for the return of the "load and go" truck to Home Depot.

{¶ 6} Unfortunately, despite having observed the lawn tractor being manually loaded by Home Depot personnel in neutral with the engine off and having received the operator's manual explicitly instructing that the lawn tractor must be manually loaded and unloaded, appellants did not do so.

{¶ 7} Appellants checked to make sure that there was gas in the engine, started the engine, and unsuccessfully attempted to drive the lawn tractor down the ramps with the

engine running. This process was contrary to how the lawn tractor was loaded and contrary to the instructions set forth in the operator's manual.

{¶ 8} In the course of attempting to drive the lawn tractor down the ramp and off of the delivery truck, appellant began to back the lawn tractor up but determined that he was not satisfied with the centering of the rear tires. Accordingly, appellant attempted to reverse course and drive the lawn tractor forward again. As appellant began to drive forward, the lawn tractor became unsteady, tipped over, and caused injuries.

{¶ 9} On April 5, 2011, appellants filed a complaint alleging negligence against appellees. Subsequent to extensive discovery and the taking of depositions, appellees filed for summary judgment pursuant to Civ.R. 56(C). In support, appellees denied owing any duty to appellants regarding self-delivery unloading from which liability could potentially be imposed in connection to the underlying incident. By contrast, appellants asserted that because Home Depot employees are trained in the safety of loading and unloading products such as the Cub Cadet lawn tractor and the failure to instruct customers on unloading safety would be construed as a violation of internal employee policies, this should be construed as a voluntary assumption of a legal duty capable of resulting in liability in negligence.

{¶ 10} The parties concur that appellants personally observed the safe manual loading of the lawn tractor by Home Depot employees with the engine off. The parties concur that appellants were furnished with the Cub Cadet operator's manual at the time of sale which expressly states that the tractor must be manually loaded and unloaded.

However, the parties dispute whether the Home Depot employees involved in the sale of the tractor and the loading of it at the store also verbally conveyed unloading safety instructions to appellants. Accordingly, the ultimate issue for determination becomes whether internal training and policies unknown to appellants at all relevant times can be construed so as to constitute a legal duty to appellants in the absence of a statutory or case law legal duty to convey unloading safety instructions to them under the facts of this case.

{¶ 11} On December 12, 2012, the trial court granted summary judgment to Home Depot. The trial court determined in relevant part, "A finding that defendant's internal training procedures create an otherwise absent duty reinforces the risk of which *Pierce* warned." The court went on to conclude, "The Court declines to find or create a duty based on Defendant's internal training policies." Accordingly, upon a determination that no duty existed, all arguments in connection to breach, proximate cause, and damages became moot. This appeal ensued.

{¶ 12} In the first assignment of error, appellants maintain that the trial court erred in granting summary judgment to appellees. Appellate review of summary judgment determinations is conducted on a de novo basis, applying the same standard as that utilized by the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 572 N.E.2d 198 (9th Dist. 1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment shall be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the

non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 13} In support of its position that it did not unwittingly assume a duty of care exposing it to liability in negligence through the existence of training and internal employee policies, appellees cite the Fourth District case of *Pierce v. Bishop*, 4th Dist. Meigs No. 10CA06, 2011-Ohio-371. In *Pierce*, a tow truck company possessed an internal policy designed to prevent employees from releasing impounded vehicles to visibly intoxicated vehicle owners by stalling or reporting the intoxicated party to the police. Despite this employee policy, a vehicle was released to an intoxicated vehicle owner and an accompanying passenger. The intoxicated driver thereafter caused an accident in which the passenger was killed. In finding that there was no legal duty owed premised upon the internal policy, the *Pierce* court noted that neither Ohio statutes nor case law recognizes such a duty. The court held in pertinent part, "Imposition of a duty on the basis of aspirational policies like this one would discourage worthy but non-mandatory efforts to promote safety and amount to adopting a rule that makes law out of the cliché, 'No good deed goes unpunished.'" The court further concluded, "We agree with their conclusion that it is not good policy to do so, as it would also result in almost unlimited potential liability." *Pierce* at ¶ 22.

{¶ 14} In addition to relevant precedent reflecting no duty can be found in this matter, we further note that the record is devoid of any evidence that appellants were aware of the Home Depot internal policy on verbal unloading safety instructions at the

time of the incident so as to support an assumption of the duty argument. As the court held in *Albright v. Univ. of Toledo*, 10th Dist. Franklin No. 01AP-130, 2001WL1084461 (Sept. 18, 2001), "Appellants failed to produce any evidence demonstrating they reasonably relied upon the university's assumption of any duty to assist pedestrians crossing the middle of a public street after exiting a concert." *Albright* * 8. Accordingly, appellants could not claim reliance upon a university policy to provide assistance to patrons and crossing a roadway following events at this venue as a basis from which to find a duty to triggering potential liability in negligence. Likewise, the instant case reflects no awareness or reliance upon the policy by appellants prior to the incident.

{¶ 15} We have carefully reviewed the record of evidence in the course of our independent consideration of the disputed summary judgment decision in this matter. We find that the record reflects that appellees were not subject to any legal duty to appellants in connection to the self-delivery unloading of the lawn tractor by appellees by statute or by case law. We find that the record reflects that appellees were not aware of and did not rely upon any internal Home Depot training or policy prior to the incident. We find that reasonable minds can only conclude that appellees had no duty of care to appellants from which liability in negligence could potentially be found in this matter. Appellees were entitled to summary judgment as a matter of law. Wherefore, we find appellants' first assignment of error not well-taken.

{¶ 16} In appellants' second assignment of error, appellants maintain the trial court erred in failing to consider their expert affidavit. Upon careful consideration, we do not concur. The record clearly reflects the appellants' expert failed to personally observe the truck involved in the incident, the ramp involved in the incident, or the mower involved in the incident. In addition, the record clearly shows that the entirety of the expert's basis of opinion was derived solely from the review of depositions and discovery materials contained in the record in this case. Thus, none of his proffered opinions are in any way rooted in independent materials, observations, or testing of any kind. As emphasized by the trial court in its determination that the expert affidavit should be disregarded, it was based solely upon depositions and discovery materials that were not described and were not attached to it. In conjunction with this, the court noted that the expert assumed facts that were not in evidence and ignored facts that were in evidence. Thus, the trial court concluded, "Reed's opinions lack foundation and any specialized knowledge, measurements, or technical information that is beyond the ken of a layperson."

{¶ 17} As held at ¶ 14 in *Ohio Turnpike Commission v. Spellman Outdoor Advertising Serv. L.L.C.*, 6th Dist. Lucas No. E-09-038, 2010-Ohio-1705, expert affidavits submitted in summary judgment filings must be based upon personal knowledge, set forth facts that would be admissible, and the affiant must be competent to testify to the statements in the affidavit, in order to be properly considered by the trial court. The record in this case reflects that appellants' expert affidavit did not comply

with these requirements. As such, the testimony of appellants' expert was properly not considered. We find appellants' second assignment of error not well-taken.

{¶ 18} We find that substantial justice has been done in this matter. Reasonable minds can only conclude that liability in negligence attributable to appellees is not possible. No duty was owed. No awareness of or reliance upon the Home Depot internal policy by appellants was established. The judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE