

IN THE SUPREME COURT OF OHIO

David A. Parker,)	Case No:
)	
Plaintiff-Appellant,)	(On Appeal from Champaign County
)	Court of Appeals, Second Appellate
)	District, Case No. 2017-CA-8)
v.)	
)	
ACE Hardware Corporation, et al.,)	
)	
Defendant-Appellees.)	

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DAVID A. PARKER**

James P. Connors, Esq. (0034651)
LAW OFFICES OF JAMES P. CONNORS
580 South High Street, Suite 150
Columbus, OH 43215
Telephone: 614-221-6868
Telefax: 614-221-6889
Email: jclaw221@aol.com
Counsel for Plaintiff-Appellant David A. Parker

Lisa M. Fedynyshyn-Conforti (0074324)
Goldberg Segalla
311 S. Wacker Drive, Suite 2400
Chicago, IL 60606
(312) 572-8418
Email: lconforti@goldbergsegalla.com
Counsel for Defendant-Appellees McAuliffe ACE Hardware,
McAuliffe Rental LLC, and ACE Hardware Corporation

TABLE OF CONTENTS

	<u>Page</u>
WHY THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS.....	1
A. The Ohio Products Liability Act Does Not Abrogate Unrelated Common Law Personal Injury Negligence Claims Against Non-Products Liability Defendants.....	1
STATEMENT OF THE CASE AND FACTS.....	3
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW	9
 Proposition of Law No. I:	
"The Ohio Products Liability Act, R.C. 2307.71 et seq., Does Not Apply To, Nor Does It Abrogate, Common Law Negligence Claims Asserted Against Non-Products Liability Defendants.....	9
CONCLUSION.....	11
CERTIFICATE OF SERVICE.....	12
APPENDIX.....	12

WHY THIS CASE HAS PUBLIC AND GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS

A. The Ohio Products Liability Act Does Not Apply To, Nor Does it Abrogate, Unrelated Common Law Personal Injury Negligence Claims Against Non-Products Liability Defendants.

This case arises from an arcane construction and application of the Ohio Products Liability Act ("OPLA") to an unrelated common law personal injury negligence claim against an unrelated non-products liability defendant, and is believed to represent a case of first impression for this court.

In a 2-1 split decision, the court of appeals in a single swipe of the pen has created a policy out of whole cloth which seemingly provides that any unrelated claim, no matter how it is pled, has been abrogated by the OPLA when it happens to be included as part of a lawsuit in which a separate products liability claim is made. The court of appeals affirmed a summary judgment for a hardware store by holding that a common law negligence claim (for a store clerk's negligence in selling Mr. Parker the wrong product) was abrogated by the OLPA even though it had nothing to do with a products liability claim against Coleman, the product manufacturer.

This de facto policy grossly misinterprets and misapplies the OPLA, flies in the face of the statute itself and the Ohio Constitution which unequivocally provide that Ohio courts are open to litigants for the prompt fair resolution of their claims, and defies the long standing constitutional right to bring such a claim. This case has serious constitutional implications.

The decision effectively eviscerates Mr. Parker's constitutional right to bring a common law negligence claim against a hardware store whose clerk gave him the wrong information about the kerosene which he sought to purchase, and then negligently sold him a highly volatile camp fuel instead of the kerosene which he had requested. Under these circumstances, the OPLA clearly does not foreclose his common law negligence claim simply because there was

another separate claim made against the product manufacturer. The court of appeals raised this issue and decided the appeal based on a grossly mistaken application of the OPLA when affirming a summary judgment based on entirely different issues arising from a common law negligence claim. There is no constitutional or legal right to do this, but this is precisely what happened below in this case.

David "Andrew" Parker was catastrophically injured when he lit a carefully organized brush and stick pile on fire for a friend whom he was helping who needed assistance cleaning his property in a remote area of Champaign County. Mr. Parker stopped at ACE Hardware on his way to his friend's home to buy kerosene which his friend had requested to be used to start the fire. Mr. Parker bought and then used what he was told by an ACE hardware store clerk was kerosene to start the fire.

It turned out that the store clerk misinformed Mr. Parker by failing to properly advise him that what she had actually sold him was not the requested kerosene, but rather was a highly flammable and volatile Coleman camp fuel. Upon lighting the fire, Mr. Parker was immediately engulfed in flames and suffered devastating third degree burns when the burn pile exploded. The story line of how this case arrives on this court's docket is less intriguing, but even more devastating for Andrew.

This court should review this case in order to set forth and clarify clear parameters by which Ohio courts may use and apply the OPLA to deny a personal injury claimant his constitutional right to bring a common law negligence claim at the same that he makes an unrelated products liability claim. This case is extremely important to the public at large because it presents the opportunity for this court to rectify a grossly mistaken application of a law that was never intended to foreclose unrelated common law negligence claims simply because a

products liability claim was asserted against a manufacturer. The court of appeals below grossly exceeded its legal authority to apply the OPLA to dismiss an unrelated common law negligence claim.

A failure to correct this obvious error would wreak havoc and deny basic justice, and have catastrophic ramifications for Ohio litigants. The following provides a “thorough explanation of ... why the case is of public or great general interest.” S. Ct. Prac. R. 3.1.

Statement of The Case and Facts

On March 20, 2015, Andrew filed this personal injury action against an ACE hardware store for its store clerk's negligence in directing Andrew to purchase camp fuel instead of the requested kerosene and then selling it to him. He included other negligence claims against the property owner, his friend Mr. Stephens, and a products liability claim against Coleman as manufacturer of the camp fuel.

Mr. Parker specifically settled and dismissed *all* products liability claims against Coleman on January 15, 2016 with prejudice. Lest there be any doubt about what claims were being settled and dismissed, the last sentence of the January 15, 2016 notice of dismissal states: “In addition, Plaintiff also dismisses Count Five of the Complaint (Products Liability and Strict Liability) with prejudice as to all parties.” (Emphasis original.) Coleman insisted on the language as part of the settlement agreement so that there was no misunderstanding that the only remaining claims were the common law negligence claims against ACE.

On March 16, 2016, the claims against Mr. Stephens were likewise dismissed with prejudice. The only remaining common law negligence claims against the hardware store (appellees ACE and McAuliffe's) proceeded from that point forward.

On August 30, 2016, ACE filed a motion for summary judgment. ACE argued that it had no duty to Mr. Parker and was thus entitled to summary judgment. Motion for Summary Judgment, p. 8 ("There appears (sic) to be no specific duties on a hardware salesperson selling items to a consumer at a hardware store."). ACE argued that any reliance by Mr. Parker on what the store clerk told him was not reasonable. Motion for Summary Judgment, pp. 10-11. ACE concluded by arguing that Mr. Parker assumed the risk of his injuries.

The trial court agreed with ACE and granted its motion for summary judgment on March 17, 2017. "The trial court's summary judgment decision is based upon the conclusion that, under the circumstances of this case, ACE owed Parker no duty of care." *Parker v. ACE Hardware Corp.*, 2018-Ohio-320, at ¶45. The court of appeals acknowledged that the trial court decided there was no duty owed. There was no mention of the OPLA or a products liability claim. The trial court decision made no mention of a products liability claim. It offered no analysis based on a products liability claim. The summary judgment had nothing to do with a products liability claim because nobody ever raised the issue at any time.

To the contrary, the trial court construed Mr. Parker's common law negligence claim as one for "professional negligence" similar to lawyers or doctors. Journal Entry, March 17, 2017, pp. 6-7. It held that it was not reasonable to hold a store clerk to this "professional" standard of care since the store has thousands of products and it is unlikely that a store clerk can be familiar with all of them. *Id.* The essence of the negligence claims against the ACE defendants was that their store clerk was negligent by pointing out and selling Mr. Parker camp fuel instead of kerosene which he had requested.

Mr. Parker alleged that the store clerk was merely negligent in what she said and did that day as a store clerk, not as a professional lawyer or doctor. He did not allege or analogize the

negligence claims as ones for “professional negligence,” as the trial court held. The trial court erred by misconstruing this case as a “professional” negligence case, but there was never any mention of a products liability claim and no mention of the OPLA.

The trial court next failed to properly address the duty issue, the first element of a negligence claim. The trial court erred by somehow finding that had Mr. Parker “studied” the can before checking out, he would have found that what he was buying was not kerosene, even though this is not relevant to whether the store owed a duty to Mr. Parker as a customer when advising him and making recommendations. *Id.* at 11. If the store clerk was unfamiliar with camp fuel or kerosene, then she should not have given Mr. Parker any advice or recommendations. More importantly, there was again never any mention of a products liability claim or the OLPA.

The trial court also found that he was in a “hurry” to get to Mr. Stevens’ house when in fact he was not in a hurry and there was no evidence that he was in a hurry. Mr. Parker simply relied on the store clerk’s advice that what he needed and had purchased was suitable for starting a brush fire and was in fact kerosene. The key issue which the trial court failed to address or decide is whether the clerk had a duty to provide accurate information to a customer, and whether in this case she breached that duty. The trial court did not decide this key issue.

The trial court improperly analogized this case to a customer buying apples instead of oranges (which he had requested), and being surprised when returning home to find that he did not buy oranges. *Id.* at 11. This case is not remotely similar to that analogy. The one gallon Coleman camp fuel can is no different than a one gallon kerosene can. Mr. Parker was unable to read the cans because he did not have his reading glasses, and relied on the store clerk when she

pointed out the cans, picked them up, and took the cans to checkout for him to buy. The trial court's "apples to oranges" analogy has nothing to do with the facts of this case.

The trial court focused only on the duty issue. It decided that the information about the product was available to Mr. Parker had he read the can, and that this absolved the clerk from any negligence in failing to accurately convey information about the product to be used for starting a brush fire. The trial court held that it could not find a duty or how a duty could be breached under this scenario. *Id.* at 12 (“the Court cannot articulate a possible duty owed to Plaintiff”).

The trial court’s decision did not determine whether defendants owed a duty to Mr. Parker and, if so, what that duty might be, and whether that duty was breached. It simply concluded that a claim fails because had he read the can, he would have found that he had bought camp fuel, not kerosene. *Id.* at 15-16. The trial court did not properly decide the negligence claim, nor did it determine the initial element of duty or any of the proper steps in evaluating the legal merits of the claim.

The trial court similarly erred by dismissing the negligent misrepresentation claim when it held that Mr. Parker’s reliance on what the store clerk said or told him was not reasonable. *Id.* at 18. There was no analysis on this claim by the trial court.

Never once did the trial court raise or decide a products liability claim, nor did it mention a products liability claim.

On appeal, the only issues presented to the court of appeals concerned the above issues about Mr. Parker's negligence claims against a hardware store. Again, there was no discussion of the OPLA or a products liability claim. There was likewise no mention of a products liability claim at oral argument.

In a split 2-1 decision, the court of appeals stunned everyone, including ACE, when it affirmed summary judgment based on an "out of thin air" determination that Mr. Parker's negligence claims were somehow "products liability" claims that were abrogated by the OPLA. The court of appeals provided no insight how it arrived at this conclusion. It merely concluded, without more, "In Counts 2 and 3, Parker alleged negligence, negligent failure to warn, and negligent misrepresentation, and we conclude these are product liability claims." *Parker v. ACE Hardware Corp.*, 2018-Ohio-320, at ¶31. "We finally conclude, as in Miller, and pursuant to R.C. 2307.71(B), that summary judgment on Parker's claims of negligence, negligent failure to warn, negligent misrepresentation, and breach of warranties is proper as a matter of law." *Id.* at ¶36.

The court of appeals' decision offers no insight into how it concluded that the common law negligence claim was actually a products liability claim since there was no apparent review of the record, the pleadings, or Ohio law. This issue was never raised below, nor was it ever litigated or even reviewed at any level. The appellees never raised the issue, the appellant never raised the issue, the trial court never raised the issue, and last but not least the court of appeals never raised the issue. That is, until its decision.

That there was no products liability claim is fairly obvious. The dissenting justice recognized the "elephant in the room" in that the only claim pled against ACE was a simple common law negligence claim. He took the time to review the pleadings and how they measured up against the OPLA. All he correctly found was this was indeed a simple negligence claim.

"Though Parker's complaint asserts two negligence causes of action against ACE (negligence and negligent misrepresentation), Parker, as distilled by his deposition testimony, asserts a single negligence cause of action. This cause of action asserts, in essence, that ACE,

through Reigle's conduct, negligently sold Parker Coleman Camp Fuel instead of the kerosene he requested. The following OPLA analysis is based upon this negligence assertion." *Parker v. ACE Hardware Corp.*, 2018-Ohio-320, at ¶38.

"ACE's summary judgment motion did not assert that Parker's negligence cause of action is within the coverage of the OPLA and, as a result, abrogated. Further, ACE's brief and reply brief do not suggest such abrogation. These omissions, I suggest, are based upon ACE's recognition that Parker's negligence claim is not a products liability claim as defined by the OPLA." *Id.* at ¶39.

It is readily apparent to even the casual reader of the pleadings that Mr. Parker's negligence claim was not a products liability claim. "Parker's negligence cause of action does not make any allegation regarding Coleman Camp Fuel that fits into R.C. 2307.71(A)(13)(a) because it is not asserted that the Coleman Camp Fuel is defective. Also, when the statutory definitions regarding subsections (b) and (c) are reviewed, it becomes apparent that Parker's negligence claim does not make any allegations regarding Coleman Camp Fuel that fit into either subsection." *Id.* at ¶40.

The negligence claim bears no resemblance to a products liability claim. "As can be seen, a product is defective based upon an inadequate warning or instruction based upon the conduct of the manufacturer. Parker's negligence cause of action makes no allegations regarding the manufacturer of the Coleman Camp Fuel leading to the conclusion that R.C. 2307.71(A)(13)(b) has no application to the analysis." *Id.* at ¶41.

"A product, again as can be seen, is defective based upon the manufacturer's conduct. Parker's negligence claim does not assert that Coleman Camp Fuel was defective based upon the product not being in conformance with a manufacturer's representation." *Id.* at ¶42.

"Parker's negligence cause of action does not assert that ACE made any nonconforming representations regarding Coleman Camp Fuel. Parker's negligence cause of action, as such, cannot be considered a product liability claim on this basis." *Id.* at ¶43.

"Parker's factual assertions, this being said, do not assert that the Coleman Camp Fuel was a defective product as statutorily defined or otherwise. Parker, instead and as noted, asserts that ACE, through Reigle's conduct, sold him Coleman Camp Fuel instead of the kerosene he requested. This claim is simply not a product liability claim under the OPLA." *Id.* at ¶44.

The court of appeals' decision, therefore, is not only unclear and vague as to its reasoning, but totally escapes any rational reading of the pleading, statute, and facts of the case.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I:

"The Ohio Products Liability Act, R.C. 2307.71 et seq., Does Not Apply To, Nor Does It Abrogate, Common Law Negligence Claims Asserted Against Non-Products Liability Defendants."

The court of appeals' application of the OPLA to Mr. Parker's negligence claims in this case effectively strips, without due process, Mr. Parker's unequivocal right to bring a common law negligence claim that has nothing to do with the OPLA.

The decision in this case fails to observe the basic constitutional protections afforded to litigants such as Mr. Parker. "Section 16, Article I of the Ohio Constitution provides, 'All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.' This provision contains two distinct guarantees. First, legislative enactments may restrict individual rights only 'by due course of law,' a guarantee equivalent to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Sedar v. Knowlton Constr. Co.*

(1990), 49 Ohio St.3d 193, 199, 551 N.E.2d 938." *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, at ¶108.

"The second guarantee in Section 16 is that 'all courts shall be open to every person with a right to a remedy for injury to his person, property or reputation, with the opportunity for such remedy being granted at a meaningful time and in a meaningful manner.' Sedar, 49 Ohio St.3d at 193, 551 N.E.2d 938." *Id.* at ¶109.

The result in this case is especially harsh since Mr. Parker at no stage of this process was aware that the OLPA was implicated. ACE never raised the issue, nor did the trial court, nor did anyone, even at oral argument. It was only upon release of the decision that anyone first learned that the court of appeals even had a concern about this or considered it to be an issue.

So the issue was never litigated nor raised at any level. Use of the OLPA is akin to an affirmative defense which was never pled nor raised by ACE at any time. Basic fairness dictates that Mr. Parker would have notice of the defense and the opportunity to address it in court at any level. He was never given that chance. ACE never pled this as a defense nor did it present the issue on summary judgment. At a minimum, the court of appeals should have remanded so that the issue could be litigated and resolved with basic fairness.

As the dissent observes, however, there is simply no question that Mr. Parker's common law negligence claims were never subject to the OPLA because they were not products liability claims under any construction of that definition in the statute.

None of the case law cited by the court of appeals involved a similar scenario found here. Rather the cited case law concerned the proper finding that the OLPA abrogated common law claims against a manufacturer that had been sued for a defective product under the OLPA. In other words, the court of appeals relied primarily on federal cases finding that once a product

manufacturer has been sued under the OPLA, it cannot also be sued under common law negligence claim theories. None of the cases cited by the court of appeals in support of its decision concerned a common law negligence claim being asserted against a non-products liability defendant such as ACE in this case.

This court is urged to review this case so that the application and extent of the OPLA can be clarified to state the obvious. The OPLA does not apply to common law negligence claims asserted against non-products liability defendants who happen to be included in a case involving a products liability claim. The OPLA was never intended to be used or applied in this manner. This court is urged to accept review and to set the record straight on the OPLA, and a litigant's right to basic due process and fairness in having his claim heard and resolved by an Ohio court.

CONCLUSION

Mr. Parker respectfully submits that this apparent case of first impression presents several questions of public or great general interest, and substantial constitutional questions. In this case, the court of appeals blatantly and clearly abrogated basic fairness by holding that a common law negligence claim was barred by the OPLA even though it was not a products liability claim.

The Ohio Constitution provides that litigants are entitled to due process in the determination of their claims by a jury in open court. This case was decided on summary judgment concerning an issue which was never raised by anyone at any level until the court of appeals' decision to bar the claim. The two member majority of the court of appeals in this case lost their way by finding that the OLPA applied simply because a products liability claim had once been pled in the case. There is absolutely no legal ground on which this decision can arguably stand, and to allow it to stand without review would be an even more egregious injustice to both Mr. Parker and the citizens of our great state.

This court is urged to accept full review of this case, and the proposed proposition of law, which have great general interest among Ohio citizens, businesses, and courts, and which significantly and deeply impact the ability of all Ohio litigants, citizens and courts alike to preserve and protect basic fairness and integrity in the litigation process for common law negligence claims.

Respectfully submitted,

/s/ James P. Connors
James P. Connors, Esq. (0034651)
LAW OFFICES OF JAMES P. CONNORS
580 South High Street, Suite 150
Columbus, OH 43215
(614) 221-6868
FAX (614) 221-6889
JClaw221@aol.com
Counsel for Appellant David A. Parker

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served upon counsel for the appellees via email, this 23rd day of April, 2018.

/s/ James P. Connors
Counsel for Appellant David A. Parker

APPENDIX

<u>Description</u>	<u>Date</u>	<u>Page</u>
Opinion of the Champaign County Court of Appeals	January 26, 2018	
Decision and Entry Denying Motion for Reconsideration	March 8, 2018	