No. 09-0460

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY, OHIO
CASE NO. 2-08-10

KEVIN J. MOELLER, et al.,

Plaintiffs-Appellants,

v.

AUGLAIZE ERIE MACHINE CO., *et al.*,

Defendants-Appellees.

APPELLEE TEXTRON'S MEMORANDUM OPPOSING JURISDICTION

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I. EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC AND GREAT GENERAL INTEREST

A. Introduction

Discretionary review by this Court is reserved for cases that present issues of public or great general interest. See Section 2(B)(2)(e), Article IV, Ohio Constitution; S.Ct.Prac.R. III(1)(B)(2). This is not one of those cases because (1) the facts are unique, (2) the applicable law is well-settled and not in need of clarification, and (3) Appellants' Memorandum in Support seeks merely error correction.

Kevin Moeller ("Moeller") was injured while working for a non-party subcontractor ("Manco") retained to finish painting an industrial mower prior to it being placed in the stream of commerce. Moeller and his parents filed this products liability/negligence lawsuit against the designer of the mower ("Textron") and the assembler of the mower ("Auglaize Erie").[1] The Third District Court of Appeals affirmed summary judgment in favor of these defendants. *Moeller v. Auglaize Erie Machine Co.*, 3rd App. No. 2-08-10, 2009-Ohio-301. Applying the relevant statute, R.C. 2307.75, the court below found that, while it was being finished by the subcontractor, the mower was "still under Appellees' control." *Moeller, supra,* at ¶ 20. As support, the court referred to the pertinent facts in the record and noted that "the product designed and assembled by Appellees was sent to a subcontractor, Manco, for touch-up paint at Appellees' direction."

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[1] Apart from this lawsuit, Kevin Moeller received a workers' compensation award as a result of this workplace injury.

Id. This opinion is a well-reasoned application of relevant law to the facts of this case. No further review is necessary.

B. The Unique Facts of this Case Do Not Warrant Jurisdiction.

Further appellate review is not warranted because any opinion by this Court would be limited to the unique facts of this case. Here, the assembler of the mower, Auglaize Erie Machine Co., retained Manco to paint the mower to specification prior to it being placed in the stream of commerce. This mower itself comprised three large wing decks that were secured in an upright position. Before painting the mower, the subcontractor removed two of the mower's safety features—a latch used to secure the decks upright and the hydraulics designed to lower the decks—and directed Moeller and another employee to stand under each wing deck and lower the decks by hand. Moeller and the other employee narrowly escaped injury during the lowering of the right wing deck because it became too heavy at chest level and they had to jump out of the way as they dropped it. Moeller was injured when he and the other employee tried to lower the second wing deck. Again, the two struggled under the weight of the deck as they tried to lower it by hand. This time, however, Moeller could not get out of the way when the deck dropped to the ground and on top of Moeller.

Thus, the relevant facts supporting the Third District's rationale for affirming summary judgment involve a subcontractor finishing a product for the assembler before the product is placed in the stream of commerce. Moeller was not injured by using the product, but rather was injured while finishing the product *before* it was placed in the stream of commerce. This is not a common fact pattern. Further, these facts must be

viewed within the context of a subcontractor altering the product by removing safety features and a plaintiff-employee who assumed a known risk. These unique facts would severely limit the applicability of this case and thus this case would be a poor candidate for an Ohio Supreme Court opinion.

C. Jurisdiction Is Not Warranted Because This Case Does Not Involve the Application of Any Unsettled or Conflicting Law.

This Court does not need to clarify any unsettled or conflicting aspect of Ohio law. In affirming summary judgment on the product liability claims, the Third District applied R.C. 2307.75 which limits product liability claims to alleged defects that exist in a product "at the time it left the control of its manufacturer..." The court below held that prior to being placed in the stream of commerce, the industrial mower was "still under Appellees' control due to these circumstances." *Moeller, supra,* at ¶ 20. Appellants' Memorandum in Support does not argue that this area of Ohio law is unsettled. In fact, Appellants agree that R.C. 2307.75 applies to these facts. Appellants' Memorandum in Support at p. 11. Additionally, they do not cite any conflicting authority regarding the application of this statue to similar facts.

Appellants' argument is that "possession" of the mower should equal "control" for purposes of R.C. 2307.75. Appellants' Memorandum in Support at p.10-11. Appellants have not cited any authority to support this argument. More importantly, Appellants' wish to see R.C. 2307.75 applied in a new and unique manner does not evidence an unsettled area of law. There is no need for this Court to step in and clarify this area of Ohio Product Liability Law.

Nor is there any need to clarify Ohio negligence law. In affirming summary judgment in favor of the assembler of the mower, Auglaize Erie Machine, the court applied settled law. The court found that "Appellees could not anticipate a risk of injury to an employee of a subcontractor after that subcontractor disconnected both the safety latch and hydraulic cylinder intended to mechanically lower the wings, and attempted to lower a wing by directing his employee to stand underneath it and manually lower it." *Moeller, supra,* at ¶ 26. Ohio's negligence law is well-established and the opinion from the Third District breaks no new ground. Further appellate review is unnecessary.

D. Error Correction Is an Insufficient Basis for Jurisdiction.

Appellants' Memorandum in Support does not present any reason to justify further appellate review. Appellants merely argue that the court below erred in affirming summary judgment. This request for error correction does not merit a grant of discretionary jurisdiction. *State v. Bartrum*, ____ Ohio St.3d ____, 2009-Ohio-355 at ¶ 31 ("Our role as a court of last resort is not to serve as an additional court of appeals on review, but rather to clarify rules of law arising in courts of appeals that are matters of public or great general interest.") Appellants exercised their right to pursue their arguments on appeal to the Third District which unanimously rejected Appellants' arguments. Appellants' Memorandum in Support does not present any viable reason for further review.

II. COUNTERSTATEMENT OF THE CASE AND FACTS

Appellees Jacobsen, Division of Textron Inc., Textron Inc., and STE Holdings, Inc. (formerly known as "Steiner Turf Equipment, Inc.")(collectively referred to as

"Textron") are related, non-resident corporate entities. STE Holdings Inc. is the successor to Steiner Turf Equipment Inc., which designed the product at issue, a Brouwer RM-22 Rotary Mower ("RM-22" or "the mower"). Textron Inc. was the parent company of Steiner Turf Equipment Inc. Jacobsen is an operating division of Textron Inc. focused on turf maintenance equipment. Appellee Auglaize Erie Machine Company ("Auglaize Erie") assembled the mower for Textron. Manco Manufacturing Company ("Manco"), which is not a party to this matter, was a sub-contractor Auglaize Erie hired to paint the mower.

Moeller was injured during the course of his employment at Manco. *Moeller, supra,* at ¶ 2. At the time of Moeller's injury, the RM-22 had not been placed into the stream of commerce, as it had never been delivered to a dealer, customer, or end user. Id. at ¶ 6. Manco never intended to purchase or use the mower. Id. In fact, the RM-22 was returned to Manco before it was released into the stream of commerce because the paint job was not up to specification. Id.

The RM-22 mower is an industrial mower with a frame, two seven-foot long wing decks, and a rear deck. Id. at ¶ 5. During transport, the wing decks are placed in an "upright position," at a ninety degree angle and connected to the frame with a latch to hold them in place. Id. The RM-22 was specifically designed so that hydraulic power would raise and lower the wings. Id. at ¶ 6. The mower also contained a safety latch that supported the weight of the wings in addition to the hydraulic cylinder. Id.

After the mower was delivered to Manco, the hydraulics were removed and Patrick Nieberding, Moeller's supervisor, attached a rope to one of the wings. Nieberding

did not, however, throw the rope over an overhead bar or anything else to reduce the tension on the rope. He then instructed Moeller and another Manco employee to lower both of the wings in order to touch up the paint. Nieberding directed them to stand underneath either side of the wing to slowly lower it down by hand while he held the rope to assist in lowering. Moeller and the other employee lowered the right wing to chest level and then violently dropped it down after they both got out of the way.

The three men then began to lower the left wing by the same method. As they lowered the left wing, Moeller and the other employee began to struggle and lost control of the wing. The left wing then dropped. The other employee was able to jump out of the way, but Moeller's abdomen and legs were pinned under the wing. Id. at ¶ 7.

Moeller, along with his parents, sued Appellees, seeking damages under theories of product liability and negligence. After full discovery, the Textron defendants and Auglaize Erie Machine separately moved for summary judgment. The trial court granted each motion and Appellants appealed. On appeal, the Third District Court of Appeals affirmed. *Moeller, supra.* Thereafter, Appellants filed their Notice of Appeal and Memorandum in Support of Jurisdiction with this Court.

III. ARGUMENT

A. Appellants' First Proposed Proposition of Law

The requirement in Section 2307.75(A), Revised Code, that the defect exist at the time the product left the control of the manufacturer means that the alleged design defect is the manufacturer's design rather than a subsequent design or modification and does not mean that the product must be sold in order for the statute to have application.

1. Introduction

In their First Proposed Proposition of Law, Appellants seek this Court's jurisdiction because they disagree with the Third District's application of R.C. 2307.75 to these facts. Jurisdiction is not warranted because the court below correctly applied settled Ohio law. More importantly, Appellants' request amounts to nothing more than a plea for error correction which is an insufficient basis for jurisdiction. *State v. Bartrum, supra*; *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 541, 2004-Ohio-5847, at ¶12.

2. The Third District's Opinion Is Correct.

The Third District's decision to affirm the lower court's determination is well-grounded in law and fact. The appellate court applied the correct statute. R.C. 2307.75. Appellants agree. "It is true that the alleged defect in the product must exist at the time it left the control of the manufacturer. See Section 2307.75." Appellants' Memorandum in Support of Jurisdiction at p. 11.

The court accurately applied this statute to the facts in the record. Pursuant to R.C. 2307.75, a plaintiff must show that "a product is defective in design or formulation..., at the time it left the control of its manufacturer..." R.C. 2307.75(A). Applying this statute, the court below found that while the RM-22 was being worked on by Manco, it was "still under Appellees' control." *Moeller, supra,* at ¶ 20. As support, the court referred to the pertinent facts in the record and noted that "the product designed and assembled by Appellees was sent to a subcontractor, Manco, for touch-up paint at Appellees' direction." Id. The opinion, therefore, applied the correct legal authority to relevant factual support from the record.

In addition, the Third District's rationale was consistent with a goal of Ohio's product liability laws: to protect consumers and end-users from allegedly defective products. Moeller was not hurt by using the product, but while finishing the product before it was placed in the stream of commerce. Manco was not an end user, consumer, or dealer. Manco did not use this mower for its intended use—to cut grass. Rather, Auglaize Erie sent the mower to Manco, for further painting because the paint was not up to specification. Painting is part of the manufacturing process. Because the mower had not entered the stream of commerce, the Third District's reasoning was sound.

Notably, the judgment of the Third District is consistent with courts throughout the country that have reached the same result. *Ettinger v. Triangle-Pacific Corp.* (Pa. 2002), 799 A.2d 95, 105. ("In sum, we agree with the conclusion reached by those jurisdictions that have held that Section 402A does not apply to an incomplete product that has not left the control of its manufacturer and thus entered the stream of commerce."); *Gabler v. Robbins & Myers, Inc.* (Mo.Ct.App.1995), 895 S.W.2d 79, 81 ("The defectiveness of a product is measured as of the time the product enters the stream of commerce."); *Scott v. Thunderbird Industries* (Okl. 1982), 651 P.2d 1346, (Subcontractor entitled to judgment as a matter of law when the plaintiff-employee was injured during the assembly of a tank that had not been placed in the stream of commerce.)

3. The Applicable Product Liability Statutes Do Not Need Clarification by this Court.

Further, Appellants do not argue that R.C. 2307.75 is in need of clarification. They do not contend that the language of R.C. 2307.75 is either ambiguous or vague.

Nor do they cite to any conflicting interpretations of this statute in the 20-plus years since Ohio enacted R.C. 2307.75. Rather, Appellants merely disagree with how the Third District applied R.C. 2307.75 to these facts. Without citing a single case to support their position, Appellants argue that both Appellees "relinquished control" of the mower when it was moved to Manco. Appellants' Memorandum in Support at p. 12. Merely because Appellants disagree with the outcome below does not mean that R.C. 2307.75 needs clarification.

4. Because of the Alteration of this Mower and Moeller's Assumption of the Risk, this Case is Ill-Suited for Ohio Supreme Court Review.

Not only was the Third District's analysis correct, but other facets of this case limit the applicability of this case to other fact patterns. First, Appellants' strict liability claims fail because the product at issue was materially altered by Manco. *See Kobza v. General Motors Corp.* (1989), 63 Ohio App.3d 742, 745, 580 N.E.2d 47 ("A claim for strict liability in tort cannot be maintained if there has been a material alteration to the defective product once it has left the manufacturer's control, and if this material alteration significantly contributed to the plaintiff's injury."); *Sikorski v. Link Electric and Safety Control Co.* (1997), 117 Ohio App.3d 822, 830, 691 N.E.2d 749. ("The product liability statutes provide that the product is defective only if the defect existed when it left the control of its manufacturer.")

The RM-22 is designed with two specific safety features: the hydraulics and the safety transport latch. Both of these features prevent the wing decks from rapidly falling. The safety transport latch holds the wings in an upright position, and the hydraulics allow

for the controlled descent of the decks. The undisputed evidence shows that the hydraulic cylinders of the RM-22 were removed by Moeller's employer, Manco, immediately prior to his injury. The hydraulics for the left and right wing decks were removed precisely because they were serving the function for which they were designed – i.e., preventing uncontrolled descent or dropping of the wing decks. This unilateral decision by Manco to remove a safety feature of the RM-22 was the proximate cause of Moeller's injuries which would not have occurred if Manco had not disconnected the hydraulics and tried to manually lower the mower decks.

Second, Moeller's assumption of the risk acts is a "complete bar" to his strict liability product claims. R.C. § 2307.711; *Onderko v. Richmond Mfg. Co.* (1987), 31 Ohio St.3d 296, syllabus (operator of earth-boring machine assumed the risk of injuries caused by clothing entanglement; product liability claims barred). Moeller was aware of the danger posed by the falling wing deck after the safety features—the hydraulics and latches holding the wings in place—were removed. Just moments before the injury, Moeller had manually lowered the other wing deck and narrowly avoided injury. Moeller assumed the risk of this injury because, after experiencing the force with which the first wing deck came down without hydraulics, he attempted the same risky maneuver on the second wing deck.

Accordingly, because the appellate opinion was sound, the relevant law is settled, and the facts of this case are unique, jurisdiction over Appellants' First Proposed Proposition of Law is not warranted.

B. Appellants' Second Proposed Proposition of Law

An appellate court may not consider the weight of the evidence, or assess credibility, in ruling on a motion for summary judgment and thus commits error in granting summary judgment when it fails to construe the conflicting testimony and evidence in a light most favorable to the non-moving party.

Appellants' Second Proposed Proposition of Law does not apply to the Textron Appellees. This proposition seeks jurisdiction over the portion of the Third District's opinion that affirmed summary judgment in favor of Auglaize Erie on the negligence claims. The Third District described the negligence claim as follows: "the Moellers assert that AEM owed a duty to Kevin because it owned the mower that caused his injuries; that AEM breached its duty of care because the mower was defectively designed and lacked adequate warnings; and, that the mower's defects proximately caused Kevin's injuries." *Moeller, supra,* at ¶ 22. Thus, Appellants' attempt to seek review of the negligence claim does not apply to the Textron defendants.

Notwithstanding the inapplicability of the second proposition to Textron, any claim of negligence against Textron fails as a matter of law. To establish their negligence claims, Appellants were required to establish: 1) a duty on the part of Textron to protect Moeller from injuries; 2) a breach of that duty; and 3) an injury proximately resulting from the breach. *Huston v. Konieczny* (1990), 52 Ohio St.3d 214; *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140. Here, Moeller was an employee of Manco, a subcontractor to Auglaize Erie, the assembler of the mower. Textron never had possession of the mower before the accident, and Textron had no duty to Moeller. Manco, not Textron, caused Moeller's injuries by dismantling the hydraulics, releasing the latch, and lowering the

wing deck with Moeller standing under the deck. *Moeller, supra,* at ¶ 22. Any negligence claims against Textron fail as a matter of law.

Moreover, the resolution of the negligence claim by the Third District does not warrant further review. The appellate court found that "Appellees could not anticipate a risk of injury to an employee of a subcontractor after that subcontractor disconnected both the safety latch and hydraulic cylinder intended to mechanically lower the wings, and attempted to lower a wing by directing his employee to stand underneath it and manually lower it." *Moeller, supra,* at ¶ 26. This holding is an application of well-established law to the specific facts of this case. Appellants do not argue that the applicable negligence law in Ohio is in any way unsettled or in need of clarification. Appellants' request for jurisdiction over their Second Proposed Proposition of Law should be denied

C. Appellants' Third Proposed Proposition of Law

Parents of an adult child may assert a claim for loss of consortium with their injured child as a derivative claim.

In their Third Proposed Proposition of Law, Appellants seek this Court's jurisdiction over their claim for loss of consortium by the parents of an adult child. Jurisdiction is not warranted because Appellants' consortium claim is not ripe. Diane and Bruce Moeller's loss of consortium claims are derivative of Kevin Moeller's strict liability and negligence claims. *Moeller, supra,* at ¶ 29. Because the appellate court affirmed summary judgment in favor of Appellees on these two claims, the court below

never reached the issue of whether a parent can recover for loss of consortium by an adult child. Id.

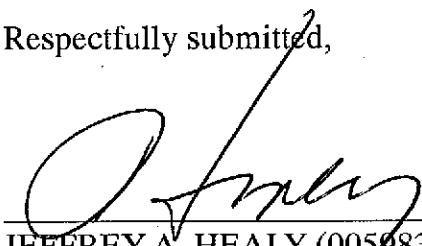
Further, in Ohio a parent is not entitled to recover for the loss of consortium of an adult child. *Cole v. Broomsticks, Inc.* (1995), 107 Ohio App.3d 573, 577-78, jurisdictional motion overruled (1996), 75 Ohio St.3d 1474, 663 N.E.2d 1301. Ohio Courts have adhered to the position that "parents of minor children bear a natural and legal burden to care for minor children, but such a natural and legal burden does not exist for parents of adult children." *Cole, supra,* at 577. Ohio law is consistent with other jurisdictions that deny consortium claims for the loss of an adult child. See *Kulish v. Westside Unlimited Corp.* (Iowa 1996), 545 N.W. 2d 860, 862; *Solon v. W.E.K. Drilling Co.* (N.M. 1992), 829 P. 2d 645,649; *Boucher v. Dixie Medical Center* (Utah 1992), 850 P. 2d 1179, 1187. See also, *Rolf v. Tri State Motor Transit Co.* (2001), 91 Ohio St.3d 380, 2001-Ohio-44 (This Court stopped short of allowing a parent to recover for loss of consortium from an adult child).

This Court has consistently declined to accept jurisdiction over this issue. *Moroney v. State Farm Mutual Auto Ins. Co.*, 5th App. No. 01CA99, 2002-Ohio-3829, jurisdictional motion overruled 97 Ohio St.3d 1424, 777 N.E.2d 278, 2002 -Ohio- 5820; *Carpenter v. United Ohio Ins. Co.*, 7th Dist. No. 272, 2000-Ohio-2586, jurisdictional motion overruled (2001), 92 Ohio St.3d 213, 749 N.E.2d 292. The only case that Appellants claim to support their position, *Brady v. Miller*, 2nd App. No. 19723, 2003-Ohio-4582, appears to be an orphan as it was never appealed to this Court.

IV. CONCLUSION

Nothing in this case warrants review by this Court. The unanimous opinion from the Third District is a well-reasoned and correct application of law to the facts. Exercising jurisdiction over this case would not be a judicious use of this Court's resources because the law in this area is well-settled and any opinion would have limited precedential value in light of these unique facts.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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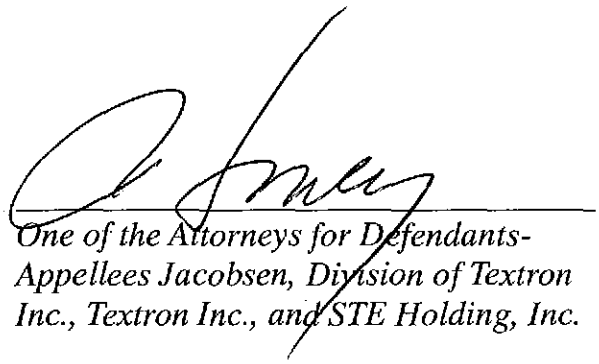

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