[Cite as *Morris v. Junior Achievement of Northwest Ohio, Inc.*, 2009-Ohio-6340.]

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

Zachary C. Morris, et al.	Court of Appeals No. L-08-1420
Appellants	Trial Court No. CI07-5024
v.	
Junior Achievement of Northwest Ohio, Inc., et al.	**DECISION AND JUDGMENT**
Appellee	Decided: December 4, 2009

* * * * *

Stuart F. Cubbon, for appellants.

Sheila A. McKeon, Timothy J. Fitzgerald, and Jane K. Conrad, for appellee.

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PIETRYKOWSKI, J.

{¶ 1} This is an accelerated appeal from a judgment of the Lucas County Court of Common Pleas that granted the summary judgment motion of defendant-appellee, Junior Achievement of Northwest Ohio, Inc. ("JANO"), and thereby dismissed the product

liability action filed by plaintiffs-appellants, Zachary C. Morris, et al. Appellants now challenge that judgment through the following assignments of error:

{¶ 2} "1. The trial court erred in granting defendant summary judgment where reasonable minds could conclude that there is a genuine issue of material fact as to whether JANO was in the business of selling go-karts, as contemplated by Ohio's product liability laws.

{¶ 3} "2. The trial court erred in granting defendant summary judgment where reasonable minds could conclude that there is a genuine issue of material fact as to whether JANO was in the business of manufacturing go-karts, as contemplated by Ohio's product liability laws.

{¶ 4} "3. The trial court erred in granting summary judgment where reasonable minds could conclude that there is a genuine issue of material fact as to whether JANO was in the business of supplying go-karts, as contemplated by Ohio's product liability laws."

{¶ 5} On May 4, 2006, Zachary Morris was injured when the brakes on a go-kart he was driving failed and he crashed into a brick wall of the Toledo Technology Academy ("TTA"). On July 19, 2007, Zachary and his parents, Randall and Annette Morris (appellants herein), filed a product liability action in the court below against JANO, Junior Achievement Worldwide ("JAW"), TNT Karts, Inc., Intense Karting Imports, Michael Combs and Jackie Combs. Ultimately, appellants dismissed their

action against JAW, TNT Karts, Inc., Intense Karting Imports, Michael Combs and Jackie Combs. Accordingly, we will only address the complaint as it relates to JANO.

{¶ 6} Appellants alleged that JANO was engaged in a business to design, formulate, produce, create, make, construct, assemble or re-build go-karts, including the go-kart on which Zachary was injured. They further alleged that the go-kart on which Zachary was injured was defective in manufacture, construction, design or formulation, that it failed to conform to representations of quality and fitness made by JANO, that JANO failed to exercise ordinary care in the manufacture and construction of the go-kart, and that as a direct and proximate result thereof, the go-kart was defective when it left JANO's custody and control. Appellants then alleged that as a direct result of JANO's defects, failures to conform, negligence and breaches of implied warranties of fitness, Zachary sustained serious and permanent personal injuries and appellants incurred medical expenses in excess of $59,000 and will continue to incur medical expenses in the future.

{¶ 7} JANO filed a motion for summary judgment, asserting that because it was not a manufacturer, seller or supplier of the go-kart at issue, it could not be held liable for Zachary's injuries under the product liability laws of Ohio and was entitled to judgment as a matter of law. Appellants opposed the summary judgment motion with their own memorandum. The motion and memorandum were based on the following undisputed facts that were presented to the court below.

{¶ 8} In the fall of 2005, Zachary was a 17-year-old student at TTA in Toledo, Ohio. General Motors Corporation ("GM") provided annual financial support to the school, and in the fall of 2005, determined that it wanted to sponsor a pace car for the 2006 Junior Achievement Grand Prix go-kart race in downtown Toledo. The Grand Prix had been an annual fund raiser for JANO since 2000. To participate in the race, local companies or organizations would sponsor a go-kart. The company or organization, however, was required to purchase the go-kart through JANO. The first year that a participant entered the race, the entry fee would be approximately $4,200, which covered the cost of the sponsorship plus the cost of the go-kart. The participant then could keep the go-kart and compete in the race in subsequent years by simply paying a sponsorship fee of approximately $2,200.

{¶ 9} JANO originally purchased the go-karts that were provided to the race participants from a company in Michigan. In February 2005, however, after that company ceased operations, JANO purchased five go-karts from TNT Karts, Inc. for the 2005 race. Only four of those go-karts were used for the 2005 race, so when GM sought to sponsor the pace car for the 2006 race, JANO gave GM the final car from its 2005 purchase from TNT. To sponsor the pace car, GM was required to pay JANO $10,000. JANO, however, understood that GM would be turning the go-kart over to TTA for modifications, which JANO permitted because the pace car was not to be involved in the actual race.

{¶ 10} After TTA took control of the go-kart, students involved in the project set about to modify the engine to run on alternative fuel. They did not, however, make any changes to the brake assembly. During the fall, winter and spring of the 2005-2006 school year, the TTA students involved in the project worked on the go-kart. In addition, the students who were 17 or 18 years old were permitted to test drive the go-kart in the school parking lot after the teachers involved in the project had given the okay that the go-kart drove fine and there were no problems with the engine. On May 4, 2006, Marvin Gladieux, the school's lab technician and designated test driver, took the go-kart for a test drive in the school parking lot. After he determined that there were no problems with the vehicle, he stopped the go-kart and turned it over to Zachary. Zachary had driven the go-kart five or six times before this day. In addition, all of the team members had driven the vehicle a number of times previously. After driving the go-kart for several laps, Zachary attempted to slow the vehicle to bring it to a stop, but when he applied the brakes he felt the brake pedal give way and the brakes fail. He was unable to stop the vehicle and crashed into the wall of TTA, causing him the injuries that prompted this case.

{¶ 11} Gary Thompson, the director of TTA, and Marvin Gladieux, subsequently examined the brake assembly of the go-kart and determined that the threaded end of the brake rod had slipped out of the collar end, or clevis, because the outer diameter of the brake rod and the inner diameter of the clevis were improperly matched. In particular, Gary Thompson testified at deposition that because the threads on the clevis were not stripped, he believed that the brake rod had simply slipped out of the collar. He further

opined that the brake assembly was defective because there was no pin holding the brake rod and collar together.

{¶ 12} In an opinion and order dated October 30, 2008, the lower court granted JANO's motion for summary judgment and thereby dismissed the action against it. The court determined that JANO was entitled to judgment as a matter of law because there was no genuine issue of material fact that JANO was not in the business of manufacturing, selling or supplying go-karts, as contemplated by Ohio's product liability laws and, so, could not be held liable under those laws. It is from that judgment that appellants now appeal.

{¶ 13} Because they are related, we will address appellants' assignments of error together. Appellants assert that genuine issues of material fact remain regarding whether JANO was a manufacturer, seller or supplier of the defective go-kart on which Zachary was injured and, therefore, the lower court erred in granting JANO summary judgment.

{¶ 14} Appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294. However, once the

movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 15} In their complaint, appellants sought to recover damages under various theories of product liability, alleging that JANO was a manufacturer, seller and/or supplier of a defective product.

{¶ 16} Ohio's product liability laws are codified in R.C. 2307.71 to 2307.80, although certain common law claims based on product liability have survived the enactment of Ohio's Products Liability Act. See *Hertzfeld v. Hayward Pool Products, Inc.*, 6th Dist. No. L-07-1168, 2007-Ohio-7097. Under Ohio's Product Liability Act, a plaintiff can seek "to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:

{¶ 17} "(a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;

{¶ 18} "(b) Any warning or instruction, or lack of warning or instruction, associated with that product;

{¶ 19} "(c) Any failure of that product to conform to any relevant representation or warranty." R.C. 2307.71(A)(13).

{¶ 20} A manufacturer is defined by R.C. 2307.71(A)(9) as "a person engaged in a business to design, formulate, produce, create, make, construct, assemble, or rebuild a product or a component of a product." Given the undisputed facts of this case, JANO was clearly not a manufacturer of go-karts as the term "manufacturer" is used in the applicable statutes. JANO bought the go-kart on which Zachary was injured from TNT Karting. JANO did not specify how the go-kart was to be built and there is no evidence in the record that JANO designed, formulated, produced, created, made, constructed, assembled or rebuilt the go-kart or any component of the go-kart before passing it along to TTA.

{¶ 21} A supplier is defined in relevant part by R.C. 2307.71(A)(15)(a) as:

{¶ 22} "(i) A person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce;

{¶ 23} "(ii) A person that, in the course of a business conducted for the purpose, installs, repairs, or maintains any aspect of a product that allegedly causes harm."

{¶ 24} In his deposition, Jeffrey Bosch, the president of JANO, testified that the overall purpose of JANO was to educate and inspire young people through free enterprise education. In order to fund its educational programs, JANO operates various fund raising events throughout the year. The Grand Prix event was operated for seven years as a fund raiser for JANO. JANO has an annual budget of approximately $600,000. The most JANO ever made on a Grand Prix event was $60,000. So that the contestants in the

Grand Prix competed fairly, they were required to acquire their go-kart through JANO. JANO then secured the vehicles from a manufacturer. Despite appellants' assertions to the contrary, no evidence was presented in the proceeding below that JANO conducted its business for the purpose of selling, distributing, leasing, preparing, blending, packaging, labeling or otherwise placing go-karts into the stream of commerce, or conducted its business for the purpose of installing, repairing or maintaining any aspect of go-karts. Rather, JANO passed along the go-karts, and the cost of those vehicles, to the participants in the Grand Prix Accordingly, JANO was not a supplier of go-karts as that term is used in Ohio's Product Liability Act.

{¶ 25} Finally, appellants assert that JANO was liable as a seller of a defective product. In *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, the Supreme Court of Ohio recognized for the first time that a nonmanufacturing seller of a defective product could be liable for injuries caused by that product. In paragraph one of the syllabus, the court held:

{¶ 26} "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."

{¶ 27} As we discussed above, Jeffrey Bosch, the president of JANO, testified as to the purpose and activities of JANO. Consistent with our discussion above, there was

no evidence presented in the proceedings below that JANO was "engaged in the business" of selling go-karts as that phrase is used in *Temple*. Rather, JANO was engaged in the business of educating young people through free enterprise education.

{¶ 28} Because JANO was not a manufacturer, supplier or seller of go-karts as those terms are used in the product liability laws of Ohio, the lower court did not err in granting JANO summary judgment and the three assignments of error are not well-taken.

{¶ 29} On consideration whereof, the court finds that substantial justice has been done the parties complaining and the judgment of the Lucas County Court of Common Pleas is 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.

Peter M. Handwork, P.J.	_______________________ JUDGE
Mark L. Pietrykowski, J.	
Arlene Singer, J. CONCUR.	_______________________ JUDGE
	_______________________ JUDGE

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