

[Cite as *Estate of Thompson v. Club Car, Inc.*, 2010-Ohio-2593.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ESTATE OF SCOTT THOMPSON, ET
AL.

Plaintiffs-Appellants

-vs-

CLUB CAR, INC. ET AL.

Defendants-Appellee

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 2009-CA-0120

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County Court of
Common Pleas, Case No. 2005CV11188H

JUDGMENT:

Affirmed in part; Reversed in part and
remanded

DATE OF JUDGMENT ENTRY:

June 8, 2010

APPEARANCES:

For Plaintiffs-Appellants

For Defendants-Appellee

JOHN K. RINEHARDT
Rinehardt Law Firm
2404 Park Avenue West
Mansfield, OH 44906

JEFFREY S. MOELLER
Hermann, Cahn & Schneider
1301 East Ninth Street, St. 500
Cleveland, OH 44114

Hoffman, J.

{¶1} Plaintiff-appellant Estate of Scott Thompson appeals the June 22, 2009 Judgment Entry of the Richland County Court of Common Pleas excluding the testimony of their expert witness, Timothy Long, and granting summary judgment in favor of Defendant-appellee Club Car, Inc.

STATEMENT OF THE FACTS AND CASE

{¶2} This appeal proceeds from a product liability action in which Appellant sought recovery for damages arising out of the traumatic head injury to and eventual death of Scott Thompson.

{¶3} On March 15, 2003, the Richland Correctional Institute furnished a converted golf cart for use by its corrections officers for transportation around the corrections campus. On that day, the golf car in use was manufactured by Appellee Club Car, Inc., and had been converted to a four-person transport vehicle by adding a rear seat conversion kit. Appellee Club Car, Inc. designed and manufactured the rear seat conversion kit, which did not include seat belts for use by the rear seat passengers.

{¶4} On the same date, Captain Scott Thompson was riding as a rear seat passenger in the cart equipped with the rear seat conversion kit. A fellow officer, Officer Robert Richardson, was driving the cart, and another officer, Officer Scott Rachel, was riding as a front seat passenger. As the cart traveled down a paved roadway, Captain Thompson asked the driver to turn into the prison infirmary. A few seconds later, Captain Thompson was observed lying outside the vehicle, face-up. Subsequently, it was determined he suffered a head injury after hitting his head on the pavement.

Captain Thompson died on September 8, 2003, allegedly as a result of the injuries he suffered on March 15, 2003.

{¶15} Appellants filed this action against Club Car, Inc. and Ingersoll-Rand, alleging the defective design of the golf car for failing to install seat belts with the rear seat conversion kit.

{¶16} Club Car, Inc. and Ingersoll-Rand filed motions for summary judgment. Appellants did not oppose the motion of Ingersoll-Rand.

{¶17} On July 25, 2007, the trial court granted summary judgment in favor of both Club Car, Inc. and Ingersoll-Rand.

{¶18} On April 2, 2008, this Court reversed and remanded the judgment of the trial court granting summary judgment in favor of Club Car finding genuine issues of material fact existed as reasonable minds could conclude the alleged negligent design of the cart was the proximate cause of Captain Thompson's ejection from the vehicle. Specifically, this Court held:

{¶19} "We find there is sufficient evidence when considered in the light most favorable to Appellants to allow reasonable minds to conclude the car was traveling at a speed of over 11mph at the time of Thompson's accident. Furthermore, we believe reasonable minds could conclude Captain Thompson was ejected at the apex of the turn and the turn was abruptly made after Captain Thompson's command. The weight and credibility of the conflicting expert opinions must be left to the trier of fact."

{¶10} On remand, Appellee filed a motion in limine seeking to exclude the opinion of Appellant's expert, Timothy Long. Appellee further filed a renewed motion for

summary judgment and a partial motion for summary judgment on the issue of punitive damages.

{¶11} Via Judgment Entry filed on September 22, 2009, the trial court granted the motion in limine to exclude Mr. Long's expert opinion, granted Appellee's motion for summary judgment and granted the motion for partial summary judgment on the issue of punitive damages.

{¶12} Appellant now appeals, assigning as error:

{¶13} "I. THE TRIAL COURT ERRED IN ITS REFUSAL TO APPLY THE LAW OF THE CASE AS ESTABLISHED IN A PREVIOUS APPEAL IN THIS MATTER.

{¶14} "II. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING *IN LIMINE* THE OPINIONS OF PLAINTIFF'S EXPERT WITNESS.

{¶15} "III. THE TRIAL COURT IMPROPERLY ENGAGED IN WEIGHING EVIDENCE AND DETERMINING CREDIBILITY OF WITNESSES TO DECIDE ISSUES OF FACT AS WAS DONE IN THE TRIAL COURT'S PREVIOUS GRANT OF SUMMARY JUDGMENT.

{¶16} "IV. THE TRIAL COURT ERRED IN HOLDING THAT THERE WAS NO ISSUE OF FACT ON THE ISSUE OF PUNITIVE DAMAGES."

I.

{¶17} In the first assignment of error, Appellant maintains the trial court erred in not applying the law of the case doctrine in ruling on Appellee's motion for summary judgment. We disagree.

{¶18} Specifically, Appellant cites this Court's April 2, 2008 Opinion finding a genuine issue of material fact based upon the varying expert opinions. Upon review of

the record subsequent to our remand, the parties proceeded to take the deposition of Timothy Long on April 10, 2009, at which time the test results of his investigation were revealed. Accordingly, the factual record before the trial court changed following remand, and the law of the case doctrine did not prevent the trial court from considering Appellee's motion in limine challenging Long's opinion and the renewed motions for summary judgment based upon the trial court's exclusion of Long's opinion.

{¶19} The first assignment of error is overruled.

II

{¶20} In the second assignment of error, Appellant argues the trial court erred in granting Appellee's motion in limine to exclude the expert opinion of Timothy Long.

{¶21} On June 20, 2007, Timothy Long provided a Preliminary Report as to his opinion regarding the accident at issue. Following remand from this Court, Appellee proceeded to take the deposition of Appellant's expert, Timothy Long, on April 10, 2009. Long testified at deposition he is a Senior Research Engineer for Accident Research and Biomechanics. He testified he was retained by Appellee to do a reconstruction, evaluate the vehicle dynamics and occupant kinematics, and to determine whether or not the occupant was ejected, and whether safety belts or seat belts would have been an effective tool preventing the occupant from being ejected. Long has a Bachelor of Science in Mechanical Engineering, a Masters of Science in Civil Engineering and he has completed numerous continuing education courses through the Society of Automotive Engineers. Long explained at deposition his methodology is used by virtually all vehicle manufacturers, research institutes and is required by the Department of Transportation.

{¶22} Ohio Rule of Evidence 702 governs the admissibility of expert testimony and provides:

{¶23} “A witness may testify as an expert if all of the following apply:

{¶24} “(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;

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

{¶26} “(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:

{¶27} “(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;

{¶28} “(2) The design of the procedure, test, or experiment reliably implements the theory;

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

{¶30} There is no dispute Mr. Long is a qualified expert who testified about a subject beyond the knowledge of lay persons. Evid.R. 702(A) and (B). Thus, at issue in this case is whether Long’s testimony complied with the requirements of Evid.R. 702(C), *i.e.*, whether his opinion was reliable. *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607. In making this determination, our inquiry focuses on whether the principles and

methods Long employed to reach his opinion are reliable, not whether his conclusions are correct. *Id.*; See Staff Notes to Evid.R. 702. Additionally, to be admissible, the expert testimony must assist the trier of fact in determining a fact issue or understanding the evidence. *Id.*; *State v. Boston* (1989), 46 Ohio St.3d 108, 118, 545 N.E.2d 1220, 1231; *State v. Bidinost* (1994), 71 Ohio St.3d 449, 454, 644 N.E.2d 318, 323.

{¶31} In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, the United States Supreme Court held expert scientific testimony is admissible if it is reliable and relevant to the task at hand. *Id.* at 589, 113 S.Ct. at 2795, 125 L.Ed.2d at 480. To determine reliability, the *Daubert* court stated that a court must assess whether the reasoning or methodology underlying the testimony is scientifically valid. *Id.* at 592-593, 113 S.Ct. at 2796, 125 L.Ed.2d at 482. In evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance. *Id.* at 593-594, 113 S.Ct. at 2797, 125 L.Ed.2d at 482-483. Although these factors may aid in determining reliability, the inquiry is flexible. *Id.* at 594, 113 S.Ct. at 2797, 125 L.Ed.2d at 483-484. The focus is “solely on principles and methodology, not on the conclusions that they generate.” *Id.* at 595, 113 S.Ct. at 2797, 125 L.Ed.2d at 484.

{¶32} Thus, our focus is not whether Long’s conclusions are correct or whether the testimony satisfies Appellant’s burden of proof at trial; rather, whether his testimony will assist the trier of fact. *Hertzfield v. Hayward Pool Prods.*, 2007-Ohio-7097.

{¶33} In *Miller v. Bike Athletic Co.* (1988), 80 Ohio St. 3d 607, the Supreme Court held:

{¶34} “In reviewing a summary judgment motion, a trial court should not reject one expert opinion for another simply because it believes one theory over the other. As stated by one court, ‘In analyzing the admissibility of expert testimony, it is important for trial courts to keep in mind the separate functions of judge and jury, and the intent of *Daubert* to * * * make it easier to present legitimate conflicting views of experts for the jury’s consideration.’ *Joiner v. Gen. Elec. Co.* (C.A.11, 1996), 78 F.3d 524, 530. Thus, a trial court’s role in determining whether an expert’s testimony is admissible under Evid.R. 702(C) focuses on whether the opinion is based upon scientifically valid principles, not whether the expert’s conclusions are correct or whether the testimony satisfies the proponent’s burden of proof at trial. *Id.*; *Ambrosini v. Labarraque* (C.A.D.C. 1996), 101 F.3d 129, 135.

{¶35} “Furthermore, the reliability requirement of *Daubert* should not be used to exclude all evidence of questionable reliability, nor should a court exclude such evidence simply because the evidence is confusing. *In re Paoli RR. Yard PCB Litigation* (C.A.3, 1994), 35 F.3d 717, 744. Instead, there must be something that makes the scientific technique particularly overwhelming to laypersons for the court to exclude such evidence. *Id.* at 746. Thus, the ‘ultimate touchstone is helpfulness to the trier of fact, and with regard to reliability, helpfulness turns on whether the expert’s ‘technique or principle [is] sufficiently reliable so that it will aid the jury in reaching accurate results.’ *DeLuca v. Merrell Dow Pharmaceuticals, Inc.* (C.A.3, 1990), 911 F.2d 941, 956, quoting 3 Weinstein’s Evidence (1988) 702-35, Section 702[03].”

{¶36} In *St. Paul Fire & Marine Ins. Co. v. Baltimore & Ohio RR. Co.* (1935), 129 Ohio St. 401, the Ohio Supreme Court held “[e]vidence of experiments performed out of court, tending to prove or disprove a contention in issue, is admissible if there is a substantial similarity between conditions existing when the experiments are made and those existing at the time of the occurrence in dispute; dissimilarities, when not so marked as to confuse the jury, go to the weight rather than the admissibility of the evidence.” *Id.* at paragraph one of the syllabus.

{¶37} Here, Timothy Long’s deposition testimony and incident report set forth he relied upon the testimony of Officer Richardson and Officer Rachel in compiling the events surrounding the accident. Specifically, Officer Richardson described the turn as angling over into the walkway, and Officer Rachel described feeling the cart make a sudden movement. Long relied on the Ohio Traffic Accident Report in this matter to determine Officer Thompson came to rest “northwest of the gore point at the entry into the walkway going towards the infirmary.” The traffic accident report indicated Thomson’s head was found pointing in a northwest direction, and evidence located at the scene indicated blood drops and gauze were recorded as being northwest of the gore point located at the entrance to the walkway.

{¶38} Upon our review of Long’s deposition testimony relative to his incident report, we do not find the testimony to be so scientifically unreliable or confusing to justify the exclusion of the same. Rather, Long’s opinion and testimony is based on conditions sufficiently similar to those existing at the time of the accident, and any dissimilarities go to the weight rather than the admissibility of the evidence. Long’s ultimate opinion concerning defective design by failing to provide seatbelts is not

dependent on the varying opinions as to where Officer Thompson's body was found following the accident. Rather, Long testifies to a reasonable degree of certainty Thompson was ejected during a hard right turn, which could have been prevented had seat belts been included in the rear seat conversion kit. It is for the jury to determine whether Long's conclusions are correct under the facts as they ultimately determine them to be or whether Long's opinion is sufficiently credible to satisfy Appellant's burden of proof.

{¶39} Based upon the above, we conclude the trial court erred in granting Appellant's motion in limine excluding the testimony of Appellant's expert, Timothy Long.

III.

{¶40} In the third assignment of error, Appellant maintains the trial court improperly engaged in weighing the credibility of the witnesses in granting summary judgment in favor of Appellee.

{¶41} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶42} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex.*

rel. Parsons v. Fleming (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.”

{¶43} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35. The weighing of evidence and judgment as to the credibility of witnesses is improper in ruling on a motion for summary judgment. *Kuhn v. ADD, Inc.* Fairfield App. No. 03CA065, 2004-Ohio-2230.

{¶44} Based upon our analysis and disposition of Appellant’s second assignment of error finding the trial court erred in granting Appellee’s motion in limine to exclude the testimony of Appellee’s expert Timothy Long the evidence on summary judgment is substantially the same as that considered by this Court in the prior appeal.

{¶45} As set forth in this Court’s prior opinion,

{¶46} “There is sufficient evidence when considered in the light most favorable to Appellant to allow reasonable minds to conclude the car was traveling at a speed of over 11mph at the time of Thompson’s accident. Furthermore, we believe reasonable minds could conclude Captain Thompson was ejected at the apex of the turn and the turn was abruptly made after Captain Thompson’s command. The weight and credibility of the conflicting expert opinions must be left to the trier of fact.”

{¶47} Accordingly, Appellant’s third assignment of error is sustained.

IV.

{¶48} In the fourth assignment of error, Appellant maintains the trial court erred in granting summary judgment as to Appellant's claim for punitive damages.

{¶49} Ohio law provides an award of punitive damages is available only upon a finding of actual malice. *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 316, 736 N.E.2d 517. The "actual malice" necessary for purposes of an award of punitive damages has been defined as "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Id.*, quoting *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus.

{¶50} The record indicates Appellee conducted testing on golf carts without the rear seat conversion kit. However, testing conducted on regular golf carts is unpersuasive as it relates to Appellee's conscious disregard for the safety of others. Both parties admit the cart ceases to be a "golf cart" when modified by the rear seat conversion kit. At that point, the vehicle becomes a personnel transport vehicle.

{¶51} The testimony of Justin Brehm, Appellee's Director of Product Safety, indicates Appellee elected to forego similar testing of golf carts modified with the rear seat conversion kit. Appellee did not conduct tests relative to the configuration of the rear seat conversion kit to determine whether rear seat passengers would be safely contained during a sharp turn maneuver. Brehm Depo. at p. 43-55. Rather, Brehm indicated in his deposition testimony lap belts were available at the time of design and marketing of the rear seat kits, and could have been integrated into the kits

inexpensively. Depo at 136-214. Appellee estimates the cost of adding a lap belt to each kit would have been approximately ten to fifteen dollars a piece. Depo at 141-142.

{¶52} However, in a similar vein, Appellant's reliance on the sheer volume of golf cart accidents not involving a rear seat converted cart is unpersuasive to establish there exists a great probability of substantial harm due to the alleged defective design. As indicated above, Appellant must demonstrate both a conscious disregard for the rights and safety of other persons and a great probability of causing substantial harm. A review of the record indicates Appellants have not demonstrated Appellee acted with actual malice or demonstrated a great probability of causing substantial harm.

{¶53} Therefore, we conclude the trial court did not err in granting summary judgment in favor of Appellee Club Car on the issue of punitive damages.

{¶54} The fourth assignment of error is overruled.

{¶55} The June 22, 2009 Judgment Entry of the Richland County Court of Common Pleas is affirmed in part, reversed in part, and the matter remanded to the trial court for further proceedings in accordance with the law and this opinion.

By: Hoffman, J.

Edwards, P.J. and

Wise, J. concur

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards

HON. JULIE A. EDWARDS

s/ John W. Wise

HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ESTATE OF SCOTT THOMPSON, ET AL.	:	
	:	
Plaintiffs-Appellants	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CLUB CAR, INC. ET AL.	:	
	:	
Defendants-Appellee	:	Case No. 2009-CA-0120

For the reasons stated in our accompanying Opinion, the June 22, 2009 Judgment Entry of the Richland County Court of Common Pleas is affirmed in part, reversed in part, and the matter remanded to the trial court for further proceedings in accordance with the law and this Court's opinion. Costs to Appellee.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ John W. Wise
HON. JOHN W. WISE