[Cite as *Parker v. Ace Hardware Corp.*, 2018-Ohio-320.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

DAVID A. PARKER	:	
	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2017-CA-8
	:	
v.	:	T.C. NO. 16-CV-131
	:	
ACE HARDWARE CORPORATION, et al.	:	(Civil Appeal from Common Pleas Court)
	:	
Defendants-Appellees	:	
	:	

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O P I N I O N

Rendered on the 26th day of January, 2018.

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DONOVAN, J.

{¶ 1} This matter is before the Court on the April 17, 2017 Notice of Appeal of David A. Parker. Parker appeals from the trial court's March 17, 2017 journal entry

granting the motion for summary judgment of ACE Hardware Corporation, McAuliffe's ACE Hardware, and McAuliffe's Rental LLC (collectively, "ACE"). We hereby affirm the judgment of the trial court.

{¶ 2} On March 20, 2015 Parker filed a complaint against ACE, Frederick Stevens, the Coleman Company Inc., and John Does 1-10, in the Franklin County Court of Common Pleas. In Count 1, Parker alleged negligence against Stevens; in Count 2, he alleged negligence against ACE; in Count 3, he alleged negligent misrepresentation against ACE; in Count 4 he alleged breaches of express and implied warranties against all defendants; and in Count 5, he alleged "a combined claim for damages under both strict liability and statutory strict products liability under both Ohio common law and Ohio Revised Code §§ 2307.71-80" against all defendants except Stevens. On January 15, 2016, Parker dismissed all claims against Coleman and the products liability claim in Count 5. On March 16, 2016, Parker dismissed his claims against Stevens.

{¶ 3} The matter was subsequently transferred to Champaign County on Parker's request and refiled on August 19, 2016. The complaint sets forth the following allegations: Parker and Stevens became friends in 2010-2011, and when Stevens had surgery in 2013, Parker helped Stevens by clearing his property of brush and performing other chores. On September 8, 2013, after a significant amount of brush had been consolidated into a large pile, Stevens asked Parker to "stop at the hardware store to purchase five cans of kerosene * * * to be used to ignite and burn the brush pile."

{¶ 4} After having his chain saw serviced and repaired at McAuliffe's ACE Hardware, Parker inquired if he could also purchase kerosene for a brush fire, and a male employee directed Parker to "a female clerk down another aisle in the store and told

[Parker] that she would assist him." Parker asked the female clerk for kerosene, and she inquired as to his intended use of the product. Parker advised the clerk that he intended to "start a large brush fire about the size of a truck, and needed kerosene to start the fire." The clerk then directed Parker to a product that she identified as kerosene, and he purchase the product. The product was in fact Coleman Camp Fuel, and when Parker ignited the brush pile with the fuel, "vapors were ignited and quickly exploded and engulfed [Parker] in flames. [Parker] was severely burned over 90% of his body."

{¶ 5} On September 7, 2016, the "Motion of Defendants McAuliffe ACE, McAuliffe Rental LLC and ACE Hardware Corporation for Summary Judgment" was filed. ACE therein asserted that "Parker cannot prevail under his various legal theories because Plaintiff was explicitly warned not to use the product in question for the purpose he intended, Plaintiff ignored that warning and Plaintiff assumed the risk of his own unsafe conduct." The motion provides that "there can be no dispute that McAuliffe's, through warnings displayed on the Coleman's product, specifically warned Plaintiff of the dangers involved in using Coleman's Camp Fuel in the manner Plaintiff contemplated using it."

{¶ 6} The motion provides that Parker "cannot establish reasonable reliance on McAuliffe's alleged statements when the product's label directly contradicted any assertion that the Coleman's Camp Fuel could be used as a fire starter – a fact Plaintiff could * * * have learned by simply reading the label's clear, unambiguously stated warnings which appeared on the product."

{¶ 7} The motion argues that Parker "assumed the risk of injury in using a product to start a fire while he was in close proximity to the fire." According to the motion, there "is no question that fire *is ipso facto* dangerous, and presents a danger that is open and

obvious, and not latent." ACE argued that Parker's use of a product "he assumed to be a fire accelerant in starting a fire was a straightforward, ordinary risk."

{¶ 8} The motion provided that Parker's common law breach of warranty claims "have been abrogated by Ohio's enactment of the Ohio Products Liability Act." The motion asserts that there "is no allegation in Plaintiff's Complaint or evidence that Plaintiff provided any pre-suit notice to McAuliffe's on his breach of warranty claim. Without any such evidence, Plaintiff's breach of warranty claims fail for want of pre-suit notice." Also on September 7, 2016, the depositions of Parker and Stevens were filed in conjunction with the motion for summary judgment.

{¶ 9} On December 19, 2016, Parker filed a "Memorandum Contra Defendants ACE Hardware and McAuliffe's Motion for summary Judgment and Plaintiff's Cross Motion for Summary Judgment." Parker asserted that Ace owed him duties to advise him as follows:

> * * *(a) where the product he requested was located, (b) that it was fit for the purpose which he told them it was going to be used when they asked him what he was using it for, and (c) that the product they sold him was suitable to be used to start a brush pile fire, which they also advised him following his response to the question about what he was using it for.

{¶ 10} Regarding negligent misrepresentation, Parker asserted that the fact that "the store clerk in this case failed to use reasonable care in communicating information to Mr. Parker is established by the only evidence presented on the claim. Summary judgment for Mr. Parker is required since there is no evidence to the contrary that she made the statements which were provably false." Regarding his failure to warn claim,

Parker argued that once ACE and McAuliffe's "admittedly assume[d] a duty to advise customers about products and services, they are indeed liable for failing to warn them and for incorrectly advising them and providing false information."

{¶ 11} Parker argued that he did not assume the risk of injury because starting "a fire with kerosene is a safe activity, as opposed to starting one with a highly volatile camp fuel." Parker argued that there "was no basis for him to assume the risk of something about which he had no knowledge, a prerequisite to assuming the risk." Parker attached his affidavit.

{¶ 12} On December 27, Defendants filed a reply brief in support of summary judgment, as well as a brief in opposition to Parker's motion for summary judgment. On January 5, 2017, Parker opposed the motion to strike his affidavit, as well as a reply to Defendants' motion for summary judgment.

{¶ 13} In granting summary judgment in favor of ACE, the trial court noted that Parker's "entire case * * * is premised on the assumption that he would not have been injured when he started the fire if the cans he purchased at McAuliffe's had contained kerosene, instead of Coleman Camp Fuel." Regarding Parker's negligence claim, the court noted that the "existence of a duty depends on the foreseeability of harm." Accordingly, the court noted, it "must determine whether a reasonably prudent person would have anticipated Ms. Reigle's misidentification of Coleman Camp Fuel as kerosene was likely to result in injury."

{¶ 14} The court cited Parker's deposition testimony acknowledging that two photographs of Coleman Camp Fuel accurately depict the product he purchased on September 8, 2013, that the labels reflect that the cans were not labeled as containing

kerosene and further warn that "Coleman Camp Fuel should not be used in kerosene, alcohol, or lamp/stove oil appliances." The court concluded that had Parker read the cans before proceeding to the checkout counter, he would have learned that they did not contain kerosene. According to the court, Parker's "purported reliance on Ms. Reigle's expertise and professionalism is misplaced since the cans themselves clearly and unequivocally inform the purchaser that the contents were Coleman Camp Fuel, and not kerosene." The court concluded that it "cannot articulate the duty breached when Ms. Reigle allegedly identified Coleman Camp Fuel as kerosene," and that "ACE and McAuliffe's are entitled to summary judgment on the negligence claim, to the extent that it can be read as alleging the breach of duty owed to [Parker.]"

{¶ 15} The court then noted as follows:

> After reviewing [Parker's] complaint, the Court also believes that his negligence claim can be construed as alleging the following on the part of defendants: (1) failure to warn; (2) negligent misrepresentation; and (3) breach of implied warranty of fitness for a particular purpose. [Parker] has pled the latter two theories in his complaint. Since the allegations can also be construed as alleging failure to warn, the Court will also analyze the negligence claim in this fashion.

{¶ 16} Citing Parker's deposition, the court noted that it "is * * * undisputed that the warnings on the can inform the user that Coleman Camp Fuel is not to be used as a fire starter" and that "fuel vapors are invisible, explosive, and can be ignited by ignition sources many feet/meters away."

{¶ 17} The court noted that it "is also undisputed that [Parker] never read the

warnings on the can prior to starting the fire. During his deposition, [Parker] admitted that the front of the can urges the user to 'carefully read all warnings on the back panel.' " According to the court, Parker "also admitted that he would have learned that the product was not kerosene and would not have used it to start the fire, if he would have read the labeling on the can." The court concluded that given "these circumstances, the only reasonable conclusion is that [Parker] cannot prevail on any 'failure to warn' claim."

{¶ 18} Regarding Parker's claim of negligent misrepresentation, the court concluded that ACE was entitled to summary judgment, since "the cans were labeled 'Coleman Camp Fuel,' and not 'kerosene.' It is also undisputed that either [Parker] or Ms. Reigle could have easily learned that the cans did not contain kerosene by simply looking at them. Since the true facts were available to both, any reliance on Ms. Reigle's statements was misplaced and does not create a material issue of fact."

{¶ 19} Finally, the court noted that Parker "has also alleged that the defendants breached both express and implied warranties, including the warranty that the product was suitable for its intended use." The court further noted, however, that Parker "does not articulate an express warranty allegedly made by Ms. Reigle at the time of the transaction. Thus, any warranty claim against ACE and McAuliffe's must be premised on the breach of an implied warranty." The court determined that since Parker "does not contend that the purchased goods, (i.e., Coleman Camp Fuel), were not suitable for use in Coleman Liquid fuel appliances, such as camping stoves and lanterns," his "breach of warranty claim does not arise under UCC § 2-314 (merchantability), but instead can only arise under UCC § 2-315 (fitness for particular purpose)."

{¶ 20} The court concluded that Parker "allegedly asked Ms. Reigle where he

could find kerosene. In response, she allegedly showed him Coleman Camp Fuel and mistakenly identified this product as kerosene." The court noted that Parker "never asked Ms. Reigle what product she would recommend to ignite a large brush pile. As such, he was not relying on her skill and expertise to select the appropriate goods for fire starting." Instead, Parker "asked Ms. Reigle where he could find a particular product and was sent in the wrong direction. Therefore, any claim alleging breach of [an] implied warranty of fitness for a particular [purpose] must fail, and ACE and McAuliffe's are entitled to summary judgment on [Parker's] Warranty claims."

{¶ 21} Parker asserts one assignment of error herein as follows:

> THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DISMISSING ALL CLAIMS AS A MATTER OF LAW.

{¶ 22} Parker asserts that he "was never warned by anyone, including the defendants' store clerk, not to use the product which they told me was kerosene on the day that they sold it to me." According to Parker, the trial court "failed to properly address the duty issue, the first element of a negligence claim."

{¶ 23} Parker asserts as follows:

> The trial court erred by not properly evaluating and deciding the negligence claims. ACE and McAuliffe's owed and breached duties to advise Mr. Parker as a customer (a) where the product he requested was located, (b) that it was fit for the purpose which he told them it was going to be used when they asked, (c) that the product they sold him was suitable to be used to start a brush pile fire, which they also advised him following his

> response to the question about what he was using it for, (d) that what they sold him was actually camp fuel and not kerosene, and (e) failed to warn him that it should not be used to start a fire. Even under the most liberal construction of the term "duty," the defendants clearly owed him a duty of ordinary care to provide accurate information and advice once they undertook to provide him with advice. Their breach of these duties constitutes negligence under Ohio law as a matter of law which therefore entitles Mr. Parker to summary judgment on the negligence claims.

{¶ 24} Parker asserts that he did not realize that he had been sold a "highly volatile camp fuel instead of kerosene," and there "was no basis for him to assume the risk of something about which he had no knowledge, a prerequisite to assuming the risk." Finally, Parker notes that ACE and McAuliffe's "argue that the claims for breach of warranty for merchantability and fitness for a particular purpose also fail because Mr. Parker supposedly failed to give pre-suit notice." Parker asserts that "these claims are not preempted by the product liability statute, therefore they are not eliminated as a matter of law as defendants assert because ACE and McAuliffe's are not manufacturers subject to product liability claims."

{¶ 25} ACE and McAuliffe's respond that they "produced evidence to demonstrate the absence of material fact regarding the breach of duty of care," and that Parker "failed to respond with competent evidence to show otherwise. Rather, [Parker] relied upon conclusory allegations and unfiled deposition testimony."

{¶ 26} As this Court has previously noted:

> Summary judgment is appropriate when the moving party

> demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.,* 127 Ohio St.3d 54, 2010–Ohio–4505, 936 N.E.2d 481, ¶ 29; *Sinnott v. Aqua–Chem, Inc.,* 116 Ohio St.3d 158, 2007–Ohio–5584, 876 N.E.2d 1217, ¶ 29. When reviewing a summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. of Edn.,* 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal Co.,* 64 Ohio St.2d 116, 119–20, 413 N.E.2d 1187 (1980). Therefore, the trial court's decision is not granted deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.,* 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

Huntington Natl. Bank v. Payson, 2d Dist. Montgomery No. 26396, 2015-Ohio-1976, ¶ 14.

{¶ 27} We initially note that "when the Ohio General Assembly enacted the current version of the [Ohio Products Liability Act, R.C. 2307.71 *et seq.*], it abrogated all common law claims relating to product liability causes of actions." *Evans v. Hanger*

Prosthetics & Orthotics, Inc., 735 F.Supp.2d 785, 795 (N.D.Ohio 2010). As further noted in *Evans*:

> Specifically, the General Assembly added a section stating that "Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability causes of action." R.C. 2307.71(B). Furthermore, the OPLA applies to "recovery of compensatory damages based on a product liability claim," as well as "[a]ny recovery of punitive damages or exemplary damages in connection with a product liability claim." R.C. 2307.72(A)-(B). *See also Delahunt v. Cytodyne Techs.,* 241 F.Supp.2d 827, 842 (S.D.Ohio 2003).

{¶ 28} The OPLA defines a "product liability claim" as follows:

> "Product liability claim" means a claim or cause of action that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code and that seeks 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:
>
> (a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;
>
> (b) Any warning or instruction, or lack of warning or instruction, associated with that product;
>
> (c) Any failure of that product to conform to any relevant representation or warranty.

R.C. 2307.71(A)(13).

{¶ 29} R.C. 2307.71 defines a "supplier" in relevant part as: "(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." We conclude that ACE is a supplier.

{¶ 30} R.C. 2307.78(A) provides in relevant part:

> * * * a supplier is subject to liability for compensatory damages based on a product liability claim only if the claimant establishes, by a preponderance of the evidence, that either of the following applies:
>
> (1) The supplier in question was negligent and that, negligence was a proximate cause of harm for which the claimant seeks to recover compensatory damages;
>
> (2) The product in question did not conform, when it left the control of the supplier in question, to a representation made by that supplier, and that representation and the failure to conform to it were a proximate cause of harm for which the claimant seeks to recover compensatory damages. A supplier is subject to liability for such a representation and the failure to conform to it even though the supplier did not act fraudulently, recklessly, or negligently in making the representation.

{¶ 31} In other words, the OPLA imposes liability based upon a supplier's negligence or misrepresentation. In Counts 2 and 3, Parker alleged negligence, negligent failure to warn, and negligent misrepresentation, and we conclude these are product liability claims. As noted by the Southern District of Ohio, Eastern Division:

> * * * These common law claims have all been abrogated by the OPLA. *See Hempy v. Breg, Inc.,* No. 2:11–CV–900, 2012 WL 380119 at *3 (S.D.Ohio Feb.6, 2012) (concluding that claims for negligence and breach of warranty constitute common law product liability claims); *Bowles v. Novartis Pharm. Corp.,* No. 3:12–CV–145, 2013 WL 5297257, at *7 (S.D.Ohio Sept.19, 2013) (concluding that claims for negligent manufacture and negligent failure to warn were subject to the OPLA); *Miller v. ALZA Corp.,*759 F.Supp.2d 929, 943 (S.D.Ohio 2010) ("Further, common law warranty claims have also been abrogated by the OPLA...."); *Miles,* 612 F.Supp.2d at 924 (concluding that "implied warranty claims (both merchantability and fitness for a particular purpose) ... constitute common law products liability claims subject to preemption by the OPLA.").

Hendricks v. Pharmacia Corp., N.D.Ohio No. 2:12-CV-00613, 2014 WL 2515478, *4 (June 4, 2014); *see also Amendola v. R.J. Reynolds Tobacco Co.*, 198 F.3d 244, 1999 WL 1111515, *2 (6th Cir.1999) (holding in part that plaintiff's negligent misrepresentation claim is governed by the OPLA). Since the OPLA provided the exclusive remedy for the claims in Counts 2 and 3, we conclude that ACE was entitled to summary judgment as a matter of law on those counts.

{¶ 32} In Count 4, Parker alleged breach of express and implied warranties, and as noted above, the trial court addressed the breach of warranties claims pursuant to "R.C. 1302.27(A) (UCC § 2-314)" and "R.C. 1302.28 (UCC § 2-315)." In *Miller v. ALZA Corp.*, 759 F.Supp.2d 929 (S.D.Ohio 2010), the plaintiff argued that his breach of warranty claims were "statutory warranty claims under Ohio's codification of the Uniform

Commercial Code ('UCC') in O.R.C. Chapter 1302," and that those claims were accordingly not abrogated by the OPLA, in reliance upon *Miles v. Raymond Corp.*, 612 F.Supp.2d 913, 924-25 (N.D.Ohio 2009). *Miller*, at 943.

{¶ 33} The Southern District of Ohio analyzed the issue as follows:

> Here, Defendant argues that the allegations in the Complaint do not support Plaintiff's contention that the warranty claims are asserted under R.C. Chapter 1302. Defendants point out that the "Complaint makes no reference—expressly or impliedly—to the UCC or its codification in Ohio [.]" (Doc. 48). The Court agrees with Defendants that nothing in Plaintiff's Complaint indicates that the warranty claims are being pursued under R.C. Chapter 1302. Not only does the Complaint not cite Ohio's codification of the UCC, Plaintiff's Response to Defendants' Motion fails to identify the specific UCC sections under which the warranty claims are being pursued. (Doc. 47).
>
> This district has dealt with the failure to specifically state whether warranty claims are asserted under the UCC. In *Miles,* the court seemingly allowed the UCC claims to stand, only to dismiss them as being time-barred under R.C. 1302.98. *Miles*, 612 F.Supp.2d at 926–27, n. 13. In *Donley* [*v. Pinnacle Foods Group*, LLC, S.D.Ohio No. 2:09-CV-540, 2009 WL 5217319 (Dec. 28, 2009)], however, the court stated:
>
> Plaintiff's Complaint ... contained no reference to the Uniform Commercial Code, or to the two statutes he cites in his memorandum contra [i.e., O.R.C. §§ 1302.27 and 1302.28]. The defendants are again entitled to

> "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.Pro. 8(a)(2). To the extent that Plaintiff now alleges that he is (and always was) suing under the Uniform Commercial Code, his Complaint failed to state such claims. To the extent that Plaintiff was suing under common-law theories of product liability, Defendants' unrefuted argument that these theories have been statutorially [sic] abrogated is correct. Plaintiff is free to move to amend his complaint to add claims arising under the Uniform Commercial Code, but he has, as yet, not stated any. The common law product liability claims he did state are barred as a matter of law.
>
> *Donely*, 2009 WL 5217319, at *4.
>
> Here, Plaintiff fails to cite any portion of R.C. Chapter 1302 in the Complaint (Doc. 1) or in the Response to Defendants' Motion. (Doc. 46). In fact, in Plaintiff's Response, Plaintiff merely asserts in conclusory fashion that the claims are UCC claims, not common law claims. Based on *Donley,* and in light of Plaintiff's conclusory arguments in attempting to establish that the warranty claims are UCC claims, the Court finds that summary judgment is proper.

Miller, at 943-44 (further granting summary judgment as a matter of law in favor of ALZA Corp. with regard to Miller's negligence and negligent misrepresentation claims).

{¶ 34} As in *Miller*, Parker failed to cite any portion of R.C. Chapter 1302 in his complaint or in his response to ACE's motion for summary judgment. Like Fed.R.Civ.Pro. 8, Civ.R. 8(A)(1) also requires "a short and plain statement of the claim

showing that the party is entitled to relief," and we conclude that Parker's breach of warranty claims are not UCC claims.

{¶ 35} In his response to ACE's motion for summary judgment and again in his brief, Parker cited to *Wright v. Harts Machine Services, Inc.,* 6th Dist. Fulton No. F-15-004, 2016-Ohio-4758, 69 N.E.3d 63 (6th Dist.) in support of breach of warranties claims. Therein, the riders of a self-assembled trike asserted claims of breach of implied warranties against Harts Machine Services, Inc. ("Harts"), and the Sixth District affirmed the trial court's decision that the claims were not abrogated by OPLA, which as noted above is limited to "products liability claims" for compensatory damages from a manufacturer or supplier. The Sixth District determined that "Harts has already litigated this issue, leading the trial court to find that it is not a manufacturer or supplier." *Id.,* ¶ 28. Since ACE is a supplier, we conclude that *Wright* does not support Parker's assertion that his claims are not abrogated by the OPLA.

{¶ 36} 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. Accordingly, Parker's assigned error is overruled, and the judgment of the trial court is affirmed.

. . . . . .

HALL, J., concurs.

TUCKER, J., concurring in part and dissenting in part:

{¶ 37} The majority opinion concludes that Parker's negligence and breach of warranty causes of action are abrogated by the OPLA. The majority opinion, based upon this determination, concludes that the trial court correctly granted ACE's summary

judgment motion. I note, initially, that Parker does not discuss his warranty claims in his appellate brief, and, based upon this, I conclude that the trial court's summary judgment determination on the warranty claims should be affirmed. I conclude, turning to Parker's negligence causes of action, that these causes of action are not product liability claims as defined by the OPLA, and, as such, Parker's negligence causes of action are not abrogated. I also conclude, assuming, as we must, that Parker's recitation regarding his interaction with Reigle is accurate, that ACE, since Reigle rendered assistance to Parker, had a duty to provide such assistance with reasonable care. I, finally, conclude there exists an issue of fact concerning whether ACE breached its assumed duty of care toward Parker making summary judgment inappropriate. I, therefore, concur, in part, and dissent, in part, with the majority decision.

Negligence Causes of Action

{¶ 38} 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.

OPLA

{¶ 39} 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.

{¶ 40} A products liability claim is defined at R.C. 2307.71(A)(13) as follows:

> "Product liability claim" means a claim or cause of action that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code and that seeks 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:
>
> (a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;
>
> (b) Any warning or instruction, or lack of warning or instruction, associated with that product;
>
> (c) Any failure of that product to conform to any relevant representation or warranty.

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.

{¶ 41} R.C. 2307.76 sets forth how a product may be defective based upon an

inadequate warning or instruction stating in relevant part as follows:

> (1) It is defective due to inadequate warning or instruction at the time of marketing if, when it left the control of its manufacturer, both of the following applied:
>
> (a) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages;
>
> (b) The manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm.

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.

{¶ 42} R.C. 2307.77 defines when a product is defective based upon the product not conforming to a representation, with the provision stating as follows:

> A product is defective if it did not conform, when it left the control of its manufacturer, to a representation made by that manufacturer. A product may be defective because it did not conform to a representation even

> though its manufacturer did not act fraudulently, recklessly, or negligently in making the representation.

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.

{¶ 43} The OPLA, in most circumstances, does not, as noted, impose liability for a products liability claim upon a supplier. This preferential status, under R.C. 2307.78, has three exceptions. The first, set forth at R.C. 2307.78(B), occurs when the supplier is placed into the "shoes" of the manufacturer.[1] The second and third exceptions, as articulated by R.C. 2307.78(A), involve a supplier's independent liability for a products liability claim based upon a supplier's misrepresentation or negligence. The misrepresentation exception, R.C. 2307.78(A)(2), makes a supplier liable, irrespective of fault, for a product representation made by a supplier and the product does not conform to the representation. 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.

{¶ 44} The final supplier liability carve out is R.C. 2307.78(A)(1) which provides that a supplier may be liable in a products liability claim if the supplier's negligence was

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[1] These circumstances are: (1) the manufacturer is not subject to process in Ohio; (2) the manufacturer is insolvent; (3) the supplier owns the manufacturer of the product; (4) the manufacturer owns the supplier; (5) the supplier created or furnished the manufacturer with the product's design or formulation; (6) the supplier altered, modified, or failed to maintain the product, and this failure made the product defective; (7) the supplier marketed the product under its own label; and (8) the supplier, upon request, failed to provide a claimant with the manufacturer's name and address.

a proximate cause of a claimant's injury. However, a supplier's negligence liability under R.C. 2307.78(A)(1) must emanate from a products liability claim as defined by R.C. 2307.71 et seq. It is, of course, realized that the determination of whether a claim is a product liability cause of action is not based upon the name given to the cause of action by the plaintiff but by the plaintiff's factual allegations. 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.[2] This conclusion, of course, does not end the discussion because the trial court's summary judgment determination must be analyzed.

Duty Analysis

{¶ 45} 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. The elements of a negligence cause of action are (1) a defendant's duty of care toward the plaintiff, (2) defendant's breach of the duty of care, and (3) injury to the plaintiff that is proximately caused by defendant's violation of the duty of care. *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, citing *Mussivand*

[2] It would seem, since, under R.C. 2307.78(A)(1), a plaintiff may establish a products liability claim against a supplier based upon the supplier's negligence, that, assuming Parker's claim is a products liability cause of action, the issue of whether ACE's negligence proximately caused Parker's injuries was before the trial court. Therefore, it would also seem, again assuming that we are dealing with a products liability cause of action, that the OPLA would not act to abrogate Parker's claim that ACE's negligence proximately caused his injuries.

v. David, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). The threshold duty element, in contrast to the breach and proximate cause elements, is a legal issue for the court's determination. *Id*.

{¶ 46} The issue of duty is, in most cases, a given, but, on occasion, as here, the issue is difficult and "at times elusive." *Wallace* at ¶ 23. In such cases, the determination of whether to impose a duty of care involves consideration of which party, under the facts of the case, should bear the loss. *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).

{¶ 47} The duty determination, though not subject to a formulaic resolution, does rest upon an evaluation of the relationship between the parties and whether, based upon this relationship, the person upon which a duty is asserted should have foreseen that his act, or failure to act, would probably cause harm to another person. *Wallace v. Ohio Dept. of Commerce*, ¶ 23. As stated by the Ohio Supreme Court in *Wallace*, "[t]his court has often stated that the existence of a duty depends upon the foreseeability of harm: if a reasonably prudent person would have anticipated that an injury was likely to result from a particular act, the court could find that the duty element of negligence is satisfied." *Wallace*, ¶ 23 (citations omitted). The duty analysis, at its core, involves a decision concerning whether the "plaintiff's interests are entitled to legal protection against the defendant's conduct." *Douglass v. Salem Community Hospital*, 153 Ohio App.3d 350, 2003-Ohio-4006, 794 N.E.2d 107 (7th Dist.), citing *Morgan v. Fairfield Family Counseling Center*, 77 Ohio St.3d 284, 298, 673 N.E.2d 1311 (1997).

{¶ 48} This review, turning to the pending case, is useful, but it does not answer the question of whether ACE, under the presented facts, had a duty of due care toward

Parker. ACE, without dispute, owed Parker no duty regarding his product selection until Parker approached Reigel for assistance. Even then, Reigel had no legal duty to render the requested assistance, but, when a person otherwise without a duty to act decides to act, this decision may impose a duty of care upon the actor, with this concept referred to as the Good Samaritan doctrine. *Indian Towing Co. v. United States of America*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). In this case it was asserted that the United States was liable to Indian Towing based upon the Coast Guard's negligent operation of a lighthouse with this negligence causing an Indian Towing tug to run aground. The Supreme Court stated that the "Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light… and engendered reliance on the guidance afforded by the light, it was obligated to use good care to make certain that the light was kept in good working order…" *Id*. at 69.

{¶ 49} The Good Samaritan concept was embraced by the Ohio Supreme Court in *Briere v. The Lathrop Co.*, 22 Ohio St.2d 166, 258 N.E.2d 597 (1970). The Ohio Supreme Court, within the context of a claim asserted by an injured employee of a subcontractor against a general contractor, stated the following:

> Where an employee of a general contractor, in the scope of his employment, voluntarily and gratuitously undertakes to assist an employee of a subcontractor in moving a scaffold, the act must be performed with the exercise of due care under the circumstances, and the failure of the general contractor's employee to exercise such care, thereby proximately causing plaintiff to fall from the scaffold, results in liability of the general contractor for the resulting injury.

Briere, paragraph one of the syllabus.

{¶ 50} The *Briere* decision cited with approval to the Restatement of the Law 2d, Torts (1965), 135, Section 323 which states as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

We applied Section 323 in *Plank v. DePaul Cranes, Inc.*, 2d Dist. Montgomery No. 10486, 1988 WL 110312 (Oct. 21, 1988). In this case Tally, an employee of a company involved in the removal of an overhead crane, assisted Plank, an employee of another company involved in the crane removal, in Plank's effort to remove an overhead obstruction to the crane's removal. Plank, while on a ladder using a crowbar to dislodge the obstruction, came into contact with an energized crane runway system. This caused Plank to fall resulting in his death as a result of a skull fracture and/or ventricular fibrillation caused by Plank's exposure to electricity.

{¶ 51} Tally's role, according to Plank's estate, involved his gratuitous decision to obtain and then hold the ladder from which Plank fell. Plank's estate argued that since

Tally decided to lend assistance, he had a duty to provide such assistance with due care and he failed to do so because he should have either de-energized the crane runway or, at least, warned Plank that the overhead runway was energized.

{¶ 52} We reversed the trial court's summary judgment decision in favor of Tally's employer based upon Section 323. We initially noted that Section 323 provides alternate recovery avenues, that liability under subsection (b) requires the plaintiff's reliance upon the defendant's conduct, that such reliance is not required for the imposition of liability under subsection (a), and that Plank's situation implicated subsection (a).

{¶ 53} We, turning to the rationale for the summary judgment reversal, concluded that "[i]f it is found that Tally undertook to perform [the alleged] acts, that Tally failed to exercise reasonable care in assisting Plank to ascend the ladder without taking adequate precautions to guard against his falling or against the electrical hazard, that the risk of harm to Plank increased as a result, and that these facts proximately caused Plank's death, [Tally's employer] would be liable for Plank's death pursuant to Section 323 of the Restatement." *Plank* at *8.

{¶ 54} In this case, since Parker requested Reigel's assistance, it seems that Section 323(b) is the better fit. Section 323(b) allows the imposition of liability upon a gratuitous actor if the intended beneficiary's reliance upon the conduct proximately causes the injury at issue. The "Restatement does not define the precise contours of § 323(b) liability," but the case law suggests that the imposition of liability requires that a "plaintiff's reliance must be reasonably foreseeable by the defendant under the circumstances." *Turbe v. Gov't of the Virgin Islands*, 938 F.2d 427, 431 (3d Cir.1991) citing *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 522-23, 429 N.Y.S.2d 606, 407

N.E.2d 451 (1980).

{¶ 55} I, turning to the pending case, would reverse the trial court's summary judgment decision based upon Section 323(b). I reach this conclusion because if a jury would conclude that Reigel acted as Parker asserts, that Reigel should have recognized that her conduct, though gratuitous, was necessary for Parker's protection, that Reigel failed to use reasonable care in assisting Parker by selecting Coleman Camp Fuel, that Parker purchased and then used the Coleman Camp Fuel in reliance upon Reigel's conduct, that Reigel should have reasonably foreseen Parker's reliance, and that Parker's reliance proximately caused his injuries, liability against ACE under Section 323(b) could appropriately be imposed. Of course, a jury's assessment would include consideration of whether Parker was comparatively negligent with this consideration potentially mitigating or eliminating ACE's liability.

{¶ 56} This conclusion rejects ACE's argument that, as a matter of law, its only duty to Parker was to insure that the manufacturer's warning was affixed to the cans of Coleman Camp Fuel Parker purchased. This duty contention, though not articulated with Section 323 in mind, goes to the issue of whether Reigel should have reasonably foreseen that Parker, instead of reading the warning, would rely upon her selection of the Coleman Camp Fuel to start the brush fire. Resolution of this issue is appropriately left to a jury. Parker's failure to read the warning label is a comparative negligence issue, but, given Reigel's asserted conduct, I am unwilling to conclude that an affixed warning label was ACE's only duty to Parker.

{¶ 57} This conclusion also rejects ACE's argument that primary assumption of the risk acts as an absolute shield to ACE's liability. Primary assumption of the risk acts, in

appropriate circumstances, to preclude the imposition of a duty of due care. *Horvath v. Ish*, 134 Ohio St.3d 48, 2012-Ohio 5333, 979 N.E.2d 1246. If triggered, it is an absolute defense to a plaintiff's claim that a defendant's negligence proximately caused injury to the plaintiff. *Id.*

{¶ 58} Primary assumption of the risk, usually applicable in the context of a recreational activity, recognizes that certain activities expose an individual to dangers that cannot be eliminated, and if one chooses to engage in such an activity, he cannot look to someone else for protection. *Brumage v. Green*, 2d Dist. Champaign No. 2014-CA-7, 2014-Ohio-2552. Primary assumption of the risk applies to those risks which are inherent to the activity. *Id*., ¶ 12. For instance, a racetrack's negligent design is not a risk inherent to participation in a go-cart racing event, and, as such, primary assumption of the risk would not act to eliminate a plaintiff's negligent design claim. *Goffe v. Mower*, 2d Dist. Clark No. 98-CA-49, 1999 WL 55693 (Feb. 5, 1999).

{¶ 59} In this case, the risk that Reigel would select Coleman Camp Fuel when Parker requested kerosene is not a risk inherent to the ignition of the brush fire that caused Parker's injuries. Primary assumption of the risk, given this, is simply not applicable to this case.

Conclusion

{¶ 60} I, based upon the foregoing, would reverse and remand the trial court's summary judgment decision.

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