

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

TRACY OPP, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF ANDREW OPP, A MINOR,	:	APPEAL NO. C-100100 TRIAL NO. A-0707864
Plaintiff-Appellant,	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
CHRISTOPHER SMITH,	:	
Defendant-Appellee,	:	
and	:	
DEMETRIUS HUGHES, BY AND THROUGH HIS NEXT OF KIN, TRACIE HUGHES,	:	
Defendant.	:	

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court.¹

Plaintiff-appellant Tracy Opp, individually and as the parent and natural guardian of her minor son, Andrew Opp, contests the entry of summary judgment for her neighbor, defendant-appellee Christopher Smith. Opp alleged that Smith had negligently furnished a pellet gun to defendant Demetrius Hughes, then 15 years old, and known in the neighborhood as “Man-Man” because of his large physique. Man-Man admitted shooting Andrew Opp with Smith’s pellet gun.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

In her sole assignment of error, Opp contends that the trial court erred in entering summary judgment in favor of Smith, as genuine issues of material fact remained to be litigated, including whether Smith had negligently furnished Man-Man with a dangerous weapon in violation of Ohio statutes.²

Summary judgment is proper when (1) no genuine issue of 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 with the evidence viewed most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.³ When, as here, the party moving for summary judgment discharges its initial burden of identifying the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims, the nonmoving party has the reciprocal burden of producing evidence on the issues for which she bears the burden of production at trial.⁴

In any negligence claim, a plaintiff must demonstrate that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the defendant's breach proximately caused the plaintiff to be injured.⁵ The concept of negligence per se allows the plaintiff to prove the first two prongs elements—duty and breach of duty—by demonstrating that the defendant had committed a specific act prohibited by statute.⁶

R.C. 2923.21(A)(3) proscribes any person from “[f]urnish[ing] any firearm” to a minor except for lawful hunting or instructional purposes. But to demonstrate that a person has furnished a firearm, under R.C. 2923.21, requires proof of some positive act by

² See R.C. 2923.11(A) and 2923.21(A)(3).

³ See Civ.R. 56; see, also, *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

⁴ See *Dresher v. Burt*, 75 Ohio St.3d at 293, 1996-Ohio-107, 662 N.E.2d 264.

⁵ See *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶10, citing *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶21, and *Menifee v. Ohio Welding Prods., Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707.

⁶ See *Lang v. Holly Hill Motel, Inc.*, at ¶15, citing *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184, 697 N.E.2d 198.

that person to supply, provide, or equip the minor with a firearm.⁷ As this court has noted, “ ‘having a share in the effect of the minor having a gun’ ” by providing “[p]assive access is not the same as furnishing.”⁸

In this case, the evidence properly before the trial court, construed most strongly in Opp’s favor, shows that Smith had discovered his son and other neighborhood children, including Man-Man, playing with his pellet gun. Smith then retrieved the pellet gun from Man-Man, admonished the children for playing with the pellet gun outside his presence, and returned the pellet gun to its hiding place behind a wooden cabinet in his bedroom. Unbeknownst to Smith, Eric Wright, a minor, had followed Smith into his home and had discovered the gun’s hiding place. Wright then took the pellet gun and gave it to Man-Man who then shot Andrew Opp despite Smith’s efforts to retrieve the gun yet again. It was Smith’s and Man-Man’s un rebutted deposition testimony that Wright and Man-Man had obtained the pellet gun without Smith’s knowledge or permission.

Because reasonable minds could only conclude that Smith had not performed any positive act to furnish Man-Man with the pellet gun, Opp failed to demonstrate that Smith had violated R.C. 2923.21 and thus failed to establish the existence of genuine issues of material fact as to Smith’s duty and breach of duty—essential elements of her claim.⁹ The assignment of error is overruled.

Therefore, the trial court’s entry of summary judgment is affirmed.

⁷ See *State v. Skaggs* (1994), 97 Ohio App.3d 15, 19, 646 N.E.2d 190.

⁸ *State v. Cornett* (Aug. 14, 1996), 1st Dist. No. C-960035; cf. *Taylor v. Webster* (1967), 12 Ohio St.2d 53, 57, 231 N.E.2d 870 (the affirmative act of placing an air gun in the hands of a child without direct supervision is one fraught with danger and leaves the adult actor open to the consequences of the unlawful act and the injury that ensued).

⁹ See *Lang v. Holly Hill Motel, Inc.*, at ¶10, 15.

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Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 2, 2011

per order of the Court _____.
Presiding Judge