APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-3290

MIKEQUALE MILLER,

Plaintiff-Appellant,

v.

PEP BOYS-MANNY, MOE & JACK, INC., et al.,

Defendants-Appellees.

Before: McKEAGUE, GRIFFIN, and NALBANDIAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPX A

NOT RECOMMENDED FOR PUBLICATION

No. 22-3290

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MIKEQUALE MILLER, Plaintiff-Appellant, and DEMETRIUS MILLER, et al., Plaintiffs, v. PEP BOYS-MANNY, MOE & JACK OF DELAWARE, INC., et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

ORDER

Before: McKEAGUE, GRIFFIN, and NALBANDIAN, Circuit Judges.

Mikequale Miller, an Ohio resident proceeding pro se, appeals the district court's grant of summary judgment to the defendants in this diversity action. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a)(2).

This action arises from an incident in 2007, when Miller, then eight years old, was injured test-driving a Baja go-kart his father purchased from Pep Boys. Miller alleged that after his father purchased the Baja go-kart and the "prepping service" from Pep Boys, he test-drove it in the Pep Boys parking lot, during which time the go-kart flipped and landed on top of him, knocking him unconscious and causing permanent injuries to his head, jaw, teeth, and collarbone, along with post-traumatic stress disorder. In 2019, Miller and 11 family members sued Pep Boys – Manny,

Moe, and Jack of Delaware, Inc.; Northeastern Technical; Techtronic Industries Co., Ltd.; and Baja, Inc., for damages, claiming that the go-kart was not assembled properly, Pep Boys failed to discover the improper assembly, and Pep Boys failed to adequately train its staff.

The district court ultimately dismissed for failure to state a claim all but the products-liability and negligence claims against Pep Boys. *Miller v. Pep Boys – Manny, Moe & Jack*, No. 2:19-cv-2083, 2020 WL 13169453, at *7 (S.D. Ohio, Feb. 5, 2020). After discovery, the district court granted Pep Boys's motion for summary judgment on those remaining claims, holding that Miller had failed to produce evidence that an act or omission by Pep Boys proximately caused his injuries, as is necessary to prove negligence and products liability under Ohio law. *Miller v. Pep Boys – Manny, Moe & Jack*, No. 2:19-cv-2083, 2022 WL 656571, at *2 (S.D. Ohio, Mar. 4, 2022).

Miller appeals, arguing that the district court should have applied the res ipsa loquitor doctrine to his case, that he was improperly deposed because he was asked to recall events that occurred when he was a minor, that the go-kart that injured him was illegally imported from China, and that the Consumer Product Safety Commission recalled the type of go-kart his family purchased. Because Miller failed to meaningfully address the district court's reasons for granting summary judgment, he likely forfeited appellate review. *See Scott v. First S. Nat'l Bank*, 936 F.3d 509, 522 (6th Cir. 2019).

In any event, we affirm on the merits. We review the district court's decision to grant summary judgment de novo, "[viewing] the evidence in the light most favorable to the party opposing the motion." *George v. Youngstown State Univ.*, 966 F.3d 446, 458 (6th Cir. 2020) (quoting *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) (alterations omitted). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

In federal diversity actions, state law governs substantive issues. *Croce v. N.Y. Times Co.*, 930 F.3d 787, 792 (6th Cir. 2019). Miller raised negligence and products-liability claims under Ohio law; therefore he had to show that an act or omission by the defendants was the proximate

cause of his injuries. Ohio Rev. Code § 2307.78(A)(1)-(2) (products liability); *Snay v. Burr*, 189 N.E.3d 758, 762 (Ohio 2021) (negligence). But although Miller alleged that Pep Boys improperly assembled and inspected the go-kart prior to the test drive, he did not point to any evidence that an act or omission of the defendants proximately caused his injuries. As the district court noted, Miller admitted at his deposition that "he does not know what caused the accident," and that "he does not know if anything [the defendants] told him, or failed to tell him, caused the accident." *Miller*, 2022 WL 656571, at *2. Thus, there was no genuine dispute about that element of his claims. *See Ondo v. City of Cleveland*, 795 F.3d 597, 603 (6th Cir. 2015) (holding that a nonmoving party must present "significant probative evidence" to create a genuine dispute of fact at the summary-judgment stage). Furthermore, and contrary to Miller's argument, res ipsa loquitur does not apply here because the go-kart was not under any defendant's "exclusive management and control" at the time of the accident. *Estate of Hall v. Akron Gen. Med. Ctr.*, 927 N.E.2d 1112, 1118 (Ohio 2010). Miller had taken the go-kart on a test drive, and therefore was himself in control of the instrumentality which caused his injury. Because Miller did not present evidence that the defendants proximately caused his injuries, the district court did not err in granting summary judgment.

For these reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

AO 450 (Rev. 11/11) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

MIKEQUALE MILLER, et al.,
Plaintiff
v.
PEP BOYS - MANNY, MOE & JACK, et al.,
Defendant

Civil Action No. 2:19-cv-2083

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ _____ recover costs from the plaintiff *(name)* _____ _____.

☑ other: The Court grants Defendant Delaware's Motion for Summary Judgment. This action is hereby dismissed.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☐ decided by Judge _____ on a motion for

Date: 3/4/2022

CLERK OF COURT

Theresa L. B...
Signature of Clerk or Deputy

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO

Appx B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MIKEQUALE MILLER, *et al.*,	:	
	:	
Plaintiffs,	:	**Case No. 2:19-cv-2083**
	:	
	:	**JUDGE SARAH MORRISON**
vs.	:	
	:	**Magistrate Judge Vascura**
	:	
PEP BOYS – MANNY, MOE & JACK, et al.,	:	
	:	
	:	
	:	
	:	
Defendants.	:	

OPINION & ORDER

Pro se Plaintiff Mikequale Miller has three remaining claims against Defendant The Pep Boys – Manny, Moe and Jack of Delaware, Inc. ("Delaware") for products liability and negligence. Delaware moves for full summary judgment (No. 83), Mr. Miller opposes (No. 85), Delaware replied (No. 86), and Mr. Miller sur-replied (Nos. 87, 88) without leave. After due deliberation, the Court **GRANTS** Delaware's Motion.

I. BACKGROUND

The Court previously summarized Mr. Miller's allegations as follows:

> Plaintiff alleges that on May 23, 2007, he was 8 years old and his father, Demetrais Miller purchased him a Baja go kart from Pep Boys, as well as the Pep Boys' $29.99 prepping fee that "would check all aspects of the vehicle including oil, gas, exhaust system, undercarriage, safety belt, rollbars and tires". [sic] (Doc. 2, Compl. at 8). Plaintiff Mikequale and his family left the Pep Boys store for a few

> hours so that Pep Boys could perform the assembly and prep work. When Mikequale and his father returned to the Pep Boys store to test drive the go-kart, the Pep Boys manager directed them to the garage bay on the side of the building. The "manager instructed Plaintiff on how to pull the string to start the vehicle," then asked Plaintiff to step into the vehicle and showed him the pedals. The manager then "told plaintiff to press on the gas to get a feel for the vehicle in the parking lot." (*Id.*). Plaintiff took the go-kart on a test drive. He "tried to stop the vehicle but it slid into the Pep Boys parking lot divider resulting in plaintiff being flipped out of the Baja vehicle & vehicle landing on top of him. Plaintiff was knocked unconscious immediately." (*Id.*). Plaintiff was transported to the hospital. He asserts that he sustained permanent damage to his jaw, head, teeth, and collar bone. Plaintiff also suffers from PTSD. (*Id.* at 4–5).

(No. 58, PageID 274.) After the accident, Mr. Miller alleges Delaware's manager discovered that the go-kart's tires were improperly inflated. (No. 2, at 8.)

After several rulings, only Mr. Miller's claims against Delaware for products liability and negligence remain. (Nos. 7, 54, 58.) As to products liability, Mr. Miller states a claim for Delaware's alleged failure to instruct as to operation of the go kart and what surface it should be operated on and for Delaware's representation that the go-kart would be safe to use at the time it left Delaware's control. (No. 58, PageID 281.) Regarding negligence, Mr. Miller states a claim for Delaware's alleged improper maintenance of the go-kart and instructions and supervision of Mr. Miller's test drive of the go-kart. *Id.* Delaware seeks full summary judgment on all claims. (No. 83.)

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, summary judgment is proper if the evidentiary materials in the record show that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.

Civ. P. 56(a); *see Longaberger Co. v. Kolt*, 586 F.3d 459, 465 (6th Cir. 2009). The moving party bears the burden of proving the absence of genuine issues of material fact and its entitlement to judgment as a matter of law, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case on which it would bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Walton v. Ford Motor Co.*, 424 F.3d 481, 485 (6th Cir. 2005).

The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original); *see also Longaberger*, 586 F.3d at 465. "Only disputed material facts, those 'that might affect the outcome of the suit under the governing law,' will preclude summary judgment." *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 702 (6th Cir. 2008) (quoting *Anderson*, 477 U.S. at 248). Accordingly, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 340 (6th Cir. 1993).

A district court considering a motion for summary judgment may not weigh evidence or make credibility determinations. *Daugherty*, 544 F.3d at 702; *Adams v. Metiva*, 31 F.3d 375, 379 (6th Cir. 1994). Rather, in reviewing a motion for summary judgment, a court must determine whether "the evidence presents a

sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252; *see Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 549 (6th Cir. 2009).

III. ANALYSIS

Because this action proceeds under diversity jurisdiction, state law governs the substantive issues. *Issuer Advisory Grp. LLC v. Tech. Consumer Prods.*, No. 5:14CV1705, 2015 U.S. Dist. LEXIS 12719, at *7 (N.D. Ohio Feb. 3, 2015) (citing *Gass v. Marriott Hotel Servs., Inc.*, 558 F.3d 419, 425-26 (6th Cir. 2009)). To prove his products liability and negligence counts under Ohio law, Mr. Miller must establish that Delaware's alleged actions and omissions proximately caused his injuries. *Kurczi v. Eli Lilly & Co.*, 113 F.3d 1426, 1432 (6th Cir. 1997) (products liability); *Wallace v. Ohio Dep't of Com.*, 96 Ohio St. 3d 266, 2002- Ohio 4210, 773 N.E.2d 1018, 1025-26 (Ohio 2002) (negligence). *See also* Ohio Rev. Code § § 2307.78(A)(1) and (2). Causation is thus an essential element of all of Mr. Miller's claims.

On this point, Delaware cites to Mr. Miller's deposition testimony wherein he admits he does not know what caused the accident. (No. 83, PageID 343) (citing Miller Depo., No. 84-1, PageID 422-23, 426, 432.) Mr. Miller testified he does not know if anything Delaware told him, or failed to tell him, caused the accident.(No. 84-1, PageID 432.) Neither Mr. Miller's opposition nor his sur-replies present any evidence on causation.

Delaware further highlights Mr. Miller's lack of expert testimony on the topic. "[T]he issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry and must be established by the opinion of medical witnesses competent to express such opinion." *Darnell v. Eastman*, 23 Ohio St. 2d 13, 17, 261 N.E.2d 114, 116 (1970).

Mr. Miller fails to sustain his Rule 56 burden. Delaware's motion for judgment is **GRANTED**. (No. 83.)

IV. CONCLUSION

Delaware's Motion for Summary Judgment is **GRANTED**. (No. 83.)

The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

s/ Sarah D. Morrison
SARAH D. MORRISON
UNITED STATES DISTRICT JUDGE