[Cite as *Gonzalez v. Posner*, 2010-Ohio-2117.]

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

Rosa L. Gonzalez, Adm.	Court of Appeals No. F-09-017
Appellant	Trial Court No. 09CV000152
v.	
Edward Posner, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: May 14, 2010

* * * * *

Stuart F. Cubbon, for appellant.

Shannon J. George, for appellee Edward Posner; Jan L. Roller, for appellee Jeremy Posner.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an accelerated appeal from the October 13, 2009 judgment issued by the Fulton County Court of Common Pleas which granted a motion for judgment on the pleadings in favor of appellees, Jeremy Posner and Edward Posner, dismissing the claims

filed by appellant, Rosa L. Gonzalez, Administratrix of the Estate of her son, Marcos Santos Gonzalez. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} On May 4, 2009, appellant filed a complaint against appellees for wrongful death of her 20-year-old son, Marcos Santos Gonzalez.[1] The complaint alleged negligence in purchasing and/or furnishing intoxicating beverages to her son and, with full knowledge of her son's intoxicated state, ordering him to leave their residence by driving his automobile. In their June 2, 2009 answer to the complaint, appellees denied the allegations against them and asserted, among other affirmative defenses, that appellant's complaint fails to state a claim upon which relief may be granted. On June 18, 2009 and June 22, 2009, respectively, appellees filed motions for judgment on the pleadings and dismissal of appellant's complaint. In a judgment journalized on October 13, 2009, the trial court granted judgment upon the pleadings pursuant to Civ.R. 12(B)(6) and Civ.R. 12(C), thereby dismissing appellant's complaint for failure to state a claim upon which relief may be granted.

{¶ 3} Appellant asserts two assignments of error on timely appeal:

{¶ 4} "ASSIGNMENTS OF ERROR

{¶ 5} "1. The trial court erred by failing to acknowledge that liability for common law negligence will lie where a tortfeasor purchases and/or furnishes intoxicating beverages to an underage adult to the point of intoxication and then requires

[1]The complaint also named Aaron Tucker as a defendant; Tucker is not a party to this appeal.

and orders the intoxicated person to leave tortfeasor's residence by driving an automobile with full knowledge that said intoxicated individual is unable to operate his car safely.

{¶ 6} "2. The trial court erred in failing to acknowledge that a social host may be held liable for purchasing and/or furnishing alcohol to an underage adult."

{¶ 7} According to appellant's complaint, on April 8, 2008, Marcos Santos Gonzalez died as a result of a single car automobile accident. At the time of his death, decedent was a 20-year-old underage adult consumer under the influence of alcohol. He was served intoxicating beverages at appellees' residence and later into the night ordered to leave the home by car. Thereafter, Gonzalez lost control of his vehicle and succumbed to injuries sustained in the accident.

{¶ 8} In her first assignment of error, appellant asserts that the trial court erred in granting judgment on the pleadings pursuant to Civ.R. 12(B)(6) and Civ.R. 12(C) by failing to acknowledge common law negligence liability for an individual who provides an underage adult with alcoholic beverages to the point of intoxication and then, with full knowledge of the risks, requires the inebriated person to leave the residence by driving his automobile.

{¶ 9} A motion to dismiss for failure to state a cause upon which relief may be granted, pursuant to Civ.R. 12(B)(6), and a motion for judgment on the pleadings, pursuant to Civ.R. 12(C), are premised on the same standard. *N. Ohio Med. Specialists, L.L.C. v. Huston*, 6th Dist. No. E-09-13, 2009-Ohio-5880, ¶ 12. The main difference between the two is timing and the material which may be considered. Id. A Civ.R.

12(B)(6) motion is ordinarily filed prior to the answer and consideration of the motion is limited solely to the complaint. Id. A Civ.R. 12(C) motion, however, is premature if advanced prior to the close of pleadings. Civ.R. 12(C) allows the court to consider both the complaint and the answer. Id.

{¶ 10} "For either motion, the court must accept the factual allegations in the complaint as true and make all reasonable inferences in favor of the nonmoving party. If, on review, the allegations in the complaint are such that the plaintiff can prove no set of facts which would entitle him or her to relief, the moving party is entitled to judgment as a matter of law." (Citations omitted.) *Clark v. Clark*, 6th Dist. No. H-05-006, 2005-Ohio-5252, ¶ 11.

{¶ 11} Under the notice pleading requirements of Civ.R. 8(A)(1), the plaintiff only needs to plead sufficient, operative facts to support recovery under his claims. *Doe v. Robinson*, 6th Dist. No. L-07-1051, 2007-Ohio-5746, ¶ 17. Nevertheless, to constitute fair notice, the complaint must still allege sufficient underlying facts that relate to and support the alleged claim, and may not simply state legal conclusions. *Clemens v. Katz*, 6th Dist. No. L-08-1274, 2009-Ohio-1461, ¶ 7; see, also, *DeVore v. Mut. of Omaha* (1972), 32 Ohio App.2d 36, 38.

{¶ 12} Appellant contends that appellees were negligent in purchasing and/or providing alcohol to Marcos Gonzalez and then requiring him to operate his vehicle in an inebriated state. Under Ohio law, however, there is no such claim recognized as a valid cause of action upon which relief may be granted.

{¶ 13} To establish actionable negligence, it is axiomatic that one shows the existence of a duty. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318. In Ohio, "[t]he existence of a duty depends on the foreseeability of the injury. The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." (Citations omitted.) *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St.3d 284, 293, 1997-Ohio-194. However, foreseeability alone is not always sufficient to establish the existence of a duty. Id. "Duty * * * is the court's expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Citations omitted.) *Homan v. George* (1998), 127 Ohio App.3d 472, 475.

{¶ 14} In *Smith v. The 10th Inning, Inc.* (1990), 49 Ohio St.3d 289, 291, the Ohio Supreme Court stated that "an adult who is permitted to drink alcohol must be the one who is primarily responsible for his or her own behavior and resulting voluntary actions." This holding also applies to underage adults who have not reached the legal drinking age of 21 years of age, but have attained the age of majority (18 years of age). *Klever v. Canton Sachsenheim, Inc.*, 86 Ohio St.3d 419, syllabus, 1999-Ohio-117; see, also, *Lee v. Peabody's, Inc.* (June 9, 1994), 8th Dist. No. 65090.

{¶ 15} As a matter of public policy, an individual therefore generally owes no duty to protect a voluntarily intoxicated underage adult from his own negligent activity. *Klever* at 422. An underage adult's voluntary decision to drink and drive is considered a primary assumption of risk. *Tome v. Berea Pewter Mug, Inc.* (1982), 4 Ohio App.3d 98,

101-102; see, also, *Cole v. Broomsticks, Inc.* (1995), 107 Ohio App.3d 573, 577. "Primary assumption of the risk requires the plaintiff to expose himself or herself 'reasonably and voluntarily' to an obvious or known danger that would relieve the defendant from any duty to protect the plaintiff." (Citation omitted.) *Cole* at 577. Primary assumption of risk is a bar to recovery in a negligence action. Id. "'The effect of raising primary assumption of the risk as a defense is to state, as a matter of law, that defendant owes no duty to plaintiff.'" *Westray v. Imperial Pools & Supplies, Inc.* (1999), 133 Ohio App.3d 426, 432, quoting *Collier v. Northland Swim Club* (1987), 35 Ohio App.3d 35, 37.

{¶ 16} Appellant asserts, however, that in the instant case appellees did more than simply fail to protect appellant's son from his own negligence due to his intoxication when they "ordered and required" him to leave their home by driving his car in a dangerous state of inebriation. Under these circumstances, appellant maintains her son no longer acted voluntarily, but was essentially forced to leave the residence in his car. As a result, appellees created the risk that Marcos Santos Gonzalez would be killed by driving drunk.

{¶ 17} Appellant claims that the trial court acted in violation of Civ.R. 12(B)(6) when it refused to accept the involuntary nature of her son's act of driving drunk as a fact pleaded in her complaint. Ohio law requires only that the trial court make those inferences from a complaint that are reasonable in light of the factual allegations. Furthermore, notice pleading requires that the complaint state more than simply "legal

conclusions." Appellant's allegation that appellees "forced" the decedent to drive involuntarily is a conclusory statement unsupported by any fact or law. Appellant makes no claim that appellees forced the decedent to drink alcohol to the point of intoxication prior to driving his car from the residence. Moreover, appellant makes no claim that appellees physically forced the decedent to drive his vehicle from the premises. As the trial court notes: "No one put a gun to Decedent's head, or strong-armed him into his vehicle." Appellants have cited no authority, nor has this court found any, establishing that the decision of an intoxicated adult or underage adult guest to leave, by car, a person's residence upon request should not be viewed as voluntary. Thus, this court finds no reasonable inference from the facts alleged that the decedent's drinking alcohol and operation of his vehicle were involuntary.

{¶ 18} For the above reasons, this court finds that appellant can prove no set of facts entitling her to relief. Appellant's first assignment of error is not well-taken.

{¶ 19} In her second assignment of error, appellant asserts that the trial court erred in failing to acknowledge that a social host may be held liable for purchasing and/or providing alcohol to an underage adult.

{¶ 20} In Ohio, as a general rule, social hosts are not subject to liability for injuries proximately caused by their intoxicated guests. *Great Central Ins. Co. v. Tobias* (1988), 37 Ohio St.3d 127, 129. "This rule is consistent with both the common-law principle that there is no duty to affirmatively act to protect another and the policy that persons should be responsible for their drinking." *Homan v. George* (1998), 127 Ohio App.3d 472, 476.

Accordingly, in *Gwin v. Phi Gamma Delta Fraternity* (Oct. 16, 1997), 8th Dist. No. 71694, the court ruled that no cause of action exists against social hosts who provided intoxicating beverages to an underage adult who suffered self-inflicted injury or death due to his intoxication. See, also, *Kirchner v. Shooters on the Water, Inc.*, 167 Ohio App.3d 708, 2006-Ohio-3583, ¶ 64. We agree and find that appellant has stated no cause of action entitling her to relief against appellees as social hosts. Appellant's second assignment of error is not well-taken.

{¶ 21} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is 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, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE