[Cite as *Baus v. Lowe*, 2007-Ohio-275.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87765

HARLAN BAUS, ET AL.

PLAINTIFFS-APPELLANTS

vs.

DAVID LOWE, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-507896

BEFORE: Nahra, J., Celebrezze, A.J., and Blackmon, J.

RELEASED: January 25, 2007

JOURNALIZED:

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Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NAHRA, J.:

I. Introduction

{¶1} In this case, Plaintiff-appellants Harlan Baus, the administrator of the estate of Carol Patch, deceased; Robert Patch and Earl Patch ("Appellants") appeal orders of the Cuyahoga County Court of Common Pleas, General Division ("the trial court"), denying Appellants' motion for partial summary judgment and granting summary judgment to Defendant-appellees Clarkwood Beach Club, Inc. and its statutory agent, Paul R. Milo (collectively, "Clarkwood"). The case at bar stems from an accident occurring in Lake Erie off the shore of Clarkwood's property, in which Carol Patch was killed when David Lowe, a defendant below, ran her over with his boat as she waded in waist-deep water in the lake. On appeal, Appellants contend the trial court erred in concluding that no genuine issue of material fact existed as to the non-liability of Clarkwood on Appellants' claims sounding in wrongful death, survivorship, premises liability and negligence. Finding no merit to Appellants' claims, we affirm.

II. Statement of Facts and Procedural Background

{¶2} Clarkwood Beach Club, Inc. is a non-profit corporation organized under Ohio law for the stated purposes of owning and maintaining a parcel of beachfront property abutting Lake Erie in Euclid, Ohio. It is a private organization which, by its charter, is limited to fifty members living in certain

housing developments in Euclid. The property owned by Clarkwood consists of a party area containing an open-air pavilion, restroom facilities and permanent grills. Below this area, people may access a beachfront area, which is also owned by Clarkwood. The parcel of property extends to the shoreline of Lake Erie, where there are no structural improvements such as boat docks or a pier extending from the beachfront into the lake. Members each have the opportunity to reserve at least one day during the year during which they can host a private party for their guests. In the party area of the property above the beach, guests may participate in recreational activities like playing volleyball or throwing horseshoes.

{¶3} On August 12, 2001, Clarkwood member Paul Adams hosted a party for friends and patrons of the Village Bar, an establishment he owns in Euclid. David Lowe, an acquaintance of Adams who frequented his bar, knew of the party and planned to attend. He received permission from Adams to drive his boat, a twenty six foot Trojan cabin cruiser, to the waters adjacent to Clarkwood property, and he planned to take willing party attendees water skiing. Lowe dropped off some unspecified food for the party at Clarkwood in the early afternoon, and at that time stated that he was going to return later on his boat.

{¶4} Lowe and his two sons arrived off the shore of Clarkwood property on his boat at approximately 7:00 p.m. He anchored it about twenty-five yards off shore and waded onto the Clarkwood beach, continuing up to the pavilion

area to talk with other party guests. At around 8:00 p.m., he decided to begin giving water skiing rides to party guests. Adams was the first person to water ski; Lowe drove his boat in a clockwise circle on Lake Erie with Adams in tow. As the boat headed back towards Clarkwood, Adams let go of the line attached to the boat pulling him, and he glided into shore on the water skis. Carol Patch was to water ski next, and she put on the water skis and other equipment. She was concerned that the boat might not have enough power to pull her, given the amount of passengers already on the boat, so she decided not to water ski. Adams decided to water ski again instead. Lowe again drove his boat in a clockwise circular route, with Adams in tow as he water skied.

{¶5} As Lowe drove his boat along and/or towards Clarkwood property, Patch and another party guest, ten year-old Samantha Trommeter, were in the lake approximately ten to fifteen yards off shore, in waist-deep water. Lowe drove his boat directly toward them, as he was allegedly looking back at Adams water skiing; while Patch and Trommeter tried to get his attention so he could avoid hitting them, their efforts failed. As the boat bore down upon them, Patch threw Trommeter aside, and the boat struck Patch. As the boat ran her over, its spinning propeller caused severe injury to her chest and abdomen, fatally wounding her. She passed away before Euclid emergency service personnel arrived.

{¶6} Subsequently, Euclid police and Ohio Department of Natural

Resources personnel arrived to the scene on the beach and questioned Lowe. A police officer administered field sobriety tests to Lowe, which he failed. Lowe provided a urine sample which, upon testing, revealed his blood alcohol level to be .14 grams of alcohol per 100 ml. of urine, well above Ohio's legal limit for intoxication. Euclid police arrested him, and he ultimately pleaded guilty in Cuyahoga County Common Pleas Court Case No. 413488 to one count of attempted involuntary manslaughter and one count of reckless operation of a vessel.

{¶7} Appellants[1] filed the instant case on August 13, 2003, against the originally purported owners of the property of Clarkwood; the Village Bar, its corporate parent and the owner of the property upon which it sits; the statutory agents of these parties; David Lowe; and a John Doe Defendant. Ultimately, in an amended complaint filed March 3, 2004, Appellants named Clarkwood, its statutory agent Paul R. Milo and Clarkwood member Paul Adams as defendants. The Complaint and Amended Complaint alleged causes of action grounded in theories of wrongful death, survivorship, premises liability, statutory dram shop liability against the Village Bar Defendants and negligence. Michelle Trommeter, the mother of Samantha Trommeter, intervened as a Plaintiff as well.

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[1]Harlan Baus is the administrator or executor of the estate of Carol Patch, the decedent, and was also Ms. Patch's maternal uncle. Robert Patch was Ms. Patch's father, and Earl Patch was her brother.

{¶8} Trommeter dismissed her claims without prejudice. Appellants dismissed their claims against Adams, The Village Bar and its corporate parent with prejudice. Appellants also, at different stages of the litigation below not relevant to this appeal, dismissed their claims against all other defendants except Clarkwood Beach Club, Inc. and its statutory agent Milo (collectively, "Clarkwood") without prejudice. On January 14, 2005, Appellants moved the court for partial summary judgment as to the liability of certain defendants including Clarkwood, and on August 31, 2005, Clarkwood moved the court for summary judgment. The court denied Appellants' motion for partial summary judgment on September 9, 2005, and granted Clarkwood's motion for summary judgment without opinion on November 4, 2005. This appeal, involving Clarkwood as the only defendants, ensued.

III. Summary Judgment Law

{¶9} Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party."

Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶10} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 1996 Ohio 336, 671 N.E.2d

241. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 1992 Ohio 95, 604 N.E.2d 138.

{¶11}The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93, 1996-Ohio-107, 662 N.E.2d 264. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

IV. Analysis

{¶12}On appeal, Appellants allege two assignments of error. In the first assignment, appellants state:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANTS IN GRANTING JUDGMENT TO DEFENDANT APPELLEES CLARKWOOD BEACH CLUB, INC. AND ITS STATUTORY AGENT, PAUL R. MILO ON THE ISSUE OF LIABILITY.

{¶13}Appellants organize their argument under this assignment of error into a series of sub-issues of discussion. We discuss each in turn.

{¶14}First, Appellants assert that Clarkwood incurred liability for the actions of Mr. Lowe, in negligently operating his boat so as to cause the death of Ms. Patch, because Adams, a member of Clarkwood, implicitly authorized Lowe to negligently operate his boat in Lake Erie. Alternatively, appellants alleged that Adams failed to investigate whether Lowe was intoxicated before boating activities began and subsequently failed to prohibit them upon noticing that Lowe was intoxicated. They characterize "boating" as a corporate purpose of Clarkwood, and seek to impute liability to Clarkwood based on Adams' alleged negligent assent on behalf of Clarkwood to Lowe's allegedly negligent actions. This argument has no merit.

{¶15}Appellants correctly note that, under R.C. 1702.12(A), "[a] corporation may sue and be sued." Appellants also correctly point out that "Ohio courts have held that where a tort is committed in accordance with the express orders of corporate officers or agents (including trustees) carrying out corporate policy, the corporation is a joint tortfeasor, and is therefore equally liable along with the corporate officer that ordered the wrongful conduct." *Dater v. Charles H. Dater Foundation*, Hamilton App. Nos. C-020675 and C-020784, 2003-Ohio-7148 at ¶73, citing *American Ins. Group v. McCowin* (1966), 7 Ohio App.2d 62,

218 N.E.2d 746; *Czubaj v. E.B.P.* (Oct. 12, 1995), Cuyahoga App. No. 65517. For the sake of the resolution of this issue only, we assume that Adams' status as a member of Clarkwood can establish the type of agency relationship sufficient to permit his acts to bind Clarkwood or expose it to liability as a result of his alleged negligence.

{¶16} However, according to Article II of the Clarkwood Beach Club, Inc., Code of Regulations establishing the entity, the "object and purpose" for the formation of the entity include:

> Section 1: To encourage civic betterment, neighborly and [sic] community spirit among its members.
>
> Section 2: To initially acquire, own, maintain and control a certain private park reserve designated as a portion of Lot No. 10 - Lake Overlook Subdivision No. 2, situated in the City of Euclid, Ohio.
>
> Section 3: To subsequently acquire and own such other real estate as may be necessary and expedient. Also to dispose of all or any portion of the Club's real estate when deemed for the best interest of the Club.
>
> Section 4: To control and maintain upon such real estate such harbors, boat houses, bath houses, club houses, pavilions, bathing beaches, and any other conveniences for the recreation, amusement, and enjoyment of its members.
>
> Section 5: To levy, assess, charge and collect such fees, dues and assessments from its members as may be reasonably necessary to carry out the object and purpose of the club.
>
> Section 6: To do all other things incidental and expedient to accomplish said purpose and object.

{¶17} Nothing in the "object and purpose" as stated in the Regulations for

the formation of Clarkwood governs or mentions boating, or gives any club member the authority, *as a member of the beach club corporation*, to control anything that happens upon the waters of Lake Erie. Indeed, nothing could, as the parcel of property owned by Clarkwood extends only to the shoreline of the lake. The deed of Clarkwood's property explicitly defines the property line as extending "*** northerly about 375 feet to the shore line of Lake Erie; thence southwesterly along the said shore line of Lake Erie to its intersection with the northerly prolongation of the said westerly line of proposed Erieside Road ***."

{¶18}The lake itself,

{¶19}*** consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands. ***

{¶20}R.C 1506.10. There is no evidence in the record to indicate that Clarkwood had any regulations, rules, or policies regarding boating. There was

no physical improvement to the real property of Clarkwood to facilitate the activity - indeed, access to the beachfront area of the property was only possible either from the lake or by navigating a stone stairway down from the upper, party area of the property. The actual injury inflicted upon Appellants' decedent was inflicted by Lowe, a non-member, operating his boat.

{¶21}Accordingly, since Adams would have been acting outside the corporate purposes of the Clarkwood Regulations in "authorizing" any non-member third party to conduct any boating operations upon the waters of the lake itself, his alleged negligence in doing so may have hypothetically - in circumstances we do not explore here - opened him up to liability in a personal capacity alone. Adams is no longer a party to this case.

{¶22}Similarly, Appellants argue that the Clarkwood Regulations vest each member of the club with the responsibility to "*** conduct themselves, or have such parties conducted in a manner that will not be offensive to other club members." See Clarkwood Regulations, Article V, Section 5. While Appellants would have us construe this duty as a special, corporate duty requiring any host member of a beach party to ensure the safety of his non-member guests as a matter or corporate policy,[2] it is plain that this provision, even seen in a light most favorable to Appellants, cannot be reasonably so construed. At best, this

[2]Appellants also allege that Adams, as a member of Clarkwood, owed him a special duty based on a premises liability theory. See infra.

rule is an internal rule of conduct for which a member may be disciplined or ejected by other members for violating. Regulations, Article IV, Section 2: "*** Any member of the club may be expelled from the membership therein for good cause ***. ***[C]ause shall include *** violation of any of the duties or obligations imposed by these regulations or any rules or regulations adopted by the Board of Trustees for the improvement, control, or use of any parks or property of the club." It is not a "corporate function or purpose" of the corporation as a legal entity. Those purposes are set out in Article II of the Regulations.

{¶23} As Clarkwood could, as a matter of law, only be subject to potential liability for Adams' actions or negligent permissiveness if he allegedly committed a tort as a "*** corporate officer[] or agent[] *** carrying out corporate policy," *Dater*, supra, the corporation cannot, as a matter of law, be liable to Appellants as a joint tortfeasor. Id.[3] Appellants may not recover from Clarkwood for the injuries inflicted by Lowe in Lake Erie for this reason alone.

{¶24} Appellants argue that R.C. 1547.07(B) imposed an obligation upon Clarkwood to monitor and control Lowe's boating activities adjacent to Clarkwood's property. We disagree.

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[3]Appellants argue at great length that Ohio substantive law applies to determine the duties and rights of the parties. We agree with this conclusion. See *Niepert v.Clev. Electric & Illum. Co.* (6th Cir. 1957), 241 F.2d 916, 917. It is upon the application of Ohio corporate, negligence and premises liability law that Appellants' claims ultimately fail.

{¶25}R.C. 1547.07(B) is a boating statute that states: "[n]o person shall operate or permit the operation of a vessel in an unsafe manner. A vessel shall be operated in a reasonable and prudent manner at all times." Appellants posit that Clarkwood, acting through Adams, had a duty to ensure that Lowe operated his boat in a safe manner and that his failure to do so opens the corporation up to liability. Again, however, Lowe operated his boat off the premises of Clarkwood. Clarkwood had no duty or authority as a bare littoral landowner to police the activities of non-members engaged in an activity with a non-member's boat on non-Clarkwood property. Clarkwood, through Adams, could not "permit" or forbid the boating activity that occurred. Clarkwood engaged in no boating activity. While appellants allege that the deposition testimony of Lowe established that he would have not "*** brought his boat to Clarkwood that evening if Mr. Adams had not wished it," see Appellant's Brief at p. 17, it is uncontroverted that Lowe did not bring his boat to "Clarkwood" on the evening of the accident giving rise to this case - Lowe *anchored his boat off the shore of Clarkwood in Ohio-owned Lake Erie.*

{¶26}Appellants may have created a question of fact as to whether Adams hypothetically failed to assure Lowe's sobriety before he drove his boat in the lake if one accepts the proposition that Adams should have noticed Lowe's intoxication and did not. However, the relationship between Mr. Adams and Mr. Lowe, in their respective personal capacities, has no bearing on the liability of

Clarkwood absent a corporate association between it and Adams or it and Lowe. As we discussed above, none existed so as to open Clarkwood up to liability through the alleged negligence of Adams. Lowe had no connection to Clarkwood whatsoever. As such, any imputed liability, on the part of Clarkwood, based on R.C. 1547.07 cannot lie, and this argument fails.

{¶27} Appellants further assert that Clarkwood harbors liability for Adams' alleged negligence on the theory that Clarkwood was a social host of Ms. Patch on the night of her death, and, as such, may be liable for Adams' or Lowe's wrongful conduct. We assume, without deciding, that Clarkwood was a social host to Ms. Patch (an analysis we need not undertake and a point we decline to determine). Social host liability analysis, however, begins with the determination that the host owned and controlled the property upon which his guest has been injured. *Scheibel v. Lipton* (1951), 156 Ohio St. 308, 102 N.E.2d 453, at paragraphs 2 and 3 of the syllabus. As the undisputed facts reveal that Ms. Patch was killed off the premises owned and controlled by Clarkwood, it is clear that Clarkwood can in no way be liable on this theory to Appellants for the fatal injury suffered by the decedent.

{¶28} Finally, Appellants seek to assign liability to Clarkwood based on characterizing Adams' conduct as a qualified nuisance. "[A] qualified nuisance or nuisance dependent upon negligence consists of anything lawfully but so negligently or carelessly done or permitted as to create a potential and

unreasonable risk of harm which, in due course, results in injury to another."

{¶29}*Metzger v. Pennsylvania, O. & D. R. Co.* (1946), 146 Ohio St. 406, 410, 66 N.E.2d 203. However, as we stated above, Adams, even if negligently acting or permitting Lowe's negligent conduct in his own right, could not have triggered Clarkwood's liability as a member of the corporation by participating in or authorizing acts occurring off the Clarkwood premises. Accordingly, this argument fails.

{¶30}Appellants' first assignment of error is not well taken.

{¶31}For Appellants' second assignment of error, they state:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANTS BY DENYING THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY AGAINST DEFENDANT APPELLEES CLARKWOOD BEACH CLUB, INC. AND ITS STATUTORY AGENT, PAUL R. MILO.

{¶32}In this assignment of error, Appellants allege that no material issue of fact exists as to the liability of Clarkwood on Appellants' claims. As we conclude that no genuine issue of material fact exists as to the non-liability of Clarkwood on Appellants' claims, we conclude that the court correctly denied Appellants' motion for partial summary judgment. As such, this assignment of error is not well taken.

V. Conclusion

{¶33} We find that, under the record compiled below and the applicable law, no genuine issue of material fact exists pertaining to Appellants' claims

sounding in wrongful death, survivorship, premises liability and negligence against Clarkwood, and that Clarkwood was entitled to summary judgment as a matter of law. Hence, we affirm the judgment of the trial court in all respects.

{¶34} It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JOSEPHJ. NAHRA, JUDGE*

FRANK D. CELEBREZZE, JR., A.J., and
PATRICIA A. BLACKMON, J., CONCUR

(*SITTING BY ASSIGNMENT: JOSEPH J. NAHRA,
RETIRED OF THE EIGHTH DISTRICT COURT OF APPEALS.)