

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

MARK MASTERSON, ETC., et al.)	CASE NO. CV 16 857804
)	
Plaintiffs,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JUDGMENT ENTRY GRANTING</u>
)	<u>AND DENYING IN PART THE</u>
ZACHARY BRODY, et al.)	<u>MOTIONS FOR JUDGMENT ON THE</u>
)	<u>PLEADINGS AND TO DISMISS</u>
Defendants.)	

John P. O'Donnell, J.:

This lawsuit arises from the beating death of Phil Masterson in the early morning hours of September 5, 2011, behind units 90 and 92 of the Island Club development in Put-in-Bay, Ohio. The claims were originally filed as case number CV 12 790788 on September 5, 2012. That suit was voluntarily dismissed on January 27, 2015, then refiled here on January 22, 2016.

The parties and their relationships

Plaintiff Mark Masterson is the administrator of decedent Phil Masterson's estate. Mark is named as a plaintiff in his capacity as administrator and separately as the brother of Phil.¹ Plaintiffs Georgeanne and Kevin Masterson are Phil's parents; plaintiffs Matt Masterson and James Masterson are Phil's other brothers; plaintiff Molly Barz is Phil's sister; and plaintiff Ayako Hobbs was engaged to be married to Phil at the time of his death.

There are nine named individual defendants. They are Zachary Brody, Brian Cultice, Ryan Collins, Clifton Knoth, Matt Brotzki, Dustin McCullough, Cameron Parris, Sarah Partlo

¹ The named plaintiffs with the last name Masterson will be referred to throughout this entry by their first name only to avoid confusion. No disrespect is intended. Defendant Michael Masterson will be referred to by his full name to distinguish him as a defendant.

and Michael Masterson. The complaint alleges that all individual defendants “were possessors, renters or occupants of” Island Club units 90 and 92 when Phil was killed and that each of them, except Partlo, participated in the severe beating and then dragged him into the woods behind the units and left him to die without either assisting him themselves or calling for emergency medical assistance. The complaint alleges that Brody and Partlo returned later to haul Phil deeper into the woods and cover him with a tarp while he was still alive.

There are five corporate defendants: Island Club, Inc. (dba Island Club), PMJ Properties, Inc. (dba Island Club Rentals and dba Island Club Taxi), Island Club Transportation, Inc., Island Club Property Owners Association, Inc. and Equity Trust Company. The plaintiffs claim that all of the corporate defendants are owners/lessors of property in the Island Club development who owed a duty of care to protect the decedent while he was on the premises.

The complaint

The complaint has eight causes of action labeled as counts one through eight.² I will summarize these here as succinctly as possible and describe them in greater detail as needed throughout this decision. Count one is against every individual and corporate defendant except Partlo. The plaintiffs allege the defendants breached a duty of “ordinary care to avoid causing injury”³ resulting in pain and suffering and ultimately his death.

Count two is against the corporate defendants. The plaintiffs allege the defendants knew before Phil was assaulted that Brody “had violent tendencies and a violent nature”⁴ and that Phil was in danger but failed to protect him – through negligence or intentionally – thus leading to his injuries and death. Count three is also against only the corporate defendants. Here, the

² The plaintiffs use Roman numerals. I will use Hindu-Arabic numerals.

³ Complaint, paragraph 8.

⁴ *Id.*, ¶12.

complaint alleges that the lessors were aware of the need for security to protect people on their premises and breached a duty to provide such security, thereby causing Phil's injuries and death.

For count four, the plaintiffs assert that Parris and Knoth asked Brody "to confront Phil"⁵ when they knew that such a confrontation would lead to injury, and then all individual defendants, except Partlo, beat him to near the point of death and then dragged him from the porch of unit 90 to the woods behind it. This portion of the complaint further alleges that everybody knew Phil needed help but nobody provided it. The plaintiffs go on to allege that Partlo came to the scene hours later while Phil was still living, saw his condition, and took no action to help him. Thus, this count alleges that all individual defendants negligently or intentionally caused Phil's injuries and death because they "failed to properly take action to remedy a danger, provide assistance to a disabled person or prevent further harm."⁶

Count five alleges that the individual defendants other than Brody knew that Brody was prone to violence and breached a duty to Phil by failing to protect him from Brody. But this count also alleges, at paragraph 35, that every individual defendant participated in the beating itself.

Count six offers no additional factual allegations on the subject of the defendants' duties or breaches thereof. It merely describes the damages the individual plaintiffs claim to have incurred as a result of the death, including loss of consortium, grief, depression, mental anguish and funeral expenses. These damages are attributed to all defendants, individual and corporate.

Count seven avers that the individual defendants knew of Phil's dire condition yet they failed to abide by section 2305.45 of the Ohio Revised Code which obligates one who finds a disabled person to make a reasonable effort to notify a law enforcement officer or medical

⁵ *Id.*, ¶22.

⁶ *Id.*, ¶29.

practitioner. This count also includes allegations that the corporate defendants negligently leased their properties to the individual defendants and negligently failed to provide for security at the properties.

Count eight alleges negligence against the corporate defendants on the basis that the security agents which they did provide were incompetent and unlicensed.

Differences between the dismissed and pending complaints

The pending 2016 complaint includes all of the allegations in the dismissed 2012 complaint, plus three additional claims. First, the 2016 complaint includes for the first time count eight against the corporate defendants for negligent hiring of security. Second, the 2012 complaint describes only Brody as the person who actually beat, struck, kicked and choked the decedent and then dragged him into the woods. That complaint does not name the remaining individual defendants as participating in these acts, but the 2016 complaint does. Finally, the 2012 complaint omits the allegations that Knoth 1) was a lessee, possessor, renter or occupant of units 90 and 92 charged with the duty of keeping Phil safe, 2) precipitated Brody's initial confrontation of Phil Masterson and 3) disposed of Phil's outer clothing.

The pending dispositive motions

The corporate defendants PMJ Properties, Inc., Island Club Transportation, LLC, Island Club Property Owners Association, Inc. and Equity Trust Company have filed a motion for partial judgment on the pleadings. Separate motions to dismiss the complaint have been filed by individual defendants McCullough, Knoth, Parris and Michael Masterson. Those same defendants have also moved to dismiss cross-claims filed against them by defendant Brody.⁷

⁷ Knoth's motion on the cross-claim is for judgment on the pleadings, the functional equivalent of a motion to dismiss.

The motion for partial judgment on the pleadings

The motion for partial judgment on the pleadings filed by four of the corporate defendants seeks a judgment against all plaintiffs except the estate on every cause of action and against all plaintiffs including the estate on count eight for negligent hiring of security. The asserted basis for the dismissal of the individual plaintiffs is that only a decedent's estate may bring survivorship and wrongful death claims, and that individual loss of consortium claims 1) are not available to the plaintiffs here since Phil was an adult relative of the Masterson plaintiffs and had no legal relationship with Hobbs and 2) cannot in any event be individually prosecuted in the case of a wrongful death. The basis for the dismissal in its entirety of count eight is that it is barred by the applicable statute of limitations because it was filed after the expiration of the statute of limitations period and it does not fall within the savings statute because it was not made in the voluntarily dismissed complaint.

The plaintiffs oppose the motion, asserting that family members' loss of consortium claims are permitted in addition to the wrongful death action, and that even though a negligent hiring of security claim is new to this lawsuit it either falls within the savings statute or has been filed within the original statute of limitations because the cause of action accrued only when the plaintiffs discovered the negligent hiring in 2014.

Wrongful death claims are provided for in Ohio by R.C. Chapter 2125. Under R.C. 2125.02(A)(1) the action shall be brought in the name of the personal representative of the decedent. Only a personal representative of the decedent has standing to bring a wrongful death action. *Williams v. Griffith*, 10th Dist. No. 09AP-28, 2009-Ohio-4045, ¶12. In this case, that person is Mark Masterson as the administrator of Phil Masterson's estate. And that is true even though the statutory beneficiaries of a wrongful death claim are a decedent's surviving spouse,

children, parents and other next of kin. Thus, while the named individual plaintiffs in this case – with the likely exception of Hobbs – will ultimately share in any award recovered by the estate, they are not properly included as named plaintiffs in this lawsuit for wrongful death.

Moreover, several of the categories of damage provided for in the wrongful death statute are coextensive with the elements of a loss of consortium so that, in effect, the Masterson plaintiffs – all of whom are statutory wrongful death beneficiaries – have duplicate claims for loss of the consortium of the decedent. See R.C. 2125.02(B)(2) and (3). As a result, and without deciding whether a loss of consortium cause of action should extend to survivors other than a spouse and minor children in the case of an adult, the individual plaintiffs' loss of consortium claims can be dismissed without any effect on their ability, as statutory wrongful death beneficiaries, to recover, through the estate, for the loss of Phil's consortium.

As for Hobbs, who is not a statutory wrongful death beneficiary, she acknowledges that the current state of the law disqualifies her as a plaintiff because of the lack of any legally recognized relationship with Phil, but argues that the common law claim should be extended to include someone in her position. Because granting the motion to dismiss her individual claim would preclude the possibility that she has a meritorious argument for expanding loss of consortium claims to cover plaintiffs in her position, a dispositive motion or a trial on the evidence are more equitable means of deciding the issue than a motion for judgment on the pleadings.

As for Phil Masterson's survivorship claim – i.e., the claim for damages as a result of the conscious pain and suffering he incurred before his death – that cause of action for personal injury survives him. *Lewis v. St. Bernard*, 157 Ohio St. 549 (1952). Nonetheless, recovery is limited to any damages which the deceased might have recovered had he lived, including

damages for any conscious pain and suffering from the time of injury until death and any damage to property occurring concurrent to the bodily injury. *Case v. Norfolk & W. R. Co.*, 59 Ohio App. 3d 11, 15 (6th Dist. 1988). As Phil Masterson's claim for personal injury, the survivorship cause of action is an asset of the estate and properly brought by the estate, not by one or more individual family members.

Negligent hiring/retention claims are subject to the two-year statute of limitations contained in R.C. 2305.10(A). *Erickson v. Management & Training Corp.*, 11th Dist. No. 2012-A-0059, 2013-Ohio-3864, ¶38. Under that statute, a cause of action accrues when the injury or loss to person or property occurs. In this case the accrual date is September 5, 2011, so that unless the period of the statute of limitations was tolled, the cause of action had to be filed by September 5, 2013, or be barred under R.C. 2305.03.

There is no question that the complaint in the 2012 lawsuit did not include an explicit cause of action for negligent hiring of security, nor did it include facts that could be construed as implicitly asserting the cause of action. To the contrary, the plaintiffs assert in their opposition to the motion for judgment on the pleadings that they did not learn the facts tending to support the cause of action until after the 2012 complaint was filed. As a result, the savings statute – R.C. 2305.19, which gives a plaintiff one year after a voluntary dismissal to re-file a cause of action – does not apply, so the filing of the negligent hiring of security claim on January 22, 2016, was late by more than two years and is barred by the operation of R.C. 2305.03 unless the cause of action accrued within two years of filing the pending complaint.

The plaintiffs argue that the cause of action did not accrue at the time of injury but instead it accrued when they discovered the evidence in support of their claim during the

deposition of Paul Jeris, the corporate defendants' representative, on June 13, 2014, and the claim was filed less than two years later.

For some causes of action, the "discovery rule" may be applied to determine the accrual date of a cause of action. Under the discovery rule, a cause of action accrues and the statute of limitations begins to run when there is a cognizable event whereby the plaintiff discovers or should have discovered that damages were related to a prospective defendant's act or non-act and the plaintiff is put on notice of a need to pursue possible remedies against the prospective defendant. *Zimmie v. Calfee, Halter & Griswold*, 43 Ohio St. 3d 54, 58 (1989). The discovery rule operates to toll the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim; the question is whether the plaintiff knew the relevant facts, not when the plaintiff knew that the facts sufficiently established a legal cause of action. There may be circumstances where a plaintiff knew an injury was incurred but could not have known that the injury was attributable to a certain act of negligence until subsequently uncovering facts showing that negligence. It is thus conceivable here that the estate knew immediately that damages were incurred because of tortious conduct but could not have learned the relevant facts for the specific cause of action of negligent hiring of security until a more thorough investigation. The estate's claim that the discovery rule applies to the negligent hiring cause of action presents questions of fact not properly decided on a motion for judgment on the pleadings.

The individual defendants' motions to dismiss the complaint

The motions to dismiss of defendants McCullough, Parris, Knoth and Michael Masterson are not identical, but they have essentially three common arguments in favor of dismissal: that the plaintiffs' intentional tort claims are barred by the statute of limitations; that all of the other

claims do not state a cause of action because they do not allege facts that would impose a legal duty on the defendants; and that the only proper plaintiff for any claims that are not dismissed is the decedent's estate.⁸

The complaint avers in several places that each of the individual defendants were active participants in the assault on Phil Masterson:

Paragraph 18 of the complaint: Phil Masterson was *savagely beaten by* Defendants Brody, Cultice, Collins, Brotzki, McCullough, Parris, Michael Masterson [and] Knoth;

¶ 23: Defendants Brody, Cultice, Collins, Brotzki, McCullough, Parris, Michael Masterson [and] Knoth . . . individually or in conjunction with one another, or by and through their agents, servants, or employees, did *knowingly and intentionally* cause severe physical and mental harm to Phil Masterson by *beating, striking, kicking and choking* him to such an extent that he died;

¶ 24: Defendants Parris and Knoth *aided and abetted* Brody;

¶ 35: Defendants Brody, Cultice, Collins, Brotzki, McCullough, Parris, Michael Masterson, Knoth [and] Partlo John Doe 1-10, and Jane Doe 1-10, individually or in conjunction with one another . . . by their actions of *beating, kicking, punching, choking*, and moving Phil Masterson, caused Phil Masterson to suffer extensive and severe pain, physical suffering, and mental suffering, which ultimately and directly caused his death;

¶ 39: [T]he injury and death [were] the direct and proximate result of the combined negligent and/or *intentional, willful and wanton*, and reckless acts and/or omissions of all Defendants; and

⁸ Defendant Michael Masterson's motion to dismiss does not make this latter argument.

¶ 43: Phil Masterson was *savagely beaten and killed* by Defendants Brody, Cultice, Collins, Brotzki, McCullough, Parris, Michael Masterson [and] Knoth.

Although the complaint does not use the word, the plaintiffs are clearly alleging the intentional tort of battery, the elements of which are intentionally causing a harmful or offensive contact. *Guerrero v. C.H.P. Inc.*, Cuyahoga App. No. 78484, 2001 Ohio App. LEXIS 3603, *9 (Aug. 16, 2001). Moreover, where the essential character of an alleged tort is an intentional, offensive touching, the statute of limitations for assault and battery governs even if the touching is pled as an act of negligence. *Love v. City of Port Clinton*, 37 Ohio St. 3d 98 (1988), syllabus.

The statute of limitations for battery is found at R.C. 2305.111, which sets forth a one-year limitations period from the date of the battery within which to bring suit, except where the plaintiff did not know the identity of the person who allegedly committed the battery. In that event, the cause of action accrues on the earlier of: (a) the date on which the plaintiff learns the identity of that person; or (b) the date on which, by the exercise of reasonable diligence, the plaintiff should have learned the identity of that person.

The plaintiffs argue essentially that the version of the discovery rule built into R.C. 2305.111 applies because they did not know the identities of the intentional tortfeasors until discovery in the first filing of this case revealed evidence that the individual defendants – who, at that point, were only accused of negligence – actively participated in inflicting injury on Phil Masterson. According to the plaintiffs, that information was first learned “[a]fter conducting depositions of the various defendants in the spring and summer of 2014.” Plaintiffs’ br. in opp. filed June 9, 2016, page 7. Accepting that as true, then the cause of action for battery accrued no later than the “summer of 2014” and had to be brought within one year of that time, i.e. by the summer of 2015. Yet the complaint was filed in January of 2016. Even though the plaintiffs do

not give a definite date for when they discovered the individual defendants' involvement in a battery, there is no question that January 2016 is well after the end of the summer of 2015, and the battery causes of action against the moving defendants were filed outside of the most generously construed period of limitations.

But the plaintiffs argue in the alternative that the battery claims were filed in time because of the operation of the savings statute. As noted above, the basic effect of the savings statute in the case of a voluntary dismissal is to give a plaintiff an additional year from the date of dismissal within which to refile a cause of action. But the defendants assert that the battery claims were never part of the first lawsuit. A review of the record shows that they are correct and the savings statute does not apply to the current lawsuit's causes of action for battery.

The first filed complaint is part of the record in this case as Exhibit 1 to Knoth's motion to dismiss. A thorough reading of the factual allegations in that complaint makes it clear that only Brody was alleged to have committed the equivalent of a battery against the decedent. All of the original complaint's claims against the individual defendants with pending motions to dismiss are based on allegations that they either failed to stop Brody or failed to help Phil after Brody assaulted him. Since the allegations of battery against the moving defendants in the pending complaint are entirely new the plaintiffs are not entitled to the benefit of the savings statute and the battery claims are barred by R.C. 2305.111 and 2305.03.

The individual defendants' arguments that the plaintiffs have not articulated a legal duty they owed to Phil under the facts alleged are based primarily on the general proposition that, in the absence of a special relationship, there is no duty to act affirmatively for the protection of another person or to prevent a third person from causing harm to another person. *Estill v. Waltz*, 10th Dist. No. 02AP-83, 2002-Ohio-5004, ¶28. The defendants also assert that the facts alleged

do not support the existence of a duty arising from the status of a person in control of a premises and that R.C. 2305.45 does not create a private cause of action against a person who violated it. The existence of a legal duty depends ultimately on the facts of a case. Here, the plaintiffs have alleged that, under the circumstances present at the time of Phil's demise, the individual defendants owed duties of care to the decedent. Whether they, in fact, owed those duties will depend not on the broad allegations in the complaint but the specifics of the parties' relationships as demonstrated by evidence. In short, the question of whether a duty or duties existed – not to mention whether they were breached – is best left to be decided on the evidence, not the pleadings.

Finally, the individual defendants' motions to dismiss the individual plaintiffs, except Mark Masterson as the estate administrator, are well-taken as to all the plaintiffs except Hobbs's loss of consortium claim for the reasons outlined here in connection with the corporate defendants' motion for judgment on the pleadings.

The individual defendants' motions to dismiss Brody's cross-claims

Brody has cross-claimed against the individual defendants for contribution as jointly liable tortfeasors under R.C. 2307.25 *et seq.* Implicitly acknowledging that, pursuant to R.C. 2307.25(A), there is no right of contribution in favor of any tortfeasor against whom an intentional tort claim has been alleged and established, Brody asserts that he is seeking contribution only “[i]n the event that these new allegations [of intentional tort against the co-defendants] are allowed to proceed.” Cross-claim, filed June 10, 2016, page 5. Accordingly, the dismissal of the battery claims as discussed above has eliminated the reason for the cross-claim and the motions to dismiss it are granted to the extent they are not moot.

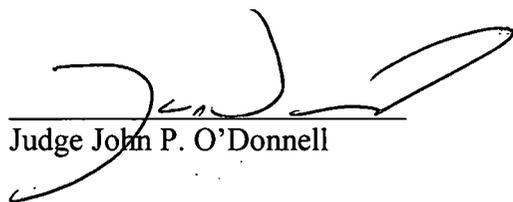
Conclusion

For the reasons given here, the motion for judgment on the pleadings of the corporate defendants PMJ Properties, Inc., Island Club Transportation, LLC, Island Club Property Owners Association, Inc. and Equity Trust Company is granted in part and denied in part. It is granted to the extent that all of the individual claims of all the Masterson plaintiffs – except for Mark Masterson in his capacity as the estate’s administrator – are dismissed, and all of Hobbs’s individual claims except for her loss of consortium claim are dismissed. The motion is denied on count eight for negligent hiring of security; that cause of action remains a pending claim of the estate and of Hobbs for her loss of consortium claim.

For the reasons given here, the motions to dismiss the complaint of the individual defendants McCullough, Parris, Knoth and Michael Masterson are granted and denied in part. They are granted as to the complaint’s claims for the intentional tort of battery. They are granted to the extent that all of the individual claims of all the Masterson plaintiffs – except for Mark Masterson in his capacity as the estate’s administrator – are dismissed, and all of Hobbs’s individual claims except for her loss of consortium claim are dismissed. They are denied as to all other causes of action asserted in the complaint.

For the reasons give here, the motions of the individual defendants McCullough, Parris, Knoth and Michael Masterson to dismiss Brody’s cross-claims are granted.

IT IS SO ORDERED:



Judge John P. O'Donnell

August 6, 2018
Date

SERVICE

A copy of this judgment entry was sent by email on August 6, 2018, to the following:

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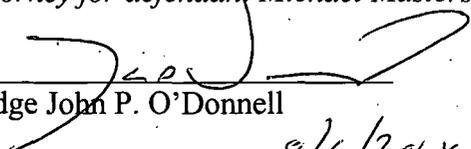
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Judge John P. O'Donnell

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