

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

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BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

BILLY COMBS, INDIVIDUALLY AND :
AS ADMINISTRATOR OF THE :
ESTATE OF JOSHUA COMBS, :
Plaintiff, :
v. :
CLARENCE C. PHILLIPS, III, et al., :
Defendants. :

CASE NO. 2008CVE1759

DECISION

Carl W. Zugelter and Jason A. Mosbaugh, Attorneys for Plaintiff, Law Offices of Carl W. Zugelter, 1285 West Ohio Pike, Amelia, Ohio 45102.

Jermone f. Rolfes, Attorney for Defendants Clarence C. and Theresa M. Phillips, Smith, Rolfes, & Skavdahl Co., L.P.A., 600 Vine Street, Suite 2600, Cincinnati, Ohio 45202.

This matter is before the Court upon Defendants Clarence C. Phillips, III and Theresa M. Phillips' motion for summary judgment under Rule 56 of the Ohio Rules of Civil Procedure. Civil Rule 56(C) provides that summary judgment is appropriate when, looking at the evidence as a whole, (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence, construed in favor of the nonmoving party, that reasonable minds could only conclude in favor of the moving party.¹

For a moving party to prevail on summary judgment, it has the burden of demonstrating that there is no genuine issue of fact on a material element of the nonmoving party's claim.² Consistent with the principles of summary judgment, the following facts are either undisputed or construed in favor of Plaintiff Billy Combs, Individually and as

¹ *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

² *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 296.

Administrator of the Estate of Joshua Combs ("Plaintiff"). Plaintiff Billy Combs was appointed Administrator of the Estate of Joshua Combs, deceased, by the Clermont County Probate Court on July 15, 2008.

On August 3, 2007, Defendants Phillips owned property located at 6502 Snider Road in Goshen Township, Clermont County, Ohio. Defendant Theresa A. Phillips is Joshua's aunt. On that date, Joshua Combs was attending a social gathering on the defendants' property. At the time, Joshua was twenty-one years of age. During the party, Joshua started to feel ill. At the suggestion of Defendant Theresa Phillips, Joshua decided to lie down on the sofa located on the lower level of the defendants' home.

At some point during the late evening of August 3, 2007 or early morning hours of August 4, 2007, the defendants' residence caught fire. The fire was first observed and discovered in the lower level of the home, where, earlier in the evening, Joshua had been observed on the sofa. No one knows where Joshua was when the fire started or when or how he first became aware of the fire. No one remembers a smoke detector sounding an alarm during the fire. In his deposition, Defendant Clarence C. Phillips admitted that he had dismantled several smoke detectors in the home because they were too sensitive to smoke. Defendant Phillips testified that he had not dismantled the smoke detectors located on the lower level of the home, but he does not remember those smoke detectors emitting a sound during the fire.

The Goshen Township Fire Department responded to the defendants' home. Joshua's body was found on the main floor near one of the entrance/exit doors of the home. Joshua Combs received severe burns and other injuries, which resulted in his death. The plaintiff sued Defendants Phillips on August 27, 2008. In the Complaint, Plaintiff asserts a claim for wrongful death, survivorship, pain and suffering, and negligence per se due to the

defendants' alleged violations of Ohio Basic Building Code and other regulations and ordinances promulgated by Goshen Township, Clermont County, and the State of Ohio. On March 10, 2010, the defendants moved for summary judgment on all of the plaintiff's claims.

First, the defendants seek summary judgment on the plaintiff's wrongful death claim. Section R.C. 2125.01 establishes a wrongful death claim in Ohio. This provision states, in relevant part, as follows:

“When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued . . . shall be liable to an action for damages.”

In support of the wrongful death claim, the plaintiff asserts that the defendants were negligent. To establish liability for negligence, the plaintiff must demonstrate that the defendants owed a duty to Joshua Combs, that they breached that duty, and that the breach directly and proximately caused Joshua Combs' injuries.³

For the purposes of this summary judgment motion only, the Defendants concede that Joshua Combs was a social guest at the defendants' home on August 3 -4, 2007.

“A host who invites a social guest to his premises owes the guest the duty (1) to exercise ordinary care not to cause injury to his guest by any act of the host or by any activities carried on by the host while the guest is on the premises, and (2) to warn the guest of any condition of the premises which is known to the host and which one of ordinary prudence and foresight in the position of the host should reasonably consider dangerous, if the host has reason to believe that the guest does not know and will not discover such dangerous condition.”⁴

First, the plaintiff asserts that genuine issues of fact remain regarding whether the defendants breached their duty to exercise ordinary care not to injure Joshua Combs by

³ *Chambers v. St. Mary's School* (1998), 82 Ohio St. 3d 563.

⁴ *Williams v. Cook* (1999), 132 Ohio App. 3d 444, 449; citing .” *Scheibel v. Lipton* (1951), 156 Ohio St. 308, paragraph 3 of the syllabus.

activities carried on by the host while Joshua was present in their home. Specifically, the plaintiff notes that the defendants allowed guests to smoke in their home and that the hosts did not ensure the smokers used safe smoking habits. Additionally, the plaintiff notes that Defendant Theresa Phillips admitted during her deposition that she allowed candles to burn unattended in her home.

Ordinary care is not statutorily defined in the context of the duty owed to a social guest. However, a lack of ordinary care can be described as doing some act which a reasonably prudent person would not do under the same or similar circumstances or the failure to do something which a reasonably prudent person would have done under the same or similar circumstances or conditions. Reasonable minds could only conclude that the defendants' failure to set forth safety precautions for guests who smoke in their home did not amount to a failure to exercise ordinary care. Likewise, reasonable minds could only conclude that leaving candles burning unattended does not qualify as an act that is inconsistent with the defendants' duty to exercise ordinary care to avoid injuring their social guests. "It is well established that a host is not an insurer of the safety of a guest while upon the premises of the host and . . . there is no warranty, express or implied, on the part of the host that the premises to which the guest is invited by him are in safe condition."⁵ The plaintiff has failed to identify an issue of fact with respect to the defendants' alleged breach of their duty to exercise ordinary care in avoiding injury to Joshua Combs.

Second, the plaintiff contends that the defendants breached their duty to warn Joshua Combs of any condition of the premises which is known to the defendants and which one of ordinary prudence and foresight in the defendants' position should reasonably consider dangerous, *if the defendants had reason to believe that Joshua Combs did not*

⁵ *Scheibel v. Lipton* (1951), 156 Ohio St. at 328.

know and would not discover such dangerous condition. The evidence establishes that Joshua Combs was 21 years of age at the time of the fire. The fact that other guests were smoking in the house and that there may have been unattended candles burning were observable conditions of the house. Therefore, the defendants did not have a duty to warn Joshua of these conditions.

The plaintiff next asserts that the defendants breached their duty to warn Joshua Combs of the absence of functioning smoke detectors in the home. First, the plaintiff has not pointed to any authority, be it statutory, administrative or legal precedent, requiring the defendants to maintain functioning smoke detectors in their private residence. Second, defendant Clarence Phillips' deposition testimony indicates that, before the fire, he was unaware of whether some of the smoke detectors in the home functioned correctly. The home had several smoke detectors. Some were located on the lower level, some were located on the ground floor, and some were located on the upper level of the home. For clarity, the Court will address the issue of breach by floor of the home.

The lower level of the home contained two smoke detectors. One was hard-wired and the other was battery operated. In his deposition, the Defendant Clarence Phillips stated that he "didn't have any reason to believe they weren't functional." He admitted that he had not changed the battery recently, but he "didn't have any reason to believe there was anything wrong with it other than possibly a dead battery." The defendant further testified that he was unaware of whether the smoke detectors on the lower level ever beeped or chirped to signal a dead battery.

Since Joshua Combs was a social guest in their home, the defendants only had a duty to warn him of any condition of the premises of which they were aware. Defendant Phillips testified that, before the fire, he did not know whether the fire detectors on the lower level of

the home functioned correctly. Based upon this uncontested testimony, the defendants could not have breached a duty to warn of a condition of which they were not aware.

The ground level of the home contained two battery operated smoke detectors. One of those was located at the top of the stairs leading from the lower level to the ground level and the other one was located in the laundry room on the ground level. Defendant Clarence Phillips admitted that he had removed the batteries from these smoke detectors a couple of years before the fire occurred. The defendant further testified that he had removed all of the other smoke detectors on the main floor a year before the fire.

A host must warn a guest of any condition of the premises which is known to the host and which one of ordinary prudence and foresight in the host's position should reasonably consider dangerous, if the host has reason to believe that the guest does not know, and will not discover, the condition. Clearly, the absence of the smoke detectors that had been removed was a condition that Joshua Combs would have discovered. Therefore, the defendants did not have a duty to warn him that the smoke detectors had been removed. Accordingly, the defendants could not have breached their duty to do so.

With respect to the smoke detectors without batteries, it is uncontested that Joshua Combs was familiar with the defendants' home and its condition. Joshua was the defendants' nephew, he used to live in the defendants' home, and he was a frequent guest even after he no longer lived in the home. Unlike some sort of trap on a host's property that may actively cause injury to a guest, non-functioning smoke detectors do not pose a threat to a guest. Only when a condition precedent occurs, a fire breaks out, does the functionality of a smoke detector become relevant. By itself, a non-functioning smoke detector poses no threat to a social guest in a host's home. Additionally, ". . . there is no warranty, express or

implied, on the part of the host that the premises to which the guest is invited by him are in safe condition.”⁶

Under these circumstances, reasonable minds could only conclude that the failure to maintain functioning smoke detectors is not a condition of the premises which one of ordinary prudence and foresight in the defendants’ position should reasonably consider dangerous. The plaintiff has failed to identify an issue of fact with respect to the defendants’ alleged breach of their duty to warn Joshua Combs of hidden dangers. Accordingly, reasonable minds could only conclude that the defendants did not breach their duty to warn the plaintiff of a dangerous condition on their property.

Finally, the upper level of the home contained two smoke detectors. One was located at the top of the stairs leading from the ground level to the upper level and the other was located in the defendants’ bedroom. The defendant testified that he had removed the batteries in the smoke detector at the top of the stairs, but had not done so to the one in his bedroom. As noted above, reasonable minds could only conclude that the failure to maintain functioning smoke detectors is not a condition of the premises which one of ordinary prudence and foresight in the defendants’ position should reasonably consider dangerous. Thus, reasonable minds could only conclude that the defendants did not breach their duty to warn the plaintiff of a dangerous condition on their property.

However, even if there was a question of fact regarding the existence of a duty and a breach, the plaintiff has failed to identify facts or reasonable inferences from which a jury could conclude that the defendants’ alleged breach of such duty was the proximate cause of Joshua Combs’ injuries and ensuing death. The plaintiff argues that functioning smoke detectors *could* have saved Joshua Combs’ life; however, this conclusion is based on mere

⁶ *Scheibel v. Lipton* (1951), 156 Ohio St. at 328.

speculation, not reasonable inferences. Joshua Combs' body was found near the front door on the upper level of the home. No one knows where Joshua was when the fire started. No one knows if a detector sounded. Even construing the facts in the plaintiff's favor, the plaintiff's argument that the non-functioning smoke detectors caused Joshua's death is speculative at best. Issues of proximate cause are generally for determination by the trier of fact, here a jury. However, "(s)peculation or conjecture . . . [as to] what caused the [injury] is not sufficient to establish the premises owner's liability as a matter of law, because the issue of proximate cause is not open to speculation . . ."⁷ Accordingly, a reasonable jury could not determine that the non-functioning smoke alarms were a proximate cause of Joshua Combs' death. As a result, the defendants are entitled to summary judgment on the plaintiff's wrongful death claim.

Next, the defendants seek summary judgment on the plaintiff's survivorship claim. Through a survivorship claim, a decedent's estate may recover for the injuries suffered by the decedent before his death. This claim is also premised upon the defendants' negligence. As noted above, the defendants owed Joshua Combs a duty of ordinary care and a duty to warn because he was a social guest on their property at the time of the fire. The same analysis for the wrongful death claim applies to the survivorship claim. No genuine issues of material fact remain to be resolved regarding the defendants' alleged breach of their duty. Additionally, even if questions of fact remained, reasonable minds could not conclude that the alleged breach was the proximate cause of the plaintiff's injuries. Accordingly, reasonable minds could only find in the defendants' favor. As a result, the defendants are entitled to summary judgment on the plaintiff's survivorship claim.

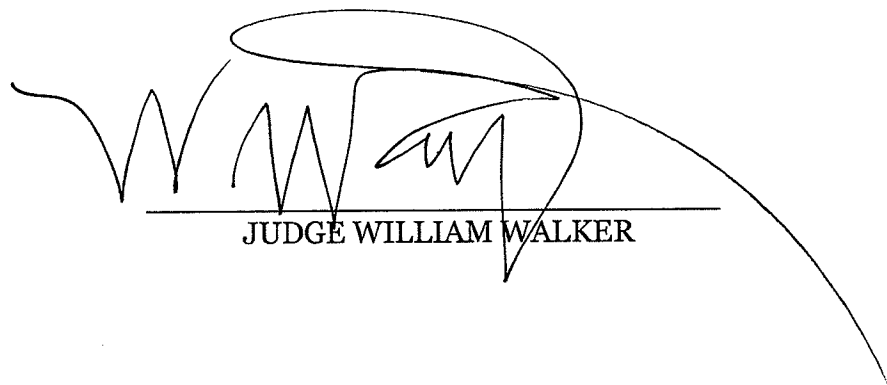
⁷ *Koop v. Speedway SuperAmerica, LLC*, 2009 -Ohio- 1734 (Ohio App. 12 Dist.), ¶ 34; citing *Scott v. Kings Island Co.* (Feb. 16, 1999), Warren App. No. CA98-04-044, at 6-7.

Next, the defendants seek summary judgment on the plaintiff's claim that the defendants' negligence in maintaining smoke detectors was the direct and proximate cause of Joshua Combs' pain and suffering and death. As a social guest in their home, the defendants owed Joshua Combs a duty of ordinary care and a duty to warn. The same analysis for the wrongful death and survivorship claims applies to the pain and suffering claim. No genuine issues of material fact remain to be resolved regarding the defendants' alleged breach of their duty. Additionally, even if questions of fact remained, reasonable minds could not conclude that the alleged breach was the proximate cause of the plaintiff's pain and suffering and death. Accordingly, reasonable minds could only find in the defendants' favor. As a result, the defendants are entitled to summary judgment on the plaintiff's claim for monetary damages for Joshua Combs' pain and suffering.

Finally, the defendants seek summary judgment on the plaintiff's claim that they were negligent per se due to the defendants' alleged violations of Ohio Basic Building Code and other regulations and ordinances promulgated by Goshen Township, Clermont County, and the State of Ohio. However, the plaintiff has not identified any regulation or ordinance requiring that a private residence be equipped with a functioning smoke detector. The case law that the plaintiff cites in support of this argument relate to a landlord's duty to provide functioning smoke detectors in apartment complexes. Since the plaintiff has failed to identify a statutory or regulatory duty that the defendants owed to Joshua Combs, the plaintiff's negligence per se claim must fail as a matter of law. Accordingly, reasonable minds could only conclude in the defendants' favor and the defendants are entitled to summary judgment on the plaintiff's negligence per se claim.

Based upon the foregoing, the Court grants Defendants Clarence C. Phillips, III, and Theresa M. Phillips' motion for summary judgment in all respects. Counsel for Defendants

Phillips shall prepare, circulate pursuant to local rule, and present to the Court an appropriate entry. Costs taxed to Plaintiff.



JUDGE WILLIAM WALKER

CERTIFICATE

I hereby certify that a copy of the foregoing was sent to counsel of record by regular U.S. Mail this 8th day of June, 2010.

