[Cite as *Estate of Sample v. Xenos Christian Fellowship, Inc.*, 2019-Ohio-5439.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Estate of Kwesi Sample, through its Administrator Lawrence Cornish,	:	
Plaintiff-Appellant,	:	No. 18AP-804
v.		(C.P.C. No. 16CV-6763)
Xenos Christian Fellowship, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 31, 2019

On brief: *Cooper & Elliott, LLC*, and *Adam P. Richards*, for appellant.

On brief: *Crabbe, Brown & James, LLP*, and *John C. Albert*, for appellee. **Argued:** *John C. Albert*.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Plaintiff-appellant, Lawrence Cornish, administrator of the estate of Kwesi Sample, appeals a judgment of the Franklin County Court of Common Pleas that granted summary judgment to defendant-appellee, Xenos Christian Fellowship, Inc. For the following reasons, we affirm that judgment in part and reverse it in part.

{¶ 2} Xenos is a non-traditional, non-denominational church based in Columbus. Xenos consists of approximately 200 home churches, each including 20 to 50 adults who meet regularly in someone's home. In 2011, Sample joined a home church led in part by Joshua "Levi" LeVan.

{¶ 3} Each year, college-aged Xenos congregants take a week-long trip to Holden Beach, a barrier island on the coast of North Carolina. In May 2013, Sample traveled with others from his home church to Holden Beach. Sample and nine other men from his home church rented a beach house together. Although members of Sample's home church generally gathered for morning devotionals and attended a church meeting midweek, they otherwise went their own ways and decided how they wanted to spend their time.

{¶ 4} Prior to the trip, LeVan and another Xenos congregant, Christopher Cooksey, had decided that they wanted to go geocaching while at Holden Beach. Geocaching is an outdoor recreational activity in which participants use GPS coordinates and online clues to find hidden containers known as caches. A geocacher creates a cache by hiding a waterproof container containing a logbook and trade items, and then posting the coordinates, along with other details regarding the location, on a listing website. Geocachers then use the posted information to locate the cache and, if successful, record their accomplishment in the logbook, take a trade item, and leave an item in exchange.

{¶ 5} Searching geocaching.com, Cooksey found a listing for a cache entitled "Treasure Island." The coordinates for the cache placed it on an uninhabited barrier island east of Holden Beach. The geocacher who created the cache, treasurehunter64, rated it four out of five stars in "difficulty" and five out of five stars in "terrain." (Ex. V. at 1, Pl.'s Memo in Opp. to Summ. Jgmt.) Additionally, treasurehunter64 commented, "Park at these co-ord[inate]s[:] N33.54.945 W078.13.930[.] [Y]ou will need a kayak or canoe to get to this cache. This cache is a waterproof box. This is a beautiful [i]sland that I found [k]ayaking this summer." *Id.* at 2.

{¶ 6} LeVan and Cooksey disregarded the parking coordinates in the listing because the coordinates pinpointed a location on Oak Island, another nearby barrier island, and LeVan and Cooksey intended to approach "Treasure Island" from Holden Beach.[1] On May 13, 2013, LeVan and Cooksey went to the east end of Holden Beach to reconnoiter the area. They wanted to determine whether they could swim between Holden Beach and Treasure Island at low tide, or whether they needed a kayak or canoe. Based on what they

[1] Apparently, the cache was hidden on an island named Sheep Island, but both LeVan and Cooksey called that island "Treasure Island," so we will do the same.

saw, they decided that they could swim across an inlet to an exposed sandbar, and then they could walk the remaining distance to Treasure Island.

{¶ 7} The next day, May 14, 2013, Sample overheard LeVan talking to others about going geocaching and he asked if he could come along. LeVan asked Sample if he could swim, and Sample indicated he could. LeVan then agreed that Sample could join him and Cooksey.

{¶ 8} Sample was not the only person interested in going geocaching. When LeVan and Cooksey set out, five other people accompanied them: Sample, Reuben Chapman, Christina Lehane, Rebecca Lehane, and Renee Geiger. The group's plan was to swim from the eastern end of Holden Beach across an inlet to an exposed sandbar. The seven participants entered the water around 4:00 p.m., approximately one hour before low tide. The weather was clear, and the water was calm, with little wave action or current.

{¶ 9} Initially, the water was shallow, but it soon became too deep to stand, requiring everyone to swim. Cooksey and Sample were swimming in the middle of the group. Less than halfway across the inlet, Cooksey decided to turn around. He was not a good swimmer, and he was worried that he would not have enough stamina to swim back to Holden Beach if he swam the entire distance to the sandbar. Sample swam a short distance past the point Cooksey turned around, and then he, too, turned around.

{¶ 10} As they swam back, Sample and Cooksey passed Christina and Rebecca Lehane, who were still headed toward the sandbar. To Rebecca, both Sample and Cooksey looked tired. A short while later, Sample began to yell for help and wave his arms. Chapman, who was closest to Sample, swam toward Sample to help him. LeVan and Geiger, who had arrived at the sandbar, reentered the water and also swam toward Sample. Cooksey continued swimming to the Holden Beach shore and alerted beachgoers, who called 911. Before anyone could reach Sample, he went under water and did not resurface.[2]

{¶ 11} On July 20, 2016, the administrator of Sample's estate ("the Estate") filed a wrongful death and survivorship action against Xenos asserting claims for negligence and negligent supervision and/or training. The Estate immediately moved the trial court to apply Ohio's modified comparative negligence statutory scheme, and not North Carolina's contributory negligence doctrine, to decide Xenos' liability for negligence. In response,

[2] The record contains no evidence explaining why Sample drowned.

Xenos argued that North Carolina law should determine its liability because the injury-causing conduct and Sample's death occurred in North Carolina. In a decision and entry dated March 13, 2017, the trial court concluded that it would apply North Carolina law to the entirety of the Estate's action.

{¶ 12} Xenos then moved for summary judgment, arguing in relevant part that reasonable minds could only conclude that Sample was contributorily negligent. According to Xenos, summary judgment in its favor was warranted because Sample's contributory negligence completely barred the Estate's recovery. In response, the Estate asserted that genuine issues of material fact existed regarding whether Sample was contributorily negligent. Alternatively, the Estate contended that it provided evidence establishing Xenos' conduct was grossly negligent, willful, or wanton, and thus, it overcame the bar contributory negligence posed to its recovery.

{¶ 13} In a decision and entry dated September 25, 2018, the trial court granted Xenos summary judgment. The trial court agreed with Xenos that Sample was contributorily negligent, stating:

> [T]here is no question of fact that Mr. Sample, in the exercise of ordinary care, should have been aware of the dangers associated with swimming in an open body of water including but not limited to the risk of drowning. More specifically, Mr. Sample knew or should have known that swimming in ocean waters was dangerous given his particularized knowledge of his swimming abilities, together with the readily observable distance between the starting point and the cache, as well as the generally known potential for undercurrents and uneven depths in open waters. There was reasonable opportunity for him to avoid this danger by choosing not to participate in the activity, and yet, he entered the water choosing to swim at his own risk. In doing do, Mr. Sample failed to use ordinary care before entering the water on May 14, 2013 as a matter of law.

(Sept. 25, 2018 Decision & Entry at 8.)

{¶ 14} The trial court then concluded that no reasonable finder of fact could find that Xenos was grossly negligent, willful, or wanton. Absent evidence of gross negligence, willfulness, or wantonness to override the affirmative defense of contributory negligence, Xenos prevailed.

{¶ 15} The Estate now appeals the September 25, 2018 judgment, and it assigns the following error:

> The Trial Court erred when it granted Defendant-Appellee's ("Xenos") motion for summary judgment.

{¶ 16} Initially, we must address the conflict-of-law issue the Estate raises; namely, whether the trial court erred in applying North Carolina law to the issue of contributory fault. Appellate courts review a trial court's choice-of-law determination de novo. *Walker v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 16AP-894, 2018-Ohio-1810, ¶ 16.

{¶ 17} In resolving a conflict of law, the forum court applies the choice-of-law rules of its own state. *Pevets v. Crain Communications, Inc.*, 6th Dist. No. OT-10-023, 2011-Ohio-2700, ¶ 32. Ohio has adopted the Restatement of the Law 2d, Conflict of Laws (1971) ("Restatement"), in its entirety to govern choice-of-law analysis. *Am. Interstate Ins. Co. v. G & H Serv. Ctr., Inc.*, 112 Ohio St.3d 521, 2007-Ohio-608, ¶ 8. The Restatement employs the significant-relationship test, which seeks to identify and apply the law of the state that has the most significant relationship with the parties and dispute. Restatement, Section 145(1); Hay, Borchers, Symeonides, & Whytock, *Conflict of Laws*, Section 2.14A, 60 (6th Ed.2018). To achieve that objective in a tort action, a court must focus on at least three different sections of the Restatement. The most crucial of those three sections is Section 6. Hay, Borchers, Symeonides, & Whytock, Section 2.14A, at 58 ("Section 6 is the cornerstone of the entire Restatement."). Section 6 lists the principles for a court to consider in choosing the applicable law, which include:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of the other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and

> (g) ease in the determination and application of the law to be applied.

Restatement, Section 6(2).

{¶ 18} A court does not examine these principles in a vacuum, but rather in relation to each interested state's contacts to the occurrence and the parties. Thus, the second Restatement section a court must consider is Section 145, which lists the relevant contacts, including:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Restatement, Section 145(2).

{¶ 19} The third section in the analysis, unlike Sections 6 and 145, varies depending on the nature of the parties' dispute. In selecting the third section, the court turns to the portion of the Restatement that contains jurisdiction-selecting rules that specify the "presumptively applicable" law. Felix & Whitten, *American Conflicts Law*, Section 59, 205 (6th Ed.2011). These rules identify the state's law that will apply absent some other state having a more significant relationship with the occurrence and parties. *Id.* Separate rules are stated for different torts and for different issues in tort, so the applicable section turns on the nature of the tort or issue before the court. Restatement, Chapter 7, Topic 1, Introductory Note.

{¶ 20} To begin its choice-of-law analysis, a court first chooses the appropriate jurisdiction-selecting rule. *See Morgan v. Biro Mfg. Co.*, 15 Ohio St.3d 339, 342 (1984) (beginning the choice-of-law analysis with Section 146, a jurisdiction-selecting rule applicable to personal injury torts). The court then works backward, connecting the contacts between the concerned states to the relevant principles in Section 6 to determine if some state other than the state of presumptive choice is the state of the most significant relationship. Felix & Whitten, Section 59, at 205.

{¶ 21} In the case at bar, the trial court began its choice-of-law analysis with Sections 146 and 175, which apply to actions for personal injury and wrongful death, respectively. Both of those sections provide that "the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied." Restatement, Sections 146 & 175. Sample's death occurred in North Carolina, so the trial court presumed that North Carolina law applied. After reviewing Ohio's and North Carolina's contacts to the occurrence and parties in light of the Section 6 principles, the trial court found North Carolina had the more significant relationship. Because both the alleged negligent conduct and injury occurred in North Carolina, that state had the greater interest in regulating the conduct and determining whether the conduct amounted to a tortious act that justified a legal recovery.

{¶ 22} On appeal, the Estate only challenges the trial court's ruling to the extent that it extends to the affirmative defense of contributory fault. Essentially, the Estate seeks to evade the doctrine of contributory negligence, which is still the law in North Carolina. Under that doctrine, a plaintiff cannot recover, even if the defendant is negligent, if the plaintiff is negligent as well. *Davis v. Hulsing Ents., LLC*, 370 N.C. 455, 458 (2018) (also holding that the affirmative defense of contributory negligence applies in an action for wrongful death). In contrast to North Carolina, Ohio has adopted a modified comparative negligence statutory scheme. Under that scheme, a plaintiff's negligence does not bar the plaintiff's recovery as long as the plaintiff's negligence is not greater than the combined tortious conduct of all other persons involved. R.C. 2315.33; *Sauer v. Crews*, 10th Dist. No. 10AP-834, 2011-Ohio-3310, ¶ 14. Rather than precluding recovery, a plaintiff's contributory fault instead reduces the amount of compensatory damages due to the plaintiff by the percentage of the plaintiff's negligence. R.C. 2315.33; R.C. 2315.35; *Sauer* at ¶ 14.

{¶ 23} Initially, the Estate's attack on the trial court's judgment raises the question of whether Ohio law permits depecage. "Depecage" is "the use of the law of different states to resolve different issues in the same case." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 216 F.3d 338, 342 (3d Cir.2000), fn. 7; *accord Johnson v. Continental Airlines Corp.*, 964 F.2d 1059, 1062 (10th Cir.1992), fn. 4 ("Depecage is the widely approved process whereby the

rules of different states are applied on the basis of the precise issue involved."). If this court cannot engage in depecage, we cannot apply Ohio law to one issue (i.e., contributory fault), while applying North Carolina law to the remaining issues related to the negligence claim.

{¶ 24} At least one Ohio court has recognized depecage. *See Mayse v. Watson*, 6th Dist. No. E-85-8 (Sept. 27, 1985) (holding that depecage permits "a court [to] treat[ ] different issues in a case by referring to laws of more than one state"). However, depecage did not actually occur in that case. We thus turn to the Restatement, because it governs choice-of-law determinations in Ohio, to see if it authorizes depecage.

{¶ 25} According to the Restatement, "[t]he rights and liabilities of the parties *with respect to an issue in tort* are determined by the local law of the state which, *with respect to that issue*, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." (Emphasis added.) Restatement, Section 145(1). The Restatement, therefore, adopts a selective, issue-oriented approach to determining choice of law. Restatement, Section 145, Comment d; *Huskonen v. Avis Rent-A-Car Sys., Inc.*, 9th Dist. No. 08CA009334, 2008-Ohio-4652, ¶ 11 (recognizing that, under the Restatement, a court must look at each issue in a case separately to determine the appropriate state's law to apply to that issue). This focus on issues means that different states' laws can apply to different issues in the same case, an outcome the authors of the Restatement acknowledged and found consistent with longstanding law. Restatement, Section 145, Comment d ("The courts have long recognized that they [were] not bound to decide all issues under the local law of a single state."); *accord* Hay, Borchers, Symeonides, & Whytock, Section 2.14A, at 60 (stating that the Restatement's "emphasis on particular issues also means that different issues in a single case may be governed by different laws, a splitting process known as depecage"). Consequently, the Restatement endorses depecage. *Ruiz v. Blentech Corp.*, 89 F.3d 320, 324 (7th Cir.1996); *Putnam Resources v. Pateman*, 958 F.2d 448, 465 (1st Dist.1992); *Diamond Ranch Academy, Inc. v. Filer*, 117 F.Supp.3d 1313, 1322 (D.Utah 2015); *Zimmerman v. Novartis Pharmaceuticals Corp.*, 889 F.Supp.2d 757, 761 (D.Md.2012); *Schalliol v. Fare*, 206 F.Supp.2d 689, 698 (E.D.Pa.2002), fn. 30.

{¶ 26} Ohio has adopted the Restatement in its entirety. *Am. Interstate Ins. Co.*, 112 Ohio St.3d 521, 2007-Ohio-608, at ¶ 8. It follows, then, that Ohio courts may engage in depecage, when appropriate, as part of the choice-of-law analysis. Consequently, in this

case, we will explore whether, with respect to contributory fault, Ohio or North Carolina has the most significant relationship to the occurrence and parties.

{¶ 27} However, before plunging into the analysis, we pause to emphasize that courts must use depecage with caution. "Depecage permits, but does not necessarily require, the application of different local law to different issues within a case." *Boomsma v. Star Transport, Inc.*, 202 F.Supp.2d 869, 874 (E.D.Wis.2002). Generally, depecage is inappropriate when the rule involved so closely interrelates to another that applying one without the other would upset the equilibrium established by the rules or would distort or defeat the policies of the state. Symeonides, *Issue-by-Issue Analysis and Depecage in Choice of Law: Cause and Effect*, 45 U. Tol. L. Rev. 751, 759 (2014); *accord Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 848 (7th Cir.1999) (declining to apply a different state's law to the issue of contributory fault because it "would be to pull on one thread in a complex legal tapestry"). Depecage becomes problematic "when used to fragment issues related to a common purpose or to legitimatize a smorgasbord approach which inures only to the benefit of the party picking and choosing." *Johnson*, 964 F.2d at 1064.

{¶ 28} In conducting an issue-based analysis, rather than an analysis based on the nature of the pertinent tort, a court turns to the jurisdiction-selecting rule governing the relevant issue. Restatement, Chapter 7, Topic 1, Title C, Introductory Note. In this case, we look to Section 164, which specifies the usually applicable law when the conflict of law centers on the affirmative defense of contributory fault. Pursuant to Section 164:

> (1) The law selected by application of the rule of § 145 determines whether contributory fault on the part of the plaintiff precludes his recovery in whole or in part.
>
> (2) The applicable law will usually be the local law of the state where the injury occurred.

Here, the injury—Sample's death—occurred in North Carolina, so the North Carolina law of contributory fault will apply unless the significant-relationship analysis pursuant to Sections 6 and 145 leads to a different result.

{¶ 29} As we stated above, Section 145 sets forth the four contacts a court must take into account. In this case, both the first and second contacts—"the place where the injury occurred" and "the place where the conduct causing the injury occurred"—happened in North Carolina. All the alleged negligent conduct, both on the part of Sample and other

Xenos members, as well as Sample's death, occurred in North Carolina. The third and fourth contacts—"the domicil, residence, * * * place of incorporation and place of business of the parties" and "the place where the relationship * * * between the parties [was] centered"—took place in Ohio. Sample was an Ohio resident, and he joined and participated in Xenos in Ohio, where Xenos was incorporated and operated. The Estate represents that the administrator of the Estate is also an Ohio resident.

{¶ 30} We next examine these contacts in light of the general principles set forth in Section 6. Notably, a court need not give the choice-of-law principles found in Section 6 equal weight in every circumstance. *Internatl. Ins. Co. v. Stonewall Ins. Co.*, 86 F.3d 601, 606 (6th Cir.1996); *accord Morgan*, 15 Ohio St.3d at 342 (instructing courts to evaluate the Section 6 factors "according to their relative importance to the case"); Restatement, Section 6, Comment c ("Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law."). Generally, factors (d), (e), and (f) are "of lesser importance in the field of torts." Restatement, Section 145, Comment b. Factor (g), ease in determination and application of the law to be applied, "should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results." Restatement, Section 6, Comment j. Thus, in this case, we concentrate on factors (b) and (c) in our choice-of-law analysis.

{¶ 31} Factor (b) directs a court to consider "the relevant policies of the forum," and factor (c) directs a court to consider "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issues." Restatement, Section 6(2). Together these factors require focus on "the purposes, policies, aims and objectives of each of the competing local law rules urged to govern" and "the concern of the potentially interested states in having their rules applied." Restatement, Section 145, Comment b. As the Restatement explains:

> [T]he interest of a state in having its tort rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and by the relation of the state to the occurrence and the parties. If the primary purpose of the tort rule involved is to deter or punish misconduct, * * * the state where the conduct took place may be the state of dominant interest and thus that of [the] most significant relationship * * *.

Restatement, Section 145, Comment c.

{¶ 32} As we explained above, North Carolina retains the common-law rule that a plaintiff's contributory negligence bars the plaintiff from recovering for a defendant's negligence. "The doctrine of contributory negligence is based upon sound public policy. It is invoked in order that those who are of an age or state of mind to exercise due care must do so, and in order that responsibility for their own negligent acts shall not be placed upon the shoulders of others." *Womack v. Preach*, 64 Ariz. 61, 65 (1946); *accord Otis Elevator Co. of Maine, Inc. v. F.W. Cunningham & Sons*, 454 A.2d 335, 339 (Me.1983) ("Contributory negligence rested on a 'policy of making the personal interests of each party depend upon his own care and prudence.' "). Thus, a purpose of this common-law rule is to compel plaintiffs to exercise reasonable care for their own safety. *Shuder v. McDonald's Corp.*, 859 F.2d 266, 271 (3d Cir.1988); *accord* 3 Speiser, Krause, & Gans, *American Law of Torts*, Section 12:4 (Mar. 2019 update) (the reasons for the contributory negligence doctrine include "discourag[ing] accidents by denying recovery to those who fail to use proper care for their own safety").

{¶ 33} While Ohio has adopted a modified comparative negligence statutory scheme, that scheme shares the same underlying policy. It, too, compels the exercise of due care because it diminishes or prohibits a plaintiff's recovery based on the degree of a plaintiff's negligence. In other words, like the contributory negligence doctrine, Ohio's statutory scheme deters unreasonable conduct by penalizing such conduct. Granted, Ohio has made the policy determination that it can encourage safe conduct without denying a plaintiff recovery when a plaintiff is less than 50 percent negligent for his or her injuries. Thus, Ohio's statutory scheme reflects a compromise between (at least) two policies: requiring persons to act with reasonable care and compensating plaintiffs for their injuries.

{¶ 34} Having examined the policies behind each state's contributory fault rules, we turn to each state's interest in having their rules applied. North Carolina has a legitimate interest in regulating the conduct of the persons in its state. This interest directly implicates the doctrine of contributory negligence, which is intended to compel people to act with ordinary care. Because Sample's ill-fated swim happened in North Carolina, North Carolina has a significant interest in its contributory fault law governing this case. This result is consistent with the Restatement, which recognizes that

> [i]n the great majority of cases, the plaintiff's conduct, which is claimed to constitute contributory fault, will have taken place in the state where he suffered injury. If so, the local law of this state will usually be applied to determine whether the plaintiff's conduct amounted to contributory fault and if so, whether the effect of this fault is to preclude recovery by the plaintiff in whole or in part * * *.

Restatement, Section 164, Comment b; *accord Kurent v. Farmers Ins. of Columbus, Inc.*, 62 Ohio St.3d 242, 246 (1991) ("[T]he state in which both the conduct and injury occur has the dominant interest in regulating that conduct, determining whether it is tortious in character, and determining whether the interest [affected] is entitled to legal protection."). Consequently, we conclude that North Carolina has the most significant relationship to the occurrence and parties with regard to the issue of contributory fault.

{¶ 35} The Estate argues otherwise based on Ohio's interest in the compensation of plaintiffs who are Ohio residents, like Sample and the administrator of Sample's estate. As we recognized above, Ohio's modified comparative negligence statutory scheme reflects a balancing of policies, including the desire to see plaintiffs compensated for their injuries. However, in purpose and operation, Ohio's statutory scheme is more concerned with conduct. Whenever it is raised, the affirmative defense of contributory fault requires examination of a plaintiff's conduct to determine whether the plaintiff departed from the standard of conduct of the reasonable person. *Dixon v. Miami Univ.*, 10th Dist. No. 04AP-1132, 2005-Ohio-6499, ¶ 50. Damages are only implicated if a factfinder determines that the plaintiff was less than 50 percent liable for his or her injuries. R.C. 2315.33; R.C. 2315.35. In all other cases, damages are irrelevant because liability is decided on the basis of the plaintiff's conduct and proximate cause. *Dixon* at ¶ 50. We thus conclude Ohio's contributory fault statutory scheme is primarily a liability doctrine focused on regulating conduct, and not a damages doctrine concerned with measuring a plaintiff's recovery. *Cf. Baedke v. John Morrell & Co.*, 748 F.Supp. 700, 706 (N.D.Iowa 1990) ("[T]he Restatement view[s] contributory negligence/comparative fault as a rule of conduct."); *Mastrondrea v. Occidental Hotels Mgt. S.A.*, 391 N.J.Super. 261, 284 (2007) ("Contributory and comparative negligence have been recognized as liability doctrines, * * * whereas the measure of compensation to be received by plaintiff is an issue of damages.").

{¶ 36} Given that the policy of compensating plaintiffs is secondary to regulating conduct, we find that Ohio's interest, as Sample's and the administrator's residence, does not trump North Carolina's interest, as the location where the conduct occurred. Consequently, North Carolina law has the most significant relationship to the occurrence and parties, and its law must govern the issue of contributory fault.

{¶ 37} Our conclusion is consistent with case law addressing the choice of law to apply to the issue of contributory fault. In "conduct-regulating" cases, such as the one at bar, "the principle that the state of conduct and injury has the 'dominant interest' to apply its law holds true, even when one *or both* of the parties are domiciled in the forum state." (Emphasis sic.) Symeonides, *Choice of Law*, 231 (2016). Thus, under the Restatement and other modern choice-of-law analyses, courts generally apply the law of state where the conduct and injury occurred to decide the issue of contributory fault, even where the plaintiff is domiciled in the forum state. *Spinozzi*, 174 F.3d at 844-46; *Shuder*, 859 F.2d at 272; *Heichel v. Marriott Hotel Servs., Inc.*, E.D.Pa. No. 18-1981 (Jan. 24, 2019); *White v. Intercontinental Hotels Group*, D.N.J. No. 04-3082 (AET) (Dec. 13, 2005); *Baedke* at 707-08; *Marks v. Redner's Warehouse Mkts.*, 136 A.3d 984, 991-92 (Pa.Super.2016); *Mastrondrea* at 286-87; *Manson v. Keglovits*, 19 N.E.3d 823, 829 (In.App.2014); *Ellis v. Barto*, 82 Wn.App. 454, 459 (1996); *Moye v. Palma*, 263 N.J.Super. 287, 294 (1993); *O'Connor v. Busch Gardens*, 255 N.J.Super. 545, 551 (1992).

{¶ 38} In such cases, although the forum state had a legitimate concern in seeing its residents recover for their injuries, that concern did not override the conduct-regulating interest of the state where the incident and injury occurred. We find instructive the case of *O'Connor*, where the plaintiff, who resided in New Jersey, was injured at a Virginia amusement park. When the plaintiff sued the amusement park for negligence in a New Jersey court, the amusement park raised the affirmative defense of contributory fault. The parties then disputed whether the court should apply the law of Virginia, which retained the doctrine of contributory negligence, or New Jersey, which had adopted a modified comparative negligence statutory scheme. The New Jersey appellate court held that Virginia law governed because Virginia had the most significant relationship to the parties and occurrence, reasoning:

> Virginia's legitimate interest in discouraging unsafe local property conditions and unsafe conduct is directly related to

> the substantive issue of comparative-vs.-contributory negligence on which the conflicts question focuses. New Jersey's concern for its injured citizens is also legitimate, but it cannot exempt them from other states' laws setting standards for local conditions and conduct. If New Jersey's comparative negligence doctrine followed [the plaintiff] * * * [into] Virginia, it would follow her into every other state as well, and would supplant local liability rules wherever she went. That would be an impermissible intrusion into the affairs of other states.

Id. at 549.

{¶ 39} In short, with regard to contributory fault, North Carolina's interest in determining the standards for regulating conduct within its boundaries prevails over Ohio's interest in compensating plaintiffs for injuries. Because Sample drowned while swimming in a North Carolina inlet, North Carolina law must determine whether his actions were contributorily negligent.

{¶ 40} Before addressing the merits of the summary judgment ruling, we must consider the Estate's final choice-of-law argument: the doctrine of contributory negligence violates the public policy of Ohio, so Ohio law must govern. We are not persuaded.

{¶ 41} Traditionally, courts decided conflicts of law under the rule of lex loci delicti, which dictated that the substantive law of the place where the injury occurred controlled. *Morgan*, 15 Ohio St.3d at 340. In an exception to that rule, a forum could refuse to apply the law of another state if that law was repugnant to the forum's public policy. Felix & Whitten, Section 67, at 247; Sprague, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 Calif. L. Rev. 1447, 1450 (1986). The Restatement codified this exception in Section 90, which states, "No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum." Section 90 permits a court to refuse to entertain a suit if hearing the suit would violate some fundamental principle of justice, prevalent conception of morals, or deep-seated tradition of the commonweal. *American Interstate Ins. Co.*, 112 Ohio St.3d 521, 2007-Ohio-608, at ¶ 15, quoting Restatement, Section 90, Comment c. However, Section 90 does not authorize a court to "decide the controversy between the parties and, on the stated ground of public policy, appl[y] its own local law, rather than the otherwise applicable law, in determining one or more of the issues involved." Restatement, Section 90, Comment a. Because that is exactly the relief the Estate seeks, Section 90 is inapplicable to this case.

{¶ 42} As a general matter, consideration of the public policies of both the forum and interested states is part of the significant-relationship analysis. *See* Restatement, Sections 6(2)(b) and (c). In that analysis, public policy functions not as a defense against unacceptable foreign law, but as a factor in the interest-balancing calculation. *Tucker v. R.A. Hanson Co.*, 956 F.2d 215, 218 (10th Cir.1992); Hay, Borchers, Symeonides & Whytock, Section 3.16, at 151. Under a significant-relationship analysis, evaluation of the policies behind the relevant laws may lead a court to apply the forum state's law—not because the foreign law is repugnant—but because of the importance of the forum's law to furthering the interests of the forum state. *See Tucker* at 219. Because the significant-relationship analysis includes consideration of public policy, the Restatement does not need a public policy exception permitting a court to substitute a forum's law for foreign law because the foreign law offends the forum's sensibilities. Felix & Whitten, Section 68, at 248-49; *accord Phillips v. General Motors Corp.*, 298 Mont. 438, 2000 MT 55, ¶ 75 ("A 'public policy' exception to the most significant relationship test would be redundant."); Symeonides, *Choice of Law in the American Courts in 2016: Thirteenth Annual Survey*, 65 Am. J. Comp. L. 1, 25 (2017) (Emphasis sic.) ("With the abandonment of the first Restatement and its replacement with modern policy-oriented approaches, the need for a public policy *exception* in the negative sense has diminished because a state's public policy especially the forum's, has become an integral, affirmative factor in a court's decision to apply or not apply that state's law."); Sprague, 74 Calif. L. Rev. at 1458 ("The public policy exception is purely duplicative, and therefore obsolete, because the 'public policies' employed defensively in earlier times are already an integral part of modern analysis, because that analysis determines the policies underlying the laws in dispute and the relevant contacts giving rise to the competing interests.").

{¶ 43} The Estate cites this court to out-of-state precedent that relied on the public policy exception to the rule of lex loci delicti to apply forum law because contributory negligence offended the forum state's public policy. *See Sinnott v. Thompson*, 32 A.3d 351, 357 (Del.2011); *Mills v. Quality Supplier Trucking, Inc.*, 203 W.Va. 621, 624 (1998); *McDaniel v. Ritter*, 556 So.2d 303, 316-17 (Miss.1989). As the Supreme Court of Ohio has

rejected the traditional rule of lex loci delicti in favor of the Restatement analysis, we do not find these cases persuasive.[3]

{¶ 44} Having determined that the doctrine of contributory negligence applies to this case, we turn to reviewing the merits of the trial court's ruling on Xenos' motion for summary judgment. Because the law of the forum state governs procedural matters, we look to Ohio law for the standard for summary judgment. *Columbus Steel Castings Co. v. Transp. & Transit Assocs., LLC*, 10th Dist. No. 06AP-1247, 2007-Ohio-6640, ¶ 23. Under that law, a trial court must grant summary judgment under Civ.R. 56 when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, LLC*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 45} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making conclusory allegations. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* If the moving party meets its burden, then the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial.

---

[3] We also note that not all courts agree that contributory negligence violates the public policy of a state that that has adopted a modified comparative negligence statutory scheme. *Spinozzi*, 174 F.3d at 847; *Raskin v. Allison*, 30 Kan.App.2d 1240, 1246 (2002). As one court recognized, "[t]he danger of the public policy exception is provincialism: an inability to recognize that a different jurisdiction * * * need not be benighted to have a different approach to a particular legal problem." *Spinozzi* at 847.

Civ.R. 56(E); *Dresher* at 293. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Dresher* at 293.

{¶ 46} In North Carolina, a plaintiff cannot recover in a personal injury or wrongful death action if the plaintiff is contributorily negligent. *Scheffer v. Dalton*, 243 N.C.App. 548, 556 (2015). Contributory negligence occurs when a plaintiff breaches his duty to exercise ordinary care for his own safety, and that failure to exercise ordinary care is one of the proximate causes of the injury. *Champs Convenience Stores, Inc. v. United Chemical Co.*, 329 N.C. 446, 455 (1991); *Clark v. Roberts*, 263 N.C. 336, 343 (1965). "Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Clark* at 343.

{¶ 47} A plaintiff has a legal duty to avoid open and obvious dangers. *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 479 (2002). Whether a plaintiff has breached this duty does not depend on the plaintiff's subjective appreciation of danger. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 676 (1980). In other words, "it is not necessary that [a] plaintiff be *actually aware* of the unreasonable danger of injury to which his conduct exposes him." (Emphasis sic.) *Id.* at 673. Rather, a "[p]laintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety." *Id.*; *accord Stallings v. Food Lion, Inc.*, 141 N.C.App. 135, 137 (2000) ("The test for contributory negligence is whether a person using ordinary care for his or her safety under similar circumstances would have recognized the danger."). Therefore, contributory negligence arises where a plaintiff deliberately exposes himself to a danger of which he is or, in the exercise of reasonable care, should be aware. *Taylor v. Walker*, 320 N.C. 729, 735 (1987); *Waddell v. Metro. Sewerage Dist.*, 207 N.C. 129, 135 (2010); *Lashlee v. White Consol. Industries, Inc.*, 144 N.C. 684, 690 (2001); *Davies v. Lewis*, 133 N.C.App. 167, 170 (1999).

{¶ 48} Here, Sample intended to swim from the eastern end of Holden Beach across an ocean inlet to an exposed sandbar. Although Sample was athletic, he had run approximately eight miles that morning. Sample deliberately kept swimming across the inlet after he could no longer touch bottom. In doing so, Sample ignored that entering the deep waters of an ocean inlet poses an open and obvious danger. Any prudent person exercising ordinary care understands that swimming in the deep waters of an ocean inlet

brings with it the risk of drowning. Given these circumstances, reasonable minds could only conclude that Sample was contributorily negligent. He deliberately exposed himself to an unreasonable danger, i.e., drowning, he should have known of and avoided through the exercise of ordinary care.

{¶ 49} In arguing to the contrary, the Estate asserts that Sample acted reasonably in light of the allegedly false information LeVan gave him. According to the Estate, "Xenos leaders" told Sample that participating in the geocache outing "would require a 50-yard swim across the ocean inlet," when, in fact, Sample swam 100 yards without reaching the sandbar. (Appellant's brief at 2.) The Estate also claims that "Xenos leaders" told Sample that he would be able "to stand on sandbars hidden under the ocean water after swimming 50 yards," but there were no such sandbars. *Id.* at 2-3.

{¶ 50} The Estate's argument relies on facts not in evidence. First, the record does not definitively establish the distance between Holden Beach and the sandbar. The Estate failed to introduce any objective evidence measuring that distance or the distance Sample swam before turning back to Holden Beach. While the Estate provided maps of the relevant area, they are blurry and difficult to read. The operative map, which indicates the supposed location where Sample turned back, does not include a scale, making calculation of distance impossible. (Ex. W at 1, Pl.'s Memo. in Opp. to Summ. Jgmt.)

{¶ 51} The majority of the witnesses who testified to the distance between Holden Beach and the sandbar pegged it at 50 yards. LeVan thought the distance was 50 yards, which corresponds with him inquiring whether Sample could "swim at least 50 yards" when Sample asked to join the group going geocaching. (Ex. G at 12, Pl.'s Memo. in Opp. to Summ. Jgmt.) Three other witnesses, Chapman, Christina Lehane, and Scott Risley, also estimated that the distance between Holden Beach and the sandbar was 50 yards. One witness, Cooksey, assessed the distance at 100 to 150 yards.

{¶ 52} Second, the record contains no evidence that anyone told Sample that he would encounter underwater sandbars 50 yards into the swim that would allow him to stand. The Estate cites LeVan's deposition testimony and a transcribed conversation between LeVan and Sample's mother as evidence that LeVan told Sample he "would be able to stand in the ocean on some sandbars after 50-yards [sic] and walk the rest of the way." (Appellant's brief at 17.) In the cited statements, however, LeVan only talks about "sand

bars that had been exposed at low tide," which he could see from the Holden Beach shore. (LeVan Dep. at 75.) LeVan says nothing about underwater sandbars.

{¶ 53} Therefore, at the most, a question of fact exists regarding whether LeVan's query as to whether Sample could swim "at least 50 yards" gave Sample the incorrect impression that the distance between Holden Beach and the exposed sandbar was 50 yards, when it was 100 to 150 yards. That question of fact, however, does not preclude summary judgment. Even a 50-yard swim across an ocean inlet in water too deep to stand presents the obvious danger of drowning. Reasonable minds could only conclude that a prudent person exercising ordinary care for his safety would have recognized this danger and avoided it. Sample, therefore, was contributorily negligent in attempting to swim across the inlet.

{¶ 54} We do not find the testimony of the Estate's expert witness, Hans Vogelsong, relevant to our analysis. Vogelsong stated that:

> 8. It is my opinion, based on my experience in coastal zone recreation and recreational psychological and social choice behaviors, that due to the inaccurate information Kwesi Sample was told about the swim in connection with the geocaching activity, as well as his relationship with the Xenos church and Joshua ["]Levi["] Le[V]an, that it is more likely than not that when Kwesi was standing at the water's edge on the day that he died, Kwesi was unable to accurately or independently assess the dangers related to the swim.
>
> 9. Particularly, due to the topography, clarity of the water, inaccurate information Kwesi was provided regarding the geocaching activity, status of Joshua ["]Levi["] Le[V]an [a]s a Xenos' leader, and Xenos' teachings, Kwesi acted reasonably in swimming and believing that he would only have to swim 50 yards in order to safely participate in the geocaching activity, even if the size of the body of water as Kwesi was standing on the edge of the beach looked larger than 50 yards.

(Vogelsong Aff. at ¶ 8-9.)

{¶ 55} This testimony suffers from two defects. First, Vogelsong erroneously focuses on Kwesi's subjective assessment and understanding of the danger the swim entailed, not on whether a prudent person using ordinary care would recognize that the swim across the ocean inlet involved unreasonable danger. Second, and more importantly, Vogelsong concentrates on the wrong danger. Vogelsong forms his opinion on the basis of

unsupported facts advanced by the Estate: (1) Sample received "inaccurate information," which the Estate identifies as LeVan's supposed statement that Sample would only have to swim for 50 yards and then he would be able to stand on underwater sandbars; and (2) Sample actually swam over 100 yards and did not reach the sandbar. Vogelsong then opines that Sample could not appreciate the danger—that the distance that he had to swim exceeded 50 yards—due to the factors listed. But even if Sample could not appreciate that the distance conceivably exceeded 50 yards, that does not mean Sample acted with ordinary care. As we stated above, reasonable minds can only conclude that a prudent person in Sample's situation would have recognized the danger of swimming even 50 yards across an ocean inlet in water too deep to stand. Thus, Vogelsong's opinion does not create a question of fact as to Sample's contributory negligence.

{¶ 56} The Estate also contends that Sample acted reasonably because neither LeVan nor Cooksey told him that the instructions in the listing for the "Treasure Island" cache on geocaching.com stated geocachers would need a kayak or canoe to reach the cache. We are not persuaded. Whether a prudent person exercising ordinary care would appreciate the danger of the activity—swimming in a deep ocean inlet—turns on the nature of that activity. Reasonable minds can only conclude that a prudent person would understand that the danger of drowning is an apparent risk of swimming in a deep ocean inlet. The instructions, therefore, are superfluous to determining whether Sample was contributorily negligent.

{¶ 57} Having rejected each of the Estate's arguments, we agree with the trial court's conclusion regarding Sample's contributory negligence. Based on the evidence presented, reasonable minds could only find that Sample was contributorily negligent in swimming across an ocean inlet in water too deep for him to stand.

{¶ 58} In its final argument against summary judgment on its negligence claim, the Estate asserts that it adduced evidence showing that Xenos committed gross negligence or engaged in willful or wanton conduct. We disagree.

{¶ 59} Contributory negligence does not bar a plaintiff's recovery if the defendant's gross negligence, or its wanton or willful conduct, is the proximate cause of the plaintiff's injuries. *Yancey v. Lea*, 354 N.C. 48, 51 (2001). "Gross negligence" and "wanton conduct" share the same meaning. *Id.* at 53. Conduct is wanton if it is done with wicked purpose, or

when it is done needlessly, manifesting a reckless indifference to the rights or safety of others. *Id.* at 52. Conduct is willful if it is done with a deliberate purpose not to discharge a duty necessary to the safety of the person or property of another, a duty assumed by contract, or a duty imposed by law. *Id.* at 52-53. According to the Supreme Court of North Carolina, the difference between gross negligence and negligence

> is not in degree or magnitude of inadvertence or carelessness, but rather is intentional wrongdoing or deliberate misconduct affecting the safety of others. An act or conduct rises to the level of gross negligence when the *act* is done purposely and with knowledge that such act is a breach of duty to others, i.e., a *conscious* disregard of the safety of others. An act or conduct moves beyond the realm of negligence when the *injury or damage* itself is intentional.

(Emphasis sic.) *Id.* at 53.

{¶ 60} Here, the Estate argues that LeVan was grossly negligent or engaged in willful or wanton conduct when he provided Sample with false information and withheld information relevant to Sample's safety. To the extent LeVan engaged in the behavior the Estate alleges, his actions evince carelessness, not intentional wrongdoing or deliberate misconduct. Consequently, Sample's contributory negligence remains a bar to the Estate's recovery for Xenos' alleged negligence.

{¶ 61} Finally, the Estate argues that the trial court erred in granting Xenos summary judgment on the Estate's claim for negligent supervision and/or training. Xenos responds that it sought, and received, summary judgment on all the Estate's claims. It is true that Xenos requested summary judgment on all claims pending, and the trial court granted Xenos' motion. However, Xenos' motion for summary judgment never mentioned, much less discussed, the claim for negligent supervision and/or training. As we stated above, the party moving for summary judgment bears the burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher*, 75 Ohio St.3d at 293. Given Xenos' utter failure to address the claim for negligent supervision and/or training in its motion for summary judgment, we conclude that Xenos did not meet its burden to identify the basis on which it sought summary judgment on that claim. Consequently, the

trial court erred in granting Xenos summary judgment on the claim for negligent supervision and/or training.

{¶ 62} For the foregoing reasons, we sustain the Estate's assignment of error in part, and we overrule it in part. We affirm the judgment of the Franklin County Court of Common Pleas to the extent that it granted Xenos summary judgment on the Estate's claim for negligence, but reverse it to the extent that it granted Xenos summary judgment on the Estate's claim for negligent supervision and/or training. We remand this matter to the trial court for further proceedings consistent with law and this decision.

Judgment affirmed in part, reversed in part; case remanded.

SADLER and BEATTY BLUNT, JJ., concur.