[Cite as *Barr v. Lauer*, 2009-Ohio-5563.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92497

DOUGLAS N. BARR, INDIVIDUALLY, ETC.

PLAINTIFFS-APPELLANTS

vs.

JOHN N. LAUER, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-549906

BEFORE: Blackmon, J., Kilbane, P.J., and Dyke, J.

RELEASED: October 22, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Douglas N. Barr appeals the court's decision granting summary judgment in favor of John Lauer. Barr assigns the following error for our review:

> **"I. The trial court erred in granting Appellee's motion for summary judgment."**

{¶ 2} Having reviewed the record and pertinent law, we reverse the trial court's decision. The apposite facts follow.

{¶ 3} Barr was an individual shareholder in the Oglebay Norton Company ("Oglebay"), as well as trustee of the Norton Family Trusts, which also held stock in Oglebay. In the latter part of 1997, Barr, along with one of his co-trustees, Robert I. Gale, III, met with R. Thomas Green, Jr., the then President of Oglebay, and requested that Oglebay buy back his and the trusts' stock, totaling approximately 300,000 shares. On December 17, 1997, at a meeting of the Oglebay Board of Directors, the Board passed a resolution authorizing the buyback for approximately $30 per share, totaling $9 million for Barr and the trusts.

{¶ 4} Contemporaneously with the authorization to buy back Barr's and the trusts' stock, the Oglebay Board of Directors named John Lauer Chief Executive Officer. Shortly after his appointment in January 1998, Lauer met with Barr and Gale and outlined his plans for the company. At the meeting, Lauer represented that within five years Oglebay would become a billion dollar company with its stock trading at $75 per share. Lauer indicated that he would grow the

company through acquisitions and diversification, and promised to use his best efforts to make Oglebay more profitable.

{¶ 5} After that meeting, and several that followed between Barr and Lauer, Barr decided not the sell his and the trusts' shares back to Oglebay. In February 2004, Oglebay filed for bankruptcy. On December 15, 2004, Barr filed suit against Lauer and former members of Oglebay's Board of Directors, listing the following as causes of action: breach of contract; breach of fiduciary duty; reckless/negligent misrepresentation; fraud; fraudulent misrepresentation; corporate waste; and reckless/negligent hiring and retention.

{¶ 6} Directly pertinent to this appeal, Barr alleged that Lauer disclosed financial data, negotiation details regarding corporate acquisitions, and other "insider" information that was not made available to any other shareholder, to him on a regular basis. Barr specifically alleged that in reliance on Lauer's promises, he decided against selling the Oglebay stock.

{¶ 7} On December 7, 2005, the trial court granted Lauer's and the other defendants' motion to dismiss pursuant to Civ.R. 12(B)(6) for failure to state a claim. Barr appealed the trial court's dismissal, and in our decision dated January 18, 2007,[1] we affirmed the trial court's decision on all causes of action except Barr's claim of negligent misrepresentation. Thereafter, on remand, the trial court granted Lauer's motion for summary judgment on Barr's claim of negligent misrepresentation.

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[1]*Barr v. Lauer*, Cuyahoga App. No. 87514, 2007-Ohio-156.

Negligent Misrepresentation

{¶ 8} In his sole assigned error, Barr argues the trial court erred in granting summary judgment in favor of Lauer.

{¶ 9} We review an appeal from summary judgment under a de novo standard of review.[2] Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.[3] Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion that is adverse to the non-moving party.[4]

{¶ 10} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment.[5] If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be

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[2]*Baiko v. Mays* (2000), 140 Ohio App.3d 1, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188.

[3]Id. at 192, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704.

[4]*Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

[5]*Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107.

appropriate only if the non-movant fails to establish the existence of a genuine issue of material fact.[6]

{¶ 11} In the instant case, Barr claims that his decision not to sell his and the trusts' shares was because of Lauer's inducement concerning Oglebay's business strategies and financial performance. Barr further claims that he detrimentally relied on Lauer's negligent misrepresentation.

{¶ 12} Negligent misrepresentation occurs when "'[o]ne who, in the course of his business * * * or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.'"[7] Liability for negligent misrepresentation may be based on an actor's negligent failure to exercise reasonable care or competence in supplying correct information.[8]

{¶ 13} Barr's claim of negligent misrepresentation is centered around several statements or conversations that took place between himself and Lauer. Paramount among the statements, and dispositive of this appeal, is Lauer's

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[6]Id. at 293.

[7]*Britton v. Gibbs Associates*, 4th Dist. No. 08CA9, 2009-Ohio-3943, quoting *Delman v. Cleveland Hts.* (1989), 41 Ohio St.3d 1, 4, quoting 3 Restatement of the Law 2d, Torts (1965) 126-127, Section 552(1); see, also, *Laurent v. Flood Data Serv., Inc.* (2001), 146 Ohio App.3d 392, 400.

[8]*Marasco v. Hopewell*, 10th Dist. No. 03AP-1081, 2004-Ohio-6715, at ¶53, citing 4 Restatement of the Law 2d, Torts (1977), Section 552, Comment a.

representation that Oglebay would be a billion dollar company with a $75 share price.

{¶ 14} In the instant case, Barr alleged that on January 9, 1998, shortly after Lauer took the helm of Oglebay, Barr and Gale met with Lauer. At that meeting, Lauer allegedly stated: "* * * Stick with me and in five years you'll have a billion dollar company and a $75 stock price."[9]

{¶ 15} In the instant case, it is undisputed that Oglebay's Board authorized the repurchase of Barr's and the trusts' shares. It is also undisputed that Lauer became aware of the Board's decision immediately after he was appointed chairman. In addition, Lauer does not deny representing that Oglebay would be a billion dollar company with a $75 stock price in five years. Nor does Lauer deny that he urged Barr and Gale to stick with him, which a jury could decide was an inducement not to sell their stock back to Oglebay.

{¶ 16} In his deposition, Lauer testified regarding the company's prospect and the impact of buying back the shares in pertinent part as follows:

> **"Q. Would the stock price have been [$]75, was that your hope at that point?**
>
> **A. That probably would have been the number I was looking for at that time.**
>
> **Q. Okay.**
>
> **A. If the company performed and did what our strategy said we thought we could do.**

[9]Barr Depo. at 47-48.

Q. If the company had to buy the Norton shares that would have put a damper on both the billion dollar enterprise and the $75 stock price at least in the short term, would that be fair?

A. Well, if you're correct about the 300,000 shares and the price is 30, whatever it was, over, say it was $40 a share.

Q. That's twelve million.

A. Yes. So it would have been ten or eleven or twelve million dollars.

Q. That would have been a damper on the company correct?

A. That would have been a damper on the company.

" *

Q. Let's just talk about over five years. Over five years for you to get the company to a billion dollar enterprise and for you to have a $75 stock price, taking ten or twelve million dollars would have been something of a damper on that, fair enough?

A. Not if the stock price went to $75.

Q. But to get it to $75 you need cash or borrowing power, correct?

A. That's correct.

Q. And taking cash out of a company obviously hurts the cash and can impact borrowing power, correct?

A. Yeah. I would express it differently. If, I'm correct on the timing of this, we had, I forget what we laid out for Port Inland and, Colorado silica, that's a relatively small acquisition, I'm going to say around five million. Port Inland was much more than that. We would have borrowed money to make those acquisitions. It makes little sense for a company to borrow money to buy back shares. That doesn't make a lot of sense at any time.

Q. I'm just asking if you agree with the obvious, which I think is perhaps the obvious, by buying the Norton family shares that would have had at least the effect of something of a delay, all other things being equal, in your plans to grow the company and grow the stock price, is that fair?

A. I think I stated it would be a bad decision given what we were doing."[10]

{¶ 17} It is apparent from the above excerpt that repurchasing Barr's and the trusts' shares was not high on the list of priorities that Lauer had for Oglebay. It is also apparent that Lauer considered repurchasing the shares a bad idea, especially in light of the direction and future goals of the company. Given Lauer's opinion, we conclude a genuine issue of fact arises as to whether Lauer's representations to Barr was designed to forestall Barr tendering the shares to the board for repurchase, or was designed to discourage Barr from selling the shares on the open market.

{¶ 18} In his deposition, Barr testified in pertinent part as follows:

"Q. Were you persuaded by - - that he was going to be able to do that based on the conversation you had with him?

A. That was his representation to me and he was very persuasive. Yes. So I guess my answer to your question is yes, I was persuaded.

Q. And he was persuasive by just saying he was going to do acquisitions and he was going to move the focus of the business away from iron to stone?

[10]Lauer Depo. 62-64.

A. He was persuasive in a number of ways. He's a good salesman. His demeanor is persuasive. His compensation package, which was linked to company performance, and I never did know the specifics, but the fact that he was quote taking no salary and was being awarded stock options with a strike price that I think was 20 percent higher than what the stock was selling for at the time, roughly, that he was an executive who I believed and I am sure Bob believed was able, having spent a good bit of his career at two large publicly held companies in executive capacities, and his general plans for growing the company. There was a combination of things. He was very persuasive. His representations were compelling.

Q. And by his representations, you mean in five years ON [Oglebay Norton] will be a $1 billion company with a [$]75 share price?

A. In five years. Right.

{¶ 19} Subsequently, Barr decided not to offer to sell the shares back to Oglebay, a decision he claims was largely in reliance on the aforementioned statement.

{¶ 20} We are mindful that Lauer, in Oglebay's first annual meeting after he was appointed, represented substantially the same projections to the company's shareholders.

{¶ 21} Following the meeting, Oglebay issued a press release, which outlined Lauer's strategic vision. The press release read in pertinent part as follows:

"* * * In his comments at today's annual shareholder meet-ing, Lauer stated that the Company is targeting a total interprise value of $1 billion by year 2000. 'In a business such as ours, a one billion-dollar enterprise would translate into approximately

> **$600 million in sales and approximately $150 million in operating margin or EBITDA,' said Lauer."[11]**

{¶ 22} We are also mindful that the press release included a disclaimer. The disclaimer read in pertinent part as follows:

> **"Certain statements contained in this release are 'forward looking in that they reflect management's expectations and beliefs for future performance in 1998 and beyond with respects to his operating segments. Forward-looking statements are necessarily subject to risks, uncertainties and other factors, many of which are outside the control of the Company, which could cause actual results to differ materially from such statements. Weather, oil prices, steel production, Great Lakes and Mid-Atlantic construction activity, the California economy and population growth rates in Southwestern United States, all can impact revenues and earnings. In this release, words such as 'believes,' 'expects,' and 'anticipates' are indicative of forward-looking statements."[12]**

Notwithstanding the above disclaimer, Lauer's private interaction with Barr involves a different set of dynamics than Lauer's public pronouncements to the company's shareholders at large.

{¶ 23} As opposed to the other shareholders, Lauer was dealing privately with Barr, a major shareholder, whose decision to sell or not to sell could significantly impact the company's prospects. The record indicates that Oglebay's stock was thinly traded, with an average daily volume of about one thousand shares being exchanged on the open market. Therefore, significant shareholders, such as Barr and the trust, who collectively owned approximately

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[11]Oglebay Norton Press Release, July 29, 1998, Exhibit 8, Barr's brief.

[12]Id.

300,000 shares, could depress Oglebay's share price if they sold the stock on the open market.

{¶ 24} In addition, had Barr tendered the shares, shortly after the Board authorized the repurchase, it would have cost Oglebay almost $12 million to buy back the shares. Lauer admitted that taking that amount of money out of the company would put a damper on the company's prospect. Lauer also admitted that repurchasing the shares would hurt the company's cash position and impact the company's borrowing ability.

{¶ 25} Given the adverse impact that a repurchase of such magnitude, or a sale of 300,000 shares on the open market would have on Oglebay, we conclude that genuine issues of material fact exist as to whether Lauer's private representations to Barr was designed to forestall the sale of his and the trusts' stock. As such, the trial court erred when it granted summary judgment in Lauer's favor.

{¶ 26} Nonetheless, Lauer argues that Barr's negligent representation claim is time barred. Lauer contends that the statements regarding the billion dollar enterprise and $75 stock price was made on January 9, 1998, thus Barr's claim expired on January 9, 2002, more than two years before Barr filed his claim in December 2004. On the other hand, Barr contends that these representations were ongoing, continued through 2002, and that the cause of action accrued when Oglebay filed for bankruptcy protection in 2003.

{¶ 27} Initially, we note that we find the four year statute of limitations found in R.C. 2305.09(D) is applicable to this case.[13] We also note that although a cause of action accrues and the statute of limitations begin to run at the time the wrongful act was committed,[14] the discovery rule is an exception, which provides that "a cause of action does not arise until the plaintiff knows or, by the exercise of reasonable diligence should have known, that he or she has been injured by the conduct of the defendant.[15]

{¶ 28} Generally, the purpose of the discovery rule is to limit the "unconscionable result to innocent victims who by exercising even the highest degree of care could not have discovered the cited wrong. By focusing on discovery as the element which triggers the statute of limitations, the discovery rule gives those injured adequate time to seek relief on the merits without undue prejudice to * * * defendants."[16]

{¶ 29} Further, the discovery rule must be specially tailored to the particular context to which it is to be applied.[17] The discovery rule focuses on whether the

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[13]*Kondrat v. Morris* (1997), 118 Ohio App.3d 198, 206; *Chandler v. Schriml* (May 25, 2000), 10th Dist. No. 99AP-1006.

[14] *Luft v. Perry County Lumber & Supply Co.,* 10th Dist. No. 02AP-559, 2003 -Ohio- 2305.

[15]*Ault v. Jasko*, 70 Ohio St.3d 114, 115-116, 1994-Ohio-376.

[16]Id. at 116, citing *Oliver v. Kaiser Community Health Found*. (1983), 5 Ohio St.3d 111.

[17]*Norgard v. Brush Wellman, Inc.,* 95 Ohio St.3d 165, 2002-Ohio-2007, ¶10, citing *Browning v. Burt* (1993), 66 Ohio St.3d 544, 559.

plaintiff had the facts necessary to realize that a cause of action existed.[18] Therefore, the rule requires the court to consider whether the plaintiff knew that he had a cause of action or reasonably should have known.

{¶ 30} Whether or not the discovery rule is applicable to this case is an issue that can only be addressed after further facts are put in evidence. This in itself, should have precluded granting summary judgment. Accordingly, we sustain the sole assigned error.

Judgment reversed.

It is ordered that appellees recover from appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
ANN DYKE, J., CONCUR

[18] *Norgard*, ¶17.