[Cite as *Tomasheski v. Ryan*, 2015-Ohio-1593.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

THOMAS B. TOMASHESKI	C.A. No. 14CA010631
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DONALD A. RYAN	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellee	CASE No. 13CV180144

DECISION AND JOURNAL ENTRY

Dated: April 27, 2015

HENSAL, Presiding Judge.

{¶1} Thomas Tomasheski[1] appeals the trial court's award of summary judgment in favor of defendant Donald Ryan.[2] For the reasons set forth below, we affirm.

I.

{¶2} On June 11, 2011, Mr. Tomasheski was driving home from a picnic with his wife Tammy Tomasheski, his daughter Danielle Tomasheski, and his son Thomas Tomasheski. A vehicle driven by Gerald Wetherbee crossed the centerline and struck the Tomasheski's vehicle, killing Mrs. Tomasheski and Thomas and injuring Mr. Tomasheski and Danielle. Mr. Tomasheski filed a complaint against Mr. Ryan, alleging that Mr. Ryan had provided alcohol to Mr. Wetherbee when he "knew or should have known" that Mr. Wetherbee was intoxicated and

[1] Mr. Tomasheski filed the complaint in this case on behalf of himself, as the guardian for his daughter, and as the administrator of the estates of his wife and son. Therefore, although this appeal concerns the claims set forth by each plaintiff, we will refer to the appeal and the arguments made as those of Mr. Tomasheski for ease of reading.

[2] Mr. Tomasheski dismissed his appeal of the award of summary judgment to Ryan Installations LLC.

that Mr. Wetherbee had caused the injuries to Mr. Tomasheski and his daughter and killed Mr. Tomasheski's wife and son.

{¶3} Mr. Ryan moved for summary judgment, arguing that there was no genuine dispute of fact that he was a social host and, therefore, was not liable for the injuries caused by Mr. Wetherbee. Mr. Tomasheski responded in opposition, arguing that, because Mr. Ryan had actual knowledge of Mr. Wetherbee's intoxication when leaving Mr. Ryan's home, rather than merely constructive knowledge, Mr. Ryan was liable despite not being a commercial provider of alcohol. The trial court granted Mr. Ryan's motion for summary judgment.

{¶4} Mr. Tomasheski has appealed, raising a single assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF APPELLEE DONALD R. RYAN.

{¶5} Mr. Tomasheski argues that the trial court erred when it awarded summary judgment to Mr. Ryan. Specifically, Mr. Tomasheski argues that the trial court's reliance on the jurisprudence regarding a social host's nonliability is misplaced because, unlike those cases, Mr. Ryan had actual knowledge that Mr. Wetherbee was too intoxicated to safely operate a motor vehicle.

{¶6} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). "We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Garner v. Robart*, 9th Dist. Summit No. 25427, 2011-Ohio-1519, ¶ 8.

{¶7} Summary judgment is appropriate under Civil Rule 56(C) if:

> (1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). To succeed on a motion for summary judgment, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the movant satisfies this burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Id*. at 293, quoting Civ.R. 56(E).

{¶8} Although some of the times are in dispute, it is undisputed that Mr. Wetherbee was at Mr. Ryan's home prior to the accident on June 11, 2011, and that Mr. Wetherbee killed Mrs. Tomasheski and Thomas Tomasheski and injured Mr. Tomasheski and Danielle Tomasheski when he struck their vehicle. Furthermore, when viewed in the light most favorable to Mr. Tomasheski as the non-moving party, there exists a dispute of fact as to whether Mr. Ryan furnished Mr. Wetherbee with alcohol during his visit despite knowing that Mr. Wetherbee was too intoxicated to drive his vehicle. However, there is no evidence that Mr. Ryan was anything other than a social host on June 11, 2011; therefore, the question before us is whether Mr. Ryan, as a social host, may be found liable for the injuries caused by Mr. Wetherbee.

{¶9} In *Mason v. Roberts*, 33 Ohio St.2d 29 (1973), the Supreme Court considered whether a liquor permit holder was liable for the injuries caused by one patron to another person on the premises of the liquor permit holder. *See id.* at 30. The Court recognized that, unless the seller of alcohol was aware that the purchaser's will is so impaired that he cannot refrain from

drinking the alcohol when it is placed before him or unless the sale was in violation of a statute, there was no common-law cause of action against the provider of alcohol for injuries caused to a third-party. *Id*. at 33. Nevertheless, the Supreme Court held that "R.C. 4399.01, commonly known as the Dram Shop Act, does not provide the exclusive remedy against a liquor permit holder, to recover damages for the death of a bar patron." *Id*. at paragraph one of the syllabus. The Court further held that "[t]he proprietor of a business establishment wherein alcoholic beverages are dispensed for consumption upon the premises owes a duty to members of the public while they are in his place of business to exercise reasonable care to protect them from physical injury as a result of violent acts of third persons." *Id*. at paragraph two of the syllabus. In reaching this conclusion, the Court noted, "We see no reason why the proprietor of a business establishment wherein alcoholic beverages are dispensed for consumption on the premises should be held to a lesser duty than the proprietor of premises being used for other business purposes * * *." *Id*. at 33-34, citing *Howard v. Rogers*, 19 Ohio St.2d 42 (1969).

{¶10} The Supreme Court revisited *Mason* in *Settlemyer v. Wilmington Veterans Post No. 49, Am. Legion, Inc.*, 11 Ohio St.3d 123 (1984). In *Settlemyer*, the appellant asked the Court to expand the holding in *Mason* and to hold that a provider of alcohol owes a duty to all members of the public, not just person on the provider's premises. *See id*. at 125. However, the Supreme Court did not reach the issue; instead, it distinguished *Mason*, finding "merit in [the] assertion that a social provider of intoxicating beverages should not be held to the same duty of care that a commercial proprietor is subject to under *Mason*." *Id*. at 127. The Court explained:

> [T]he commercial proprietor has a proprietary interest and profit motive, and should be expected to exercise greater supervision than in the (non-commercial) social setting. Moreover, a person in the business of selling and serving alcohol is usually better organized to control patrons, and has the financial wherewithal to do so. It also is reasonable to conclude that by virtue of its experience, the

> commercial proprietor is more familiar with its customers and their habits and capacities.

Id. The Supreme Court noted that its "reluctance" to extend the potential liability to social hosts was in line with decisions in other jurisdictions and stated, "[W]e are of the opinion that any policy modifications which are designed to encompass the potential liability of social providers of intoxicating beverages should perhaps be deferred to the sound discretion of the legislature." *Id*.[3]

{¶11} Since the decision in *Settlemyer*, this Court has adopted its reasoning and declined to extend the holding in *Mason* to social hosts. *See Pappas v. Petry*, 9th Dist. Medina No. 3035-M, 2001 WL 22481, *1 (Jan. 10, 2001); *Morrison v. Fleck*, 120 Ohio App.3d 307, 318-319 (9th Dist.1997). Although the facts in *Pappas* and *Fleck* do not completely mirror the facts in the case before us, those cases stand for the proposition that a social host is not liable for injuries to the public at large caused by intoxicated guests absent the violation of a statutory provision. *See Pappas* at *2. *See also Morrison* at 318, citing *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 113-114 (1988) (noting that *Mitseff* distinguished itself from *Settlemyer* by noting that the social host had violated a statutory duty while the defendant in *Settlemyer* had not). There is no dispute that what occurred on the evening of June 11, 2011, was a tragedy. However, because there is no dispute that, to the extent Mr. Ryan had provided alcohol to Mr. Wetherbee prior to the accident, Mr. Ryan had done so in a noncommercial capacity and because there is no evidence that would support the conclusion that Mr. Ryan had violated a statutory duty by providing alcohol to Mr.

[3] We note that the Court also held that "appellant alleges that the appellee veterans post either 'knew or should have known' that [the drunk driver] was intoxicated, and continued to serve her alcoholic beverages even after she became intoxicated" and that this allegation failed to state a claim under *Mason* because it at most set forth a claim of constructive knowledge. *Settlemyer* at 126.

Wetherbee, we must conclude that the trial court correctly entered summary judgment in favor of Mr. Ryan. *See Settlemyer* at 127.

{¶12} Accordingly, Mr. Tomasheski's assignment of error is overruled.

III.

{¶13} In light of the foregoing, the judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JENNIFER HENSAL
FOR THE COURT

MOORE, J.
SCHAFER, J.
CONCUR.

APPEARANCES:

JUSTIN F. MADDEN, Attorney at Law, for Appellant.

CRAIG G. PELLINI and KYLE A. JOHNSON, Attorneys at Law, for Appellee.