IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

Indianapolis Division

SELINA KYLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 03M25-8501-CV-588
	)	
THOMAS WAYNE; and	)	
WAYNE ENTERPRISES, L.L.C., d/b/a	)	
GRAYSON'S TAVERN,	)	
	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff, Selina Kyle, submits to the Court this Memorandum in Opposition to the Motion for Summary Judgment. Plaintiff is entitled to recover for damages for personal injury or death for the defendants' actions pursuant to Indiana law. Ind. Code Ann. § 7.1-5-10-15.5 (2006). The State of Indiana requires that a plaintiff meet the following elements in order to recover damages: the defendant must have actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished, and the intoxication of the person to whom the alcoholic beverage was furnished was a proximate cause of the death, injury, or damage alleged in the complaint. Id. There are disputes of material fact that would prevent the court from granting defendants' motion for summary judgment and accordingly, Mrs. Kyle desires that the Court deny defendants' motion and direct her complaint to proceed before a jury trial.

STATEMENT OF FACTS

On Saturday, July 28, 2007, Bruno Kyle was killed and his newlywed wife Selina Kyle sustained significant injuries when Edward Nigma crashed his car into their vehicle. (City of Gotham Police Report.) Prior to the accident the couple regularly visited Grayson's Tavern.

(Deposition Testimony of Selina Kyle "Depo. Kyle" at 2.) The Kyles arrived around 7:00 p.m. and ordered food and drinks. (Depo. Kyle at 16.) Neither of the Kyles ordered nor consumed any alcohol. (Depo. Kyle at 18.) Mr. Nigma, Mrs. Kyle's former fiancé (Depo. Kyle at 16.), was also at Grayson's that night. (Deposition Testimony of Edward Nigma "Depo. Nigma" at 3.) Almost immediately after they walked in, Mr. Nigma approached the Kyles, kindly offered his congratulations regarding their marriage and returned to his stool at the bar to resume drinking. (Depo. Nigma at 3, Depo. Kyle at 17.) Mr. Nigma consumed four to six shots of hard "whiskey" liquor over the next twenty-eight minutes by the account of Mr. Kane and Mr. Nigma (Depo. Nigma at 3, Deposition Testimony of Bob Kane "Depo Kane." at 11, Depo. Kane Ex. 3.) while Mrs. Kyle saw Mr. Nigma take "quite a few" shots. (Depo. Kyle at 17.) The sole bartender operating at Grayson's that evening (Depo. Kyle at 17.), Bob Kane (Depo. Kane at 2.), was licensed to serve alcohol (Depo. Kane Ex. 2.) and served each of these shots and other alcoholic drinks to Mr. Nigma. (Depo. Kane at 11.) Computer tabulation now reveals that Mr. Nigma ordered thirteen alcoholic drinks under the supervision of Mr. Kane. (Depo. Kane at 12, Depo. Kane Ex. 3.) After drinking his last shot, Mr. Nigma stood up and knocked over his stool. (Depo. Nigma at 4.) Mr. Nigma's fall was witnessed by many other customers at Grayson's (Depo. Kyle at 18.) who were already aware of his obvious intoxicated state. (Depo. Kyle at 19.)

Mr. Nigma resumed his place at the bar and ordered another beer, served by Mr. Kane served. (Depo. Kyle at 18.) At approximately 7:45 p.m., Mr. and Mrs. Kyle attempted to leave Grayson's. (Depo. Kyle at 18.) Before they reached the door Mr. Nigma shouted, "She should be my wife!" (Depo. Kyle at 19.) Mr. and Mrs. Kyle ignored him and continued towards the door. (Kyle at 19.) Mr. Nigma saw them leaving, pursued them, and raised his hand in an attempt to strike one of them but he fell to the ground as he swung. (Depo. Kyle at 19.) As the Kyles left the tavern, Mr. Nigma rose and began to chase the Kyles into the parking lot, shouting, "This isn't over yet." (Depo. Kyle at 19.) Mr. Kane believed Mr. Nigma looked "very drunk" when he exited the bar (City of Gotham Police Report.) and witnessed heavy wind and rain. (Depo. Kane at 16, Depo. Kane Ex. 1.)

Mr. and Mrs. Kyle entered their car and pulled out of the parking lot (CITE). In her rear-view mirror, Mrs. Kyle could see that Mr. Nigma had entered his van, began driving toward them and struck three other cars while leaving the parking lot. (Depo. Kyle at 19.) At this point Mrs. Kyle called 911 for emergency assistance. (Depo. Kyle Ex. 1, Depo. Kyle at 19.) Mr. Nigma swerved while driving toward the Kyles (Depo. Kyle Ex. 1.), and drove his van against a curb and struck a mailbox. (Depo. Kyle at 20.) Approximately a half-mile from the tavern, Mr. Kyle turned left while Mr. Nigma, driving on the wrong side of the street and without slowing down, slammed into the Kyles' driver-side door. (Depo. Kyle Ex. 2.) Mr. Kyle was killed and immediately pronounced "deceased on arrival" by the police. (City of Gotham Police Report.)

The police found Mr. Nigma's blood-alcohol content to be 0.20 (Depo. Nigma Ex. 1), two-and-a-half times the 0.08 legal limit in Indiana and clearly posted in Grayson's Tavern. (Depo. Kane Ex. 4.) Prior to this incident, Mrs. Kyle had "never" seen Mr. Nigma "act like that before." (Depo. Kyle at 21.) However, Mr. Nigma had a reputation for "buzz driving," and had been cited for driving under the influence of alcohol once before. (Depo. Kyle at 5, Depo. Kane at 7.) Mr. Nigma's reputation for driving while intoxicated was known by many people, including the bartenders and owners at Grayson's. (Depo. Kane at 7.) Mr. Nigma has no prior criminal record beyond the single OWI conviction. (City of Gotham Police Report.) Beyond the emotional suffering incurred by Mrs. Kyle as the result of the death of her husband Mrs. Kyle has sustained significant injuries to the left side of her body. (Depo. Kyle at 20.)

STANDARD FOR SUMMARY JUDGMENT

Summary Judgment is appropriately awarded where the moving party shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See Fed. R. Civ. P. 56 (c). As defendants are the party seeking summary judgment, they must show that there is no dispute of material fact that would prevent the court from ruling in their favor as a matter of law. The burden then shifts to the nonmoving party to demonstrate that there in fact is an issue of material fact. The plaintiff, however, may not rest upon "mere allegations or denials of the moving party's pleading," but rather must "set forth

specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56 (e). Therefore, we must set forth a specific fact showing that there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

ARGUMENT

The defendants' conduct meets the requirements of actual knowledge and proximate cause as required for the charges under Ind. Code Ann. § 7.1-5-10-15.5 (hereafter "Dram Shop Act"). A claim under the Dram Shop Act requires that a claimant satisfy two elements, and the first element requires actual knowledge of visible intoxication. This element is satisfied when "the person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished." Fast Eddie's v. Hall, 688 N.E.2d 1270, 1274 (Ind. Ct. App. 1997). The second element to be satisfied requires that "the intoxication of the person to whom the alcoholic beverage was furnished was a proximate cause of the death, injury, or damage." Id. In this case the plaintiff satisfies both requirements of actual knowledge and proximate cause. This generates a genuine issue of material fact and therefore, this court should deny defendants' motion for summary judgment and direct plaintiff's complaint to proceed before a jury trial.

I. DEFENDANT HAD ACTUAL KNOWLEDGE OF VISIBLE INTOXICATION

A. Bartender Continually Served Mr. Nigma Alcohol Over a Period of Time

The defendant had actual knowledge of visible intoxication because the bartender, Mr. Kane, had ample opportunity to observe Mr. Nigma's intoxicated behavior when he continually served Mr. Nigma alcohol over a period of time. It is reasonable to infer that a furnisher who had ample opportunity to observe a patron during a period in which the patron was visibly and obviously intoxicated has actual knowledge of intoxication. Jackson v. Gore, Essex and Goex, Inc., 634 N.E.2d 503 (Ind. Ct. App. 1994). In Jackson, the same waitress at a restaurant served a patron an estimated ten to thirteen beers over the course of five hours late at night. When the patron departed from the restaurant in a car, he eventually struck a pedestrian walking in the street and the victim sustained serious near-fatal injuries.

In our case the same bartender at Grayson's, Mr. Kane, filled thirteen orders of alcohol for Mr. Nigma, nearly half of which were hard shots of liquor consumed over the course of twenty-eight minutes, of which Mr. Kane testifies to have witnessing Mr. Nigma's liquor consumption. In Jackson the Court held that "quite simply, a jury could reasonably infer that the waitress, who had ample opportunity to observe [the patron] during a period in which he was visibly and obviously intoxicated, had actual knowledge of [the patron's] intoxication." Id. at 505. The Court reasoned that actual knowledge "may be inferred from facts reasonably supporting an inference of knowledge." Id. When the furnishing waitress had a long opportunity to serve and observe the patron, she had "ample opportunity" to know the patron was "visibly and obviously intoxicated." Id.

It "may be inferred from facts" that Mr. Kane had "ample opportunity" to know Mr. Nigma was "visibly and obviously intoxicated" because he served him alcohol for over two hours and at one point served six shots of hard liquor in a row to Mr. Nigma over the course of only twenty-eight minutes. Therefore, because the bartender had ample opportunity to know Mr. Nigma was visibly and obviously intoxicated, the defendant possessed actual knowledge of visible intoxication.

B. Bartender Knew of Multiple Factors Indicating Mr. Nigma's Intoxication

The defendants possessed actual knowledge of visible intoxication because the Mr. Kane knew of multiple factors that indicated Mr. Nigma's intoxication. This Court has held that "some factors which can be considered in determining whether a person was intoxicated to another person's knowledge" include "what and how much the person was known to have consumed, the time involved, the person's behavior at the time, and the person's condition shortly after leaving." Ashlock v. Norris, 475 N.E.2d 1167, 1170 (Ind. Ct. App. 1985).

First, Mr. Kane placed thirteen orders of alcohol for Mr. Nigma and testified that he knew all of the drinks had been consumed by Mr. Nigma except for one. Additionally, Mr. Kane was provided a computerized report for the record that describes all orders on a patron's single tab. (Depo. Kane Ex. 3.) As Mr. Kane used his computerized system there was never an opportunity

for him to forget the number of alcoholic beverages added to Mr. Nigma's growing tab. Second, as argued earlier Mr. Kane had ample opportunity to observe Mr. Nigma during time involved. Third, the Court listed "the person's behavior at the time" as another one of the "many factors which can be considered in determining whether a person was intoxicated to another person's knowledge." Id. Mr. Nigma's behavior at the time he was continually served alcohol by Mr. Kane indicated that he was already intoxicated. While sitting at a stool in front of Mr. Kane, Mr. Nigma knocked it over as a result of his intoxication, providing Mr. Kane knowledge of Mr. Nigma's intoxication. Additionally, after demonstrating these behaviors and various shouted statements by Mr. Nigma, Mrs. Kyle testified how "everybody knew" Mr. Nigma was intoxicated (Depo. Kyle at 19.) and clearly "everybody" would include Mr. Kane. In fact, Mr. Kane admitted that Mr. Nigma looked "very drunk" when he exited the bar (City of Gotham Police Report.) and was therefore more than capable of identifying Mr. Nigma as intoxicated or acting in an intoxicated condition.

In this case the defendants satisfy all of the "factors" indicating Mr. Nigma's intoxication as listed in Ashlock, a total far greater than the total requirement of only "some factors" found in Ashlock in which actual knowledge of visible intoxication was still demonstrated. Accordingly, the defendants possessed actual knowledge of visible intoxication because Mr. Kane was aware of multiple factors that indicated Mr. Nigma's intoxication.

II. MR. NIGMA'S INTOXICATION WAS THE PROXIMATE CAUSE OF DEATH, INJURY & DAMAGES

A. Intoxication Was The Foreseeable and Direct Cause of the Accident

Indiana Courts have determined that "the question of proximate cause usually is a question for the jury." Adams Township v. Sturdevant, 570 N.E.2d 87 (Ind. Ct. App. 1991). The Court has further suggested that "only where a single inference or conclusion can be drawn from undisputed facts is the existence of proximate cause a matter of law to be determined by the court." Id. And while this maxim stands as recommended procedure for this Court, this Court can determine that intoxication was the proximate cause of the accident by deciding if intoxication alone was the proximate the cause of the death, injury and damages. Mr. Nigma's intoxication

was the foreseeable and direct cause of the accident involving Mrs. Kyle's injuries because his actions were the direct result of his furnished intoxication by the defendants.

The defendants could have reasonably foreseen or anticipated the consequences of Mr. Nigma's intoxication. Mr. Kane should have reasonably foreseen or anticipated Mr. Nigma's actions in light of the circumstances surrounding his actions within the bar. It could have easily been expected for Mr. Nigma to extend his unintended behavior from the bar onto the road with the use of a vehicle, especially since Mr. Nigma would depart the tavern in the any vehicle he came in. (Depo. Kyle at 19.) The aggressive speech and behavior inside of the bar by Mr. Nigma prior to departing Grayson's to pursue Mr. and Mrs. Kyle were good predictors of his potential to harm the Kyles and yet Mr. Kane nor any other agent of Grayson's Tavern acted to stop Mr. Nigma from following Mrs. Kyle. Mr. Kane should have reasonably foreseen the violent actions that occurred on the road. Additionally, Mr. Kane served drinks to Mr. Nigma to the point of intoxication after he had consumed multiple light beers (Depo. Kane Ex. 3.), so once again the bar could be held liable for reasonably foreseen actions by Mr. Nigma since violent and aggressive behaviors only began after he became intoxicated, which as we have discussed, was the direct result of the Defendants' actions. Accordingly, Mr. Nigma's furnished intoxication by the defendants was the foreseeable and direct cause of the accident involving Mrs. Kyle's injuries and Mr. Nigma's intoxication was the proximate cause of death, injury and damages.

B. Mr. Nigma's Actions Do Not Break the Causal Chain

To be the deemed the proximate cause of damages, injury and death, Mr. Nigma's intoxication must be "that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the result complained of and without which the result would not have occurred." Orville Milk Co. v. Beller, 486 N.E.2d 555, 559 (Ind. Ct. App. 1985). Mr. Nigma's intoxication was the proximate cause of injury and death and his lack of criminal intent does not satisfy the standard adopted by this Court required to break proximate cause and sever defendants liability if actually met.

Indiana Courts have held that "the willful, malicious criminal act of a third party is an intervening act which breaks the causal chain between the alleged negligence and the resulting harm." Fast Eddie's v. Hall, 688 N.E.2d 1270 (Ind. Ct. App. 1997). In Fast Eddie's, while drinking together at the bar, the victim and her assailant became intoxicated around the same time and after leaving the bar, the victim was kidnapped, sexually assaulted, and murdered by the intoxicated assailant. The Court held that "the tavern could not have reasonably foreseen this series of events which culminated in [victim's] unfortunate death." Id. at 1274. The Court reasoned that despite the gruesome nature of the murders, "a willful, malicious criminal act of a third party . . . breaks the causal chain between . . . negligence and the resulting harm." Id. Unlike the murderer in Fast Eddie's, Mr. Nigma's actions were not a "willful, malicious criminal act" because he was too intoxicated to possess the intent necessary to generate a criminal motive necessary to commit a criminal act and therefore "break the causal chain" of proximate cause.

In Fast Eddie's, the Court furthered this logic by distinguishing all potential automobile accidents from "intentional acts of volition which are the result of an assailant's deliberate design." Id. at 1275. While the bar in Fast Eddie's was not held liable to the victim's family, the Court views proximate cause as broken only if the committed acts were intentional and therefore criminal. Mr. Nigma's actions were not intentional and are a clear exception to this rule because unlike the intoxicated killer in Fast Eddie's, Mr. Nigma lacked the capacity to possess any intent in his intoxicated state, so much so that he does not recall any motives, feelings or desires after he consumed excess alcohol. (Depo. Nigma at 4.)

While the Court's definition of criminal acts in Fast Eddie's would not include Mr. Nigma's actions, an earlier Court ruling on Indiana's Dram Shop Act further distanced criminal intent from intoxicated drivers. The Court held that "an intentional assault, however, is quite unlike an automobile accident . . . an assault is not an unintended, chance consequence of an alcohol-induced physical impairment." Welch v. Railroad Crossing, Inc., 488 N.E.2d 383 (Ind. Ct. App. 1986). With this language the Court has clearly concluded that instances exist in which intoxicated individuals lack the capacity necessary in order to possess criminal intent.

Application of this conclusion would clearly deem Mr. Nigma to have lacked the capacity necessary to possess criminal intent and in lacking this intent his actions could not break the casual chain of proximate cause. The harmful results of intoxication in Welch were the primary focus of the discussion and the Court allowed a jury to determine whether or not proximate cause existed, allowing the case to proceed on the basis that intoxicated drivers behind automobile accidents can lack criminal intent.

More recently in Booker v. Morrill, 639 N.E.2d 358 (Ind. Ct. App. 1994) the Court found a tavern liable under the Dram Shop Act for damages caused by a man who operated a motor vehicle under the influence of alcohol. Despite his intoxication and initial sober desire to become intoxicated, "the evidence was insufficient to establish as a matter of law that [the intoxicated man]'s conduct was intentional." Id. While Mr. Nigma desired to become intoxicated by ordering his drinks, he did not know what happened once too many drinks were served and lacked any intent that may break the causal chain of proximate cause resulting from his actions after becoming intoxicated. Based on "evidence presented" in Booker the Court concluded that "the trier of fact could reasonably have drawn the inference that Morrill's intoxication so impaired his ability to drive that he was unable to control his vehicle and was therefore involved in an accident which resulted in his death. Sufficient evidence exists to establish the element of proximate cause." Id. Mr. Nigma's intoxication is no different than the intoxication in Booker; the action against a tavern was under the Dram Shop Act, both involve the intoxicated use of a motor vehicle as potentially breaking the proximate causal chain and yet in both our case and Booker, "sufficient evidence exists to establish the element of proximate cause" and a "trier of fact could reasonably" draw the conclusion that the proximate cause exists without any causal break from Mr. Nigma's actions. Additionally relevant to the Court's discussion, the plaintiff wife in Booker recovered for damages from the tavern as a result of satisfying both the actual knowledge and proximate cause requirements under the Dram Shop Act among facts very similar to those in Mrs. Kyle's present situation.

Mr. Nigma lacked the intent to target the Kyles in a manner that may break the causal chain of proximate cause. Mr. Nigma may have presented opposition but he did so while intoxicated, all while lacking a fixed target that would communicate any intent to this Court. The weather conditions were poor (Depo. Kyle Ex. 1.), he struck other cars (Depo. Kyle at 19.), he struck a mailbox (Depo. Kyle at 20.), and he was on the wrong side of the road. (Depo. Kyle Ex. 2.) These actions strongly demonstrate that Mr. Nigma was too intoxicated to focus or possess any intent upon one target at all. For this reason and the reasons stated above, accordingly, Mr. Nigma's actions lacked criminal intent and lacked any intervening cause that would break the causal chain of proximate cause and Mr. Nigma's intoxication was the proximate cause of death, injury and damages.

CONCLUSION

Mrs. Kyle meets the requirements for actual knowledge and proximate cause and thus is entitled to recovery for her claim under Indiana's Dram Shop Act. The bartender continually served Mr. Nigma alcohol over an observable period of time and the bartender knew of multiple factors indicating Mr. Nigma's intoxication, both of which satisfy the actual knowledge requirement. Additionally, Mr. Nigma's intoxication was the proximate cause of death, injury and damages because Mr. Nigma's intoxication was the foreseeable and direct cause of the accident involving Mrs. Kyle's injuries and he did not commit any act that breaks the causal chain of proximate cause, thus satisfying the proximate cause requirement. Because Mrs. Kyle meets the two elements required under the Dram Shop Act and has clearly demonstrated a genuine issue of material fact, the Court should deny defendants' motion for summary judgment and direct plaintiff's complaint to proceed before a jury trial.

March 12, 2008 ___________________________

Michael E. Gumprecht
GUMPRECHT AND PARKS, P.C.
3343 Peachtree Rd. NE # 1600
Atlanta, GA 30326

Certification of Service

I hereby certify that on March 12, 2008, a copy of "**MEMORANDUM IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT"** was mailed to defendant's counsel as follows:

By First-Class Mail

B. P. Sledge (Bar No. 55555)
Hammer, Hammer, & Hammer
202 Bovine Circle
Gotham, Indiana 46401
(219) 234-5678
Counsel for Defendant

____