RENDERED: October 10, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001453-MR

JESSICA DIERIG, AS LEGAL GUARDIAN FOR
RICHARD DIERIG — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 00-CI-000993

SHAYA, INC.;
ANGIE FRANCIS MAHONEY; and
TIMOTHY MAHONEY, SR.
— APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND KNOPF, JUDGES.

KNOPF, JUDGE: Shortly after 11:00 P.M. on March 22, 2000, twenty-year-old Rachel Taylor attempted to make a left turn in her pickup truck across the west-bound lane of U.S. highway 42 into a Shell station in Boone County. Intoxicated at the time, Taylor failed to see Richard Dierig on his west-bound motorcycle

and turned directly in front of him. In the ensuing collision Dierig suffered catastrophic injuries, including brain damage, which have left him permanently disabled. In August 2000, Dierig's legal guardian, his daughter Jessica, brought suit on his behalf against several individuals and businesses who, she alleged, during the afternoon and evening of March 22, 2000, negligently provided the underaged Taylor with alcohol.

By order entered August 27, 2001, the Boone Circuit Court entered summary judgment in favor of three of the defendants. Angie Mahoney (formerly Angie Francis), a friend Taylor visited that afternoon, had not been negligent, the court ruled, in failing to prevent Taylor from drinking beer during her visit and that failure was not a cause of the accident; Timothy Mahoney, Sr., the owner of the premises where Francis and Taylor visited, had not been negligent in failing to prevent Taylor's drinking during the visit; and Shaya, Inc., the owner of the Shell station near which the accident occurred, had not been shown to have contributed to Taylor's intoxication by allegedly having sold beer to her earlier that evening. It is from these rulings that Dierig has appealed. She contends that her claims against these defendants raise questions of fact and should be submitted to a jury. We disagree.

As the parties have noted, summary judgment is inappropriate unless the movant demonstrates that with respect

to a dispositive aspect of the case there is no genuine issue of material fact.[1] Both the trial court and this Court assess such motions, not by weighing the evidence, but by reviewing the record in the light most favorable to the opposing party.[2]

Viewing the record in favor of Dierig, therefore, it appears that Taylor and a co-worker, Sharon Sandusky, left work at the Waffle House on U.S. highway 42 at about 2:30 in the afternoon on March 22, 2000, and decided to visit Taylor's friend Angie Francis, who was staying with her boyfriend, Timothy Mahoney, Jr., at the home of Timothy's father, Timothy, Sr. On the way to Francis's, Sandusky, who was twenty-two, purchased a six-pack of beer. The women visited for about two-and-a-half to three-and-a-half hours, during which time Taylor drank five of the beers from the six-pack and may have drunk a can or two of beer from the Mahoney's refrigerator. Francis disapproved of Taylor's drinking and told her so, but did not try forcibly to prevent it nor did she evict Taylor from the premises. Neither Timothy Jr. nor Timothy Sr. was present or had any knowledge of Taylor's uninvited visit.

Following their visit with Francis, Taylor and Sandusky went to a restaurant where, without being carded,

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[1] Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991).

[2] *Id.*

Taylor consumed two more beers. The women then stopped at the Shell station for gas. According to Sandusky, Taylor asked her to buy more beer at the Shell station, and, when Sandusky refused, entered the store and soon emerged with a bag the size and shape of a forty-ounce bottle of beer. Sandusky never saw the contents of the bag, however, nor did she see Taylor remove anything from it, and she and Taylor parted for the evening soon thereafter, at about 7:30 or 8:30 P.M. Taylor apparently visited with co-workers at the Waffle House and then went home and took a brief nap. Between 10:30 and 11:00 P.M. she persuaded the doorman of a bar to admit her notwithstanding her lack of identification and drank at least another beer. She then left the bar and was on the way to the Shell station for cigarettes when she collided with Dierig. Two tests of her blood alcohol level at the scene of the accident produced results of .137 and .15.

Without citation to any pertinent authority, Dierig contends that Mahoney Sr. negligently entrusted his home to Angie Francis. Francis, she alleges, had twice been convicted of DUI. She does not allege that Mahoney knew or should have known that fact, nor does she explain how that fact could have led Mahoney to foresee Taylor's visit or her irresponsible behavior during and following the visit. Dierig's claim against

Mahoney is patently meritless; the trial court did not err by dismissing it.

Dierig bases her claim against Francis on KRS 244.085(3) and Boone County Ordinance Chapter 112 Section 01. The statute provides in pertinent part that "[n]o person shall aid or assist any person under 21 years of age in purchasing or having delivered or served to him or her any alcoholic beverages." The statute refers to retail delivery and service and was not intended to apply to a social host's service of a guest. Even if the statutory language could be stretched to that extent, moreover, the record is clear that Francis opposed Taylor's drinking and in no way aided or assisted it.

The county ordinance provides that

> [n]o person being the owner, occupant or otherwise in possession of any property located in the county, shall knowingly allow any person under the age of 21 years, except members of his or her immediate family (spouse or children), to remain on such property while in the possession of any alcoholic beverage or while consuming any alcoholic beverage.

Dierig contends that Francis violated this ordinance and that the violation constitutes negligence per se. Although the trial court doubted that Francis was negligent, it ruled that even if she was her negligence could not be found a proximate cause of Dierig's injury some five or six hours later.

We agree with Dierig that Francis, an occupant of the Mahoney home, likely violated the ordinance by allowing Taylor, whom she knew to be underage, to remain on the property while possessing and consuming several beers. We further agree with Dierig that where, as was clearly the case here, the plaintiff is one of the persons intended to be protected by an ordinance and where the harm he has suffered is the harm the ordinance was enacted to prevent, violation of the ordinance amounts to negligence towards the plaintiff.[3] There is no liability for negligence, however, unless the negligence was a proximate cause of the plaintiff's injury,[4] and we agree with the trial court that Francis's negligence cannot be deemed a proximate cause in this case. Too much time passed between Francis's negligence and Dierig's injuries, and too many other causes intervened. In particular, Taylor's consumption of alcohol immediately prior to the accident supersedes whatever lingering effect there may have been from the beers she drank at the Mahoney residence at least five hours previously.

The trial court ruled that Dierig's claim against Shaya, Inc. failed because Dierig had proffered only speculative

[3] Louisville Taxicab & Transfer Company v. Holsclaw, Ky., 344 S.W.2d 828 (1961); Laughlin v. Lamkin, Ky. App., 979 S.W.2d 121 (1998); Alderman v. Bradley, Ky. App., 957 S.W.2d 264 (1997).

[4] Louisville Taxicab & Transfer Company v. Holsclaw, *supra;* Laughlin v. Lamkin, *supra.*

evidence that Taylor had purchased beer from the Shell station and no evidence that she had consumed it. Dierig attempted to overcome this gap in her proof by tendering a letter from Dr. James O'Donnell, a pharmacologist. Dr. O'Donnell opined, without explanation, that "Rachel Taylor would have had to have consumed all or part of the 40 oz. beer that she purchased from the Shell station." The trial court discounted this letter because the Doctor had based his opinion on an assumption—that Taylor purchased beer from the Shell station—that the record did not support. We agree with the trial court that the evidence implicating Shell in Taylor's intoxication—Sandusky's assertion that Taylor purchased something in the store the size of a forty-ounce beer bottle and the doctor's unelaborated assertion that Taylor must have consumed the purported beer—amounts to nothing more than conjecture and would not support a judgment against Shaya.

In sum, Dierig's claims against Timothy Mahoney, Sr., Angie Francis Mahoney, and Shaya, Inc., were properly dismissed. Dierig failed to proffer substantial evidence that Timothy Mahoney or Shaya was negligent and failed to proffer substantial evidence that Angie Francis Mahoney caused Dierig's injuries. Accordingly, we affirm the August 27, 2001, order of the Boone Circuit Court.

ALL CONCUR.

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