IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SUSAN C. SHEA, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF CHRISTOPHER M. SHEA, AND AS PARENT AND NEXT FRIEND OF CHRISTOPHER M. SHEA, JR. AND ELIZABETH L. SHEA, MINORS, Plaintiffs,	)	
v.	)	C.A. No. 05C-07-224-PLA
KATHRYN H. MATASSA, XL GROUP, LTD., a Delaware corporation, CHRISTOPHER JOHN BISAHA, and JOHN DOE, Defendants.	)	

Submitted: January 5 2006
Decided: January 10, 2006

UPON DEFENDANTS XL GROUP, LTD, CHRISTOPHER JOHN BISAHA AND JOHN DOE'S MOTION FOR JUDGMENT ON THE PLEADINGS
GRANTED.

Richard A. DiLiberto, Jr., Esquire and Jennifer M. Kinkus, Esquire, attorneys for the Plaintiffs.

C. Scott Reese, Esquire and Noriss E. Cosgrove, Esquire, attorneys for Defendant, Kathryn H. Matassa.

Jeffrey A. Young, Esquire, attorney for the Defendants, XL Group, Ltd, Christopher John Bisaha and John Doe.

ABLEMAN, JUDGE

This is a wrongful death action following the tragic death on July 18, 2004 of Christopher M. Shea, whose car was struck head-on by a vehicle driven by Philip M. Healy. At the time of the accident, Healy's blood alcohol level was more than three times the legal limit. Healy, who also died in the accident, had been drinking alcoholic beverages at Arena's Bar & Deli in Rehoboth Beach, Delaware. Plaintiffs, the wife and minor children of Christopher Shea, have filed suit against Healy's sister, Kathryn H. Matassa, alleging gross negligence in failing to prevent her brother from driving on the public roadways. The Sheas' have also sued XL Group Ltd, the owner of Arena's Bar & Deli, as well as its employees, for gross negligence in serving alcohol to an intoxicated individual knowing that he was going to be driving a vehicle on the public roadways after leaving the bar.

All defendants, with the exception of Kathryn Matassa, as operators and/or employees of Arena's Bar, have filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Superior Court Rules. The ground for the motion is that the Delaware Courts have never recognized either a statutory or a common law cause of action against a "tavern owner" for injuries suffered by third parties caused by the off-premises actions of an intoxicated patron. As will be outlined hereafter,

a review of the Delaware Supreme Court precedents reveals that the State's highest court has consistently adhered to the principle that creation of such a claim is a legislative rather than a judicial function. This Court, as a trial court, is duty bound to accept and follow the rulings of the Delaware Supreme Court. The defendants' Motion for Judgment on the Pleadings is therefore **granted**.

Standard of Review

In considering a Motion for Judgment on the Pleadings, this Court must accept all well pleaded allegations of the complaint as true and assume the presentation of evidence sufficient to support those allegations.[1] Furthermore, a Motion for Judgment on the Pleadings will not be granted if the plaintiffs may recover under any conceivable set of circumstances susceptible of proof under the complaint.[2]

Statement of Facts

On July 17, 2004, after attending the funeral of a close friend in Wilmington, Delaware, Healy drove to his sister, defendant Matassa's, vacation home in Longneck, Delaware. Five days earlier Healy had returned from the South Pacific and was still suffering from residual "jet lag."

[1] *Harman v. Masoneilan Int'l., Inc.*, 442 A.2d 487 (Del. 1982).
[2] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952).

After consuming alcoholic beverages at Matassa's home, at approximately 11:30 p.m. Healy drove to defendant XL's business, Arena's, arriving at about midnight on July 18, 2004. While there defendant consumed several more alcoholic beverages served by employees of Arena's, including Christopher Bisaha and an unidentified agent of XL.

In the early morning hours of July 18, 2004 Healy left Arena's Bar and drove north on Route 1 in Sussex County, Delaware, where he caused an accident in which a young woman was injured. Healy fled the scene, crossed the grass median, and continued going north in the southbound lane. After traveling in the wrong direction at a high rate of speed, Healy crashed into a Delaware State Police vehicle operated by Corporal Christopher Shea. Cpl. Shea was transported to the Milford Memorial Hospital where he was pronounced dead at 2:54 a.m. July 18, 2004.

Healy also did not survive. Upon autopsy it was determined that Healy's blood alcohol concentration was .336, more than four times the legal limit.

Contentions of the Parties

Defendants XL Group Ltd, Christopher John Bisaha, and John Doe have filed a Motion for Judgment on the Pleadings on the ground that neither the Delaware Courts nor the Delaware Legislature have recognized either a statutory or common law cause of action against a tavern owner for injuries suffered by third parties as a result of the tortuous act of an intoxicated patron.

In response, Plaintiffs contend that it is time that the Delaware Courts, and specifically this trial court, recognize that our modern law requires the "safe, responsible service and consumption of alcoholic beverages." While acknowledging that the Delaware Courts have in the past declined to create a common law cause of action against a tavern owner, they urge this Court to do so, even in the absence of legislative action.

In support of their request, Plaintiffs submit that the Delaware General Assembly has in recent years enacted or amended legislation to prevent the irresponsible and inappropriate service of alcoholic beverages,[3] has abolished the Alcoholic Beverage Control Commission and created the position of Alcoholic Beverage Control Commissioner to focus primarily on public safety,[4] and has reduced the legal blood alcohol concentration limit from .1 to .08 for the offense of driving under the

[3] 4 Del.C. §1201-1208.
[4] 4 Del.C. §301, 304(a)(1) et seq.

influence.[5] These statutory actions, they contend, are illustrative of this State's growing concern for the safety of its citizens as it relates to the responsibility of commercial servers of alcohol to ensure that their patrons are served in a responsible and appropriate manner.

In addition, plaintiffs' brief is replete with data and statistics supporting the efficacy and advantages of either dram shop legislation or the judicial acceptance of such a cause of action, particularly in Delaware.[6] For instance, plaintiffs attach a recent local newspaper article concerning the kick-off of this year's Mothers Against Driving Drunk campaign, which reveals 53 deaths thus far in 2005, as compared with 46 drunken driving deaths in Delaware in 2004. They argue that a 2002 report by MADD reveals that Delaware's "alcohol related fatality trend is one of the deadliest in the nation."

While acknowledging the Delaware Supreme Court's consistent refusal to recognize a common law cause of action against a tavern owner, plaintiffs point out the effectiveness of dram shop laws in diminishing alcohol-related traffic injuries and deaths. They point to research and studies that demonstrate that the presence of dram shop laws in a state can reduce motor vehicle deaths by about ten percent,

[5]21 Del.C. §4177(a).
[6]The Court notes that these data and statistics constitute matters outside the pleadings. However, because these offerings cannot change the law or the outcome in this case, the motion will not be converted to one for summary judgment.

and that these laws increase a bar's level of precaution in serving obviously intoxicated patrons. In so doing, plaintiffs contend that the Supreme Court's reliance upon the General Assembly's greater accessibility to empirical data as a rationale for yielding to that body for such public policy decision-making is no longer valid since the data is now equally available to courts of law via the internet and electronic research.

Lastly, plaintiffs implore this Court to concede that the traditional rule of non-liability for tavern owners – which may have been realistic at the turn of the century – is now antiquated, illogical, and anachronistic in light of the potential for death and destruction inherent in the high speed automobile. In an effort to appeal to this Court's commitment to public safety and responsible use of alcohol and automobiles, plaintiffs strongly urge this trial court to disregard Delaware Supreme Court decisions that have consistently refused to recognize a cause of action against a commercial vendor of alcohol. Plaintiffs argue that, although the Supreme Court has repeatedly deferred to the legislative branch of government, stating that "the creation of a cause of action against one who is licensed to sell alcoholic beverages . . . involves public policy considerations which can best be considered by the General Assembly," [7] the time is ripe for this Court to take action. Plaintiffs urge this Trial

[7] *Wright v. Moffitt*, 437 A.2d 554, 556 (Del. 1981).

Court to follow the example of courts in other jurisdictions that have created common law dram shop liability even in the absence of statutory enactments by their state legislatures.

Discussion

There is no dispute in this case about the present state of the law in Delaware with respect to the liability of a tavern owner or operator to an individual who is injured by the actions of an intoxicated driver who was served by the tavern's employees. The parties concede that the Delaware Supreme Court has consistently held that there is no common law liability under Delaware law.[8]

In *Wright v. Moffitt*, the Court declined to impose liability on the owner of a bar for injuries sustained by the intoxicated person himself when after leaving the tavern and attempting to walk across the highway was struck by an automobile. The Court ruled that the creation of a cause of action against one who is licensed to sell alcoholic beverages must be left to the General Assembly.

Eight years later, in *Samson v. Smith*, the Delaware Supreme Court reaffirmed with approval its rationale in *Wright* and again declined to recognize a cause of action against a tavern owner for injuries to

[8] *Wright* 437 A.2d at 555-6; *Samson v. Smith*, 560 A.2d 1024 (Del. 1989); *Oakes v. Megaw*, 565 A.2d 914 (Del. 1989).

innocent third parties caused by an intoxicated patron. The Court noted in *Samson* that the concerns expressed in *Wright* had broader application than the identity of the plaintiff and that "[t]he policy question regarding the propriety of judicial creation of a cause of action in an area subject to specific statutory regulation, is the same today as it was when *Wright* was decided. . ."

Similarly, in *Oakes v. McGaw*,[9] the Delaware Supreme Court refused to carve out an exception to allow for suit against a tavern owner in a case where the tavern served alcohol to a minor who then drove while intoxicated, injuring a third party. The Court noted that "the policy question regarding the propriety of the judicial creation of a cause of action in an area subject to specific statutory regulation," had not changed since *Samson* was decided, irrespective of the patron's age. In so doing, the Court reiterated that "if there is to be a legal basis for imposing such liability in Delaware, its origin must be an act of the General Assembly."[10]

The Court persisted in its traditional deference to legislative action -- or inaction -- in this area in the case of *Acker v. Cantinas*.[11] In *Acker*, an intoxicated driver killed an innocent plaintiff after consuming at least

[9] 565 A.2d 914 (Del. 1989).
[10] *Id* at 917.
[11] 586 A.2d 1178 (Del. 1991).

twelve beers during a bus trip to, from, and during a baseball game that was sponsored by the defendant tavern. The Supreme Court again recounted its adherence to its view previously expressed in *Wright*, *Samson* and *Oakes* as follows:

> Delaware has a legitimate interest in preventing the deaths, such as Michael Acker's, and the carnage which is caused on its roadways by drunk drivers. *Brank v. State*, Del. Supr., 528 A.2d 1185, 1190 (1987). This Court has repeatedly stated that, "[w]e do not suggest that Dram Shop liability, or a responsibility akin to it, is undesirable public policy or that adoption in Delaware would lend to illogical or unfair results. On the contrary, we think that a law which imposes some such responsibility on a licensee who willfully or carelessly serves alcohol to an intoxicated patron has much to commend it." *Wright v. Moffitt*, 437 A.2d at 556; *Samson v. Smith*, 560 A.2d at 1027; *Oakes v. Megaw*, 565 A.2d at 916.
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> However, the public policy which precludes the judicial recognition of a cause of action in an area subject to specific statutory regulation, is the same today as it was when *Wright* was decided many years ago. It has not changed since *Samson* and *Oakes* were decided more recently. *See Oakes v. Megaw*, 565 A.2d at 916 (quoting *Samson v. Smith,* 560 A.2d at 1027). "[T]he General Assembly is in a far better position than this Court to gather the empirical data and to make the fact finding necessary to determine what the public policy should be as to a Dram Shop law, and the scope of any such law." *Wright v. Moffitt*, 437 A.2d at 556 (citations omitted).[12]

[12] *Acker*, 586 A.2d at 1181.

Thus, in each of the foregoing dram shop cases, the Delaware Supreme Court has remained steadfast in declining to recognize either a direct or a third-party common law cause of action for personal injuries against a tavern owner. Indeed, the parties cannot dispute the fact that the Supreme Court has consistently and historically appealed to the General Assembly to address the public safety concerns raised here.

Notwithstanding the high Court's frequent appeals to the General Assembly, there has been a lack of legislative response to the judicial invitation to impose responsibility on a tavern owner by statute. The parties do not dispute this fact. Although Plaintiffs have identified for this Court various enactments by the Delaware General Assembly concerning the responsible service and consumption of alcohol since the Supreme Court decision in *Wright*, it is undisputed that there has been no legislative creation of a dram shop act in Delaware. And, although several Delaware General Assemblies have had the opportunity to respond to this perceived need, Delaware still does not recognize such a statutory cause of action. This is so even though the commercial dispensing of alcohol is otherwise highly regulated by the State.

Plaintiffs do not attempt to distinguish the case at bar from the Delaware Supreme Court prior precedents, however tragic the facts may be in this instance. Indeed, the gruesome death of a police officer in the

line of duty caused by a driver whose blood alcohol concentration was nearly four times the legal limit is certainly ample justification for attracting the Court's attention on this issue and there is little doubt that such a statute would serve the best interests of the citizens of Delaware. Plaintiffs also do not provide any explanation or justification for urging this Court to act in a manner that is contrary to Delaware Supreme Court decisions. Instead, Plaintiffs ask this Court simply to disregard, ignore, or otherwise overrule settled Delaware case law by appealing to this Trial Court's sensibilities and sympathies regarding the horrific facts of this case. They request this Court to recognize the modern trend toward enhancing public roadway safety, due in large part to the campaigns of organizations like MADD, and the overwhelming majority of states that do recognize liability on the part of tavern owners.

All of the statistical, historical, public policy, and safety arguments offered by plaintiffs would be relevant only if this trial court had the authority to consider it. This issue, which is one of *stare decisis*, was addressed only perfunctorily in the plaintiffs' response. In fact, while acknowledging that the Delaware Supreme Court has already decided this issue, and has time and again declined to impose dram shop liability, the plaintiffs ask this trial court to ignore or disregard those precedents as outmoded or unfair, and decide this case based on its own view of what the law ought to be. Notwithstanding Plaintiffs' persuasive,

and even sympathetic, policy arguments, it is amply clear to this Trial Judge that the Delaware Supreme Court has already decided this issue on several occasions and these precedents prevent me from making an independent finding. In short, I am duty bound to follow the law as pronounced by our State's highest court.

As explained above, the Delaware Supreme Court has repeatedly declined to create a cause of action for dram shop liability as early as the *Wright* case in 1981 and twice again in the *Samson* and *Oakes* cases in 1989. And while it has expressed its desire for the creation of tavern owner liability, the Delaware Supreme Court has consistently appealed and deferred to the General Assembly for such action. Consequently, this Court is not in a position to discard *Samson* and its predecessor rulings as an anachronism past which our standards of highway safety and of consumption of alcohol have evolved during the fifteen years since it was decided.

Despite the modern emphasis upon the prevention of highway carnage by prohibiting intoxicated individuals from driving, despite the heightened enforcement of Delaware's drunk driving laws, despite the Delaware legislature's 2004 amendment to Section 4177(a) of Title 21 reducing the legal blood alcohol concentration limit from .10 to .08, despite the fact that courts in other jurisdictions have created common

law dram shop liability even in the face of inaction by their state legislatures, despite the fact that Delaware is in a very small minority of states that do not recognize dram shop liability[13], and despite the plaintiffs' effort to persuade this Court that *stare decisis* must yield to correct a case wrongly decided – in short, despite all the facts and law available to me – I cannot conclude that it is within the power of a trial court to create a new common law cause of action that contradicts a directly applicable Supreme Court case. I simply cannot agree that the fact that our Supreme Court has recognized that "the common law must not remain static – and is a developing body of jurisprudence"[14] is an invitation to the trial courts to ignore otherwise binding decisions merely because some time has passed since they were decided. Nothing that Plaintiffs have argued either expressly or impliedly abdicates the Delaware Supreme Court's singular authority to overrule its prior cases or exempts lower courts from generally applicable principles of *stare decisis*. To find otherwise would be a dangerous usurpation, not only of State Supreme Court authority, but also of the legitimate right of elected legislatures to create causes of action by statute.

This principle does not mean that lower courts should not decide questions of first impression, or overrule their own precedents or those of lower courts. It does mean, however, that lower courts, and especially

[13] 42 states and the District of Columbia have acted to allow dram shop liability.
[14] *Aizupitis v. State*, 699 A.2d 1092, 1094 (Del. 1977).

trial courts, may not consider evolving social standards to draw their own conclusions on issues about which our Supreme Court has already directly spoken.

As of this time, the Delaware Supreme Court has held that claims by injured third parties against tavern owners or employees for injuries caused by intoxicated drivers who had consumed alcohol at the tavern are not recognized in Delaware, and *stare decisis* bars this court from ruling otherwise. It is thus unnecessary, even in light of "empirical data" showing the effectiveness of dram shop laws in decreasing alcohol-related traffic injuries and deaths, for this Court to reach the issue of whether the time is ripe to impose such common law liability. The Delaware Supreme Court -- or more appropriately, the Delaware legislature -- must make that determination either in this or another case on appeal. This Court will, of course, be duty bound to follow that opinion. For now, however, the Court is just as duty bound to follow *Samson*.

Conclusion

For all of the foregoing reasons, this Court holds that Plaintiffs do not have either a common law or a statutory cause of action against the Defendants XL Group, Christopher Bisaha, and John Doe. Accordingly, these Defendants' Motion for Judgment on the Pleadings pursuant to Superior Court Rule 12(c) is hereby **granted**.

IT IS SO ORDERED.

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PEGGY L. ABLEMAN, JUDGE

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