

## **MODERN MYTHS**

**MYTH #1: The disease of alcoholism is caused by drinking alcohol.**

**MYTH #2: Alcoholism is caused by stress.**

**MYTH #3: Alcoholism is the symptom of an underlying psychological disorder.**

**MYTH #4: Alcoholics must drink to excess on a daily basis.**

**MYTH #5: Alcoholism is cured by not drinking.**

### **Alcoholism is:**

**a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by continuous or periodic impaired control over drinking, preoccupation with drug/alcohol, use of alcohol despite adverse consequences, and distortions in thinking, most notably denial.**

**There is no cure for alcoholism; however, with proper treatment the disease can be placed in remission.**

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WANDA M. POPER, EXECUTRIX OF THE ESTATE OF HELEN J. MYERS, DECEASED v. JIM LAYE'S TAVERN, INC., t/d/b/a JIM'S TAVERN, C.P. Franklin County Branch, Civil Action - Law, No. A.D. 1996-213

*Poper V. Jim Laye's Tavern*

*Dram Shop action; Pennsylvania Liquor Code, 47 P.S. section 4-493(1); circumstantial evidence of drunkenness; summary judgment denied*

1) Summary judgment will not be granted where oral testimony alone is offered to show the absence of a genuine issue of material fact; summary judgment cannot be used to provide for trial by affidavit or deposition.

2) Dram Shop liability depends upon manifestations of intoxication, not on blood alcohol level per se; outward, visible signs of drunkenness are the basis of liability, not medical diagnoses.

3) Liability does not depend upon direct eyewitness evidence that an individual was served alcohol while visibly intoxicated, but may be established through circumstantial evidence.

4) Although Pennsylvania courts have refused to find the existence of a material fact as to visible intoxication solely on the basis of generalized or speculative "relation back" testimony, where a plaintiff produces sufficient circumstantial evidence, the case should proceed to trial where the jury then grants that evidence whatever weight it deems appropriate.

5) Summary judgment will be denied in a dram shop action where the accuracy of the drunk driver's deposition and the depositions of witnesses who observed the driver at the bar before the accident who testified the driver was not visibly intoxicated are contradicted by toxicological evidence that the driver would have been visibly intoxicated at the bar based on both chemical analysis and the statements of witnesses at the accident scene.

*David L. Lutz, Esquire, Counsel for Plaintiff*

*David C. Cleaver, Esquire, Counsel for Defendant*

### **OPINION AND ORDER**

Herman, J. June 30, 1999:

### **INTRODUCTION**

Before the court is a motion for summary judgment filed by the defendant Jim Laye's Tavern, Inc., t/d/b/a Jim's Tavern (hereinafter "Jim's Tavern") to a complaint

filed by the plaintiff Wanda M. Poper, Executrix of the Estate of Helen J. Myers. The plaintiff is proceeding under a dram shop theory of liability pursuant to the Pennsylvania Liquor Code, 47 P.S. section 4-493(1) which prohibits an establishment from serving alcohol to visibly intoxicated persons.<sup>1</sup>

## DISCUSSION

Helen J. Myers was killed when the vehicle in which she was a passenger was struck by a vehicle driven by one Gary M. Burkett. The accident occurred shortly after Burkett left Jim's Tavern where he had consumed alcohol. Burkett's blood alcohol content was .206% at 45 minutes after the accident. The defendant argues the plaintiff has failed to produce sufficient evidence that Burkett was visibly intoxicated when he was served his final drink by an employee of Jim's Tavern. The plaintiff responds that questions of fact remain and that she has demonstrated sufficient circumstantial evidence to present the case to a jury. For the reasons which follow, the motion will be denied.

Motions for summary judgment are governed by Pa.R.C.P. 1035.2 which states:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

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<sup>1</sup>Under that section of the Pennsylvania Dram Shop Act, it is unlawful:

For any licensee or the board, or any employe, servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated...

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to the jury.

Under subparagraph (2), summary judgment is appropriate where the record contains insufficient evidence of facts to set out a prima facie cause of action or defense and therefore, there is no issue to be submitted to a jury. The party opposing the motion has the burden of coming forward with evidence which shows the existence of the facts essential to the cause of action or defense. "A non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1042 (Pa. 1996). Summary judgment is appropriate only where the facts are undisputed and only one conclusion may reasonably be drawn from those facts. All doubts as to the existence of a genuine issue of material fact must be resolved in favor of the nonmoving party and against the granting of summary judgment. *Elder v. Nationwide Insurance Co.*, 599 A.2d 996 (Pa. Super. 1991).

Oral testimony alone, either through testimonial affidavits or depositions of the movant or his witnesses is generally insufficient to establish the absence of a genuine issue of material fact, even if the affidavits or depositions are uncontradicted. *Penn Center House, Inc. v. Hoffman*, 553 A.2d 900 (Pa. 1989); *Nanty-Glo v.*

*American Surety Co.*, 163 A.2d 523 (Pa. 1932). Such evidence does not form a sufficient basis for entering summary judgment because the credibility of the testimony is a matter for the jury. *Penn Center*, supra. Summary judgment cannot be used to provide for trial by affidavit or deposition. *Troy v. Kampgrounds of America, Inc.*, 581 A.2d 665 (Pa.Super. 1990).

The following facts are not in dispute. Gary Burkett was an employee of John Douglas Beltz, owner of JDB Construction Company, a framing and remodeling business. Burkett and Beltz, who were close friends, worked together on a framing job on September 20, 1995 from 7:00 a.m. until 4:00 p.m. Burkett consumed no alcohol during the work day. After putting the equipment away, the two men drove in separate cars to Jim's Tavern, arriving between 4:15 and 4:30. Burkett sat at a table near the front entrance with Beltz for a few minutes, then went to a separate room to shoot pool for approximately one hour. He returned to the table at approximately 5:55 p.m. where Sterling Thomas, Melvin Gelsinger, Curt Leydig and Beltz were then sitting. At approximately 6:05 p.m. Burkett said goodbye to Beltz and left the tavern. Burkett had nothing to eat while in the tavern. The accident which killed Helen Myers occurred at approximately 6:29 p.m. According to the police report, several witnesses observed Burkett's vehicle driving erratically and at a high speed and using the center turning lane for passing. Pennsylvania State Troopers Robert Reed and Joseph Davidson observed Burkett at the scene. An injured passenger in the Myers vehicle, Nancy Myers, observed Burkett as she rode in the ambulance to the Chambersburg Hospital with Burkett who was also injured. The alcohol content of Burkett's blood at 7:15 p.m., 45 minutes after the

accident, was .206%. His height is 6'1" and his weight was approximately 164 pounds at the time.

Counsel filed the following stipulation: the plaintiff has no eyewitnesses who will testify that Burkett was visibly intoxicated while on the premises of Jim's Tavern on September 20, 1995. The plaintiff's only eyewitnesses who will testify as to Burkett's intoxication are persons who saw him after the accident occurred. Counsel also stipulated that Helen J. Myers died as a result of injuries she sustained in the accident, that Burkett was the driver of the other vehicle involved in the accident and that he was negligent in his operation of that vehicle.

The amount of alcohol consumed by Burkett and the timing of that consumption are key facts in determining whether he was visibly intoxicated when he was served alcohol at the defendant's establishment. The record contains the depositions of several persons who observed Burkett in Jim's Tavern on September 20, 1995. The record also contains the November 16, 1998 report and February 23, 1999 supplemental report of the plaintiff's expert medical toxicologist, Dr. J. Ward Donovan, M.D., as well as his deposition taken March 29, 1999. The report and supplemental report of the defendant's expert Dr. Lawrence J. Guzzardi, M.D. is also part of the record.<sup>2</sup>

Sharon Harbaugh, John Beltz, Melvin Gelsinger, Curt Leydig and Sterling Thomas testified in their October 16, 1996 depositions to having observed Gary Burkett in Jim's Tavern between approximately 4:30 p.m. and

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<sup>2</sup>Dr. Guzzardi's report and supplemental report were produced on stationary which features his various business addresses and the following terms: EMERGENCY MEDICINE \* MEDICAL TOXICOLOGY. However, he has not been deposed and his qualifications are not yet part of the record.

approximately 6:00 p.m. on the day in question. All these witnesses testified that Burkett was not visibly intoxicated at any time while on the tavern's premises.

Burkett was himself deposed on December 23, 1996. He testified he arrived at Jim's Tavern between 4:15 and 4:30. He drank one or two beers while sitting at a table with John Douglas Beltz. Burkett then went to a separate room to shoot pool for approximately 1 ½ hours. He drank another beer when he returned to the bar area. Burkett stated he drank approximately 4 beers total, with the last one consumed at approximately 6:00 p.m. Immediately before leaving the bar, he also drank a shot of Wild Turkey whiskey. The whiskey was at the table where Beltz, Leydig, Gelsinger and Thomas were sitting. Burkett testified he could not remember anything between the time he left the bar and the time he woke up at Chambersburg Hospital. His recollections about his 1 ½ hours at the bar were poor and somewhat selective.

The plaintiff seeks to prove that an employee of Jim's Tavern served Burkett alcohol while he was visibly intoxicated by using the expert testimony of Dr. Donovan. Dr. Donovan reviewed the police accident report, the witness depositions, the hospital report, the reports of Dr. Guzzardi, and an opinion letter dated January 14, 1998 of plaintiff's previous expert, G. Thomas Passananti, Ph.D., a forensic toxicologist who is now deceased.

Liability under section 4-493(1) depends upon manifestations of intoxication, not on blood alcohol level per se. Outward, visible signs of drunkenness are the basis of liability, not medical diagnoses. *Laukemann v. Commonwealth of Pennsylvania, Liquor Control Board*, 475 A.2d 955 (Pa.Commw. 1984); *Fandozzi v. Kelly*

*Hotel, Inc.*, 711 A.2d 524 (Pa.Super. 1998). Liability does not depend upon direct eyewitness evidence that an individual was served alcohol while visibly intoxicated, but may be established through circumstantial evidence. Pennsylvania courts have refused to find the existence of a material issue of fact as to visible intoxication solely on the basis of generalized or speculative expert "relation back" testimony. *Fandozzi, supra*; *Johnson v. Harris*, 615 A.2d 771 (Pa.Super. 1992); *McDonald v. Marriott Corp.*, 564 A.2d 1296 (Pa.Super. 1989); *Conner v. Duffy*, 652 A.2d 372 (Pa.Super. 1994). However, where a plaintiff produces sufficient circumstantial evidence, the case should proceed to trial where the jury then grants that evidence whatever weight it deems appropriate. *Id.* The issue before the court is whether the plaintiff has presented sufficient circumstantial evidence to create a jury question as to whether Jim's Tavern served Gary Burkett alcohol while he was visibly intoxicated.

Burkett testified that he drank 4 12-ounce beers between 4:30 p.m. and 6:00 p.m., and a shot of whiskey right before leaving the tavern at shortly after 6:00 p.m. Dr. Donovan seriously questioned that Burkett consumed only four beers based on information in the record, including: (1) witness statements as to Burkett's extremely fast and erratic driving just before the accident at 6:29 p.m.; (2) the accident reconstructionist who determined Burkett had ample opportunity to avoid the accident; (3) statements of the investigating officers who observed Burkett's staggering and unsteady gait and a strong odor of alcohol about his person at the accident scene; and (4) a blood alcohol reading of .206% at 45 minutes after the accident.

Dr. Donovan began his analysis with this last piece of information - Burkett's blood alcohol level of .206% at

7:15 p.m. - and worked backwards in order to determine whether he would have been visibly intoxicated at the time he was served his last beer by a tavern employee at approximately 6:00 p.m. Burkett's deposition indicated that his consumption of alcohol was spread out over a 1 ½ hour period during which time he ate no food. Dr. Donovan concluded that, given Burkett's weight of 164 pounds, alcohol absorption and elimination rates during that period and continuing up through the blood test at 7:15 p.m. would have been virtually identical, giving Burkett a blood alcohol content of approximately .206% both at the time of the 6:29 p.m. accident and at the time he left the bar shortly after 6:00 p.m.. Dr. Donovan steadfastly maintained that, according to accepted toxicological principles, the .206% reading is more consistent with Burkett having consumed at least 8 drinks during the 1 ½ hours.

The defendant maintains Dr. Donovan provides no question of fact for the jury because, although he opined that Burkett would have been visibly intoxicated *at the time he left the tavern*, he does not offer an opinion as to whether Burkett would have been visibly intoxicated *at the time he was served* his last drink by a tavern employee. We believe the defendant characterizes Dr. Donovan's testimony in an unduly narrow fashion.

Dr. Donovan conceded that if he removed from his analysis the whiskey consumed at approximately 6:00 p.m. (on the assumption that it was not served by the defendant's employee) and the fourth beer, Burkett's blood alcohol level at 5:30 p.m. would have been below .15%, which is a level at which a tolerant drinker may not show signs of intoxication. (Deposition of J. Ward Donovan, M.D., March 29, 1999, pp. 34-35). There are three problems with seizing upon this portion of Dr.

Donovan's testimony as a basis for summary judgment. First, because there was very little time lag between when Burkett was served his last beer and when he left the tavern (both allegedly occurred at approximately 6:00 p.m.), defendant's argument is a distinction without a difference; Dr. Donovan's opinion that Burkett's blood alcohol level at the time he left the bar was .20% would also apply to the few short minutes before his departure when he drank his last beer. Second, Dr. Donovan's concession does not in any way undercut his view that Burkett was visibly intoxicated when he was served his final beer shortly before 6:00 p.m. because what is relevant for liability is whether Burkett was visibly drunk at just before 6:00 p.m., not whether he was visibly drunk at 5:30 p.m. Third, Dr. Donovan made this concession based on defense counsel's persistent characterization of Burkett as an alcohol-tolerant individual.

The defendant's argument is based on four assumptions which are, in fact, matters of fact for the jury: (1) that Burkett drank only four beers; (2) that Burkett drank Wild Turkey whiskey right before leaving the tavern; (3) that the whiskey was not served to him by the defendant's employee; and (4) that Burkett was a chronic, heavy, tolerant drinker. As to this last assumption, there is simply no evidence in the current record that such was the case. The depositions indicate Burkett was an occasional patron at Jim's Tavern. He was there often enough to be known by several employees, but no one described him as a frequent regular patron on any fixed schedule.

As to the whiskey, its source remains unclear. Burkett is the only witness who specifically testified to having consumed it; and his credibility is very much at issue because he appears to have a selectively poor recollection

of events. Bartender Sharon Harbaugh testified she did not serve Burkett with whiskey, but none of the other witnesses aside from Burkett were specifically asked about the whiskey in their depositions. There are also significant discrepancies between the witnesses as to how many beers Burkett drank and when he drank them. It is for the jury to evaluate the credibility of these witnesses.

The defendant also argues that the testimony of witnesses who observed Burkett at the accident scene is irrelevant and inadmissible because such testimony says nothing about his visible intoxication at the time he was served his last drink by the defendant. We disagree. The testimony of those witnesses, as well as the witnesses who saw Burkett speeding and driving erratically, is part of the foundation for Dr. Donovan's opinion that Burkett would have been visibly intoxicated when last served by the tavern at approximately 6:00 p.m.. The defendant also contends Burkett's head injury and speech impediment explain his demeanor at the accident scene.<sup>3</sup> These are all factual matters which must be weighed by the jury.

Dr. Donovan's toxicological "relation back" testimony does not stand in a vacuum and is not merely generalized or speculative, as was the case in *Johnson v. Harris*. Rather, his opinion is also based on statements from witnesses who observed Burkett's driving moments before the crash and witnesses who observed him at the

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<sup>3</sup>There is no dispute that Burkett has a speech impediment, that he spoke normally on the afternoon in question, and that the plaintiff's witnesses would not have known about the impediment while hearing him speak in a slurred, incoherent manner right after the accident. Plaintiff nevertheless maintains that other aspects of Burkett's demeanor support the idea that Burkett was intoxicated at the accident scene and on the way to the hospital. The jury will have the opportunity to observe him speak and decide whether that speech could be confused with drunkenness.

scene. This constitutes sufficient circumstantial evidence to defeat the motion for summary judgment.

An appropriate Order of Court will be entered as part of this Opinion.

#### **ORDER OF COURT**

**NOW** this 30th day of June 1999, the defendant's motion for summary judgment is hereby DENIED.