Stanley v Kelly
2021 NY Slip Op 32905(U)
May 19, 2021
Supreme Court, Oneida County
Docket Number: Index No. EFCA2019-000189
Judge: David A. Murad
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At a Term of the Supreme Court held in and for the County of Oneida, in the City of Utica, New York, on 23rd day of December, 2020.

PRESENT: HON. DAVID A. MURAD,
Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONEIDA

ELEANOR STANLEY, Individually, and as Administrator of the Estate of MICHAEL STANLEY, Deceased, CHLOE STANLEY, by and through her parent and natural guardian, ELEANOR STANLEY, and AMANDA STANLEY

Plaintiffs,

v.

THOMAS KELLY, JILLIAN KELLY and BOONVILLE HOTEL, INC.,

Defendants.

DECISION

Index No.: EFCA2019-000189
RJI No.: 32-19-0220

Appearances:

For the Plaintiff:
G. Oliver Koppell, Esq.
Daniel F. Schreck, Esq.
Law Offices of G. Oliver Koppel & Associates
99 Park Ave., Suite 1100
New York, NY 10016

For Defendants Thomas Kelly and Jillian Kelly:
Thomas P. Armstrong, Esq.
Burke, Scolamiero & Hurd, LLP
7 Washington Square
P.O. Box 15085
Albany, NY 12212

For Defendant Boonville Hotel, Inc.
Michele E. DeTraglia, Esq.
DeTraglia Law Office
1425 Genesee St.
Utica, NY 13501

Defendants Thomas and Jillian Kelly (the "Kellys") and defendant Boonville Hotel, Inc. (the "Hotel") have both moved for summary judgment dismissal in this matter alleging negligent entrustment and violation of the dram shop act as against them, respectively. The Kellys also are seeking summary judgment dismissal of any cross claims alleged against them by the Hotel.

The undisputed facts include that the decedent, Michael Stanley; defendant, Thomas Kelly; and five (5) other men met at the Kellys' home on March 17, 2017; the group left the Kellys' home, with decedent driving a snowmobile owned by the Kellys; the group stopped at the Hotel and consumed alcohol there; and after leaving the Hotel the group got gas and began the return trip to the Kellys' home, at which point decedent drove the snowmobile into a concrete overpass, resulting in his death. The autopsy report indicated the cause of death was multiple traumatic injuries due to snowmobile accident with a fixed object. The toxicology report showed decedent had a blood alcohol concentration (BAC) of .16%. The Oneida County Sheriff's Department concluded that speed and alcohol were the two biggest contributing factors to the single snowmobile accident.

THOMAS KELLY'S AND JILLIAN KELLY'S MOTION TO DIMISS

Marshalling the deposition testimony of various members of the group that were snowmobiling together that night, including Mr. Kelly and the five (5) other men; together with testimony of people working at the Hotel that night; and testimony of a Sheriff's Deputy, the Kellys allege, *inter alia*:

- Decedent was at the Kellys' home when Thomas and the others arrived there on snowmobiles from Old Forge between 6:00 and 7:00 p.m.
- Decedent went inside to suit up while Thomas Kelly got his snowmobile out of the garage and warmed it up for decedent.
- No one observed decedent to have a drink in his hand at the Kellys' home and he did not appear intoxicated.
- Within an hour the group left to ride to the Hotel, which was an hour trip, during which no one observed decedent to be driving erratically or in any manner of concern; they all traveled at about 25-30 mph.
- The group arrived at the Hotel around 7:00 or 8:00 p.m. and stayed for one or two hours.

- They ordered various appetizers, a couple of beers and maybe a mixed drink.
- No one observed decedent to appear intoxicated; he was not slurring his speech; he did not have redness in his face and was not stumbling.
- The people working at the Hotel did not observe any member of the group, or any patrons in the establishment that evening, to have signs of intoxication, including the waitress that served the group and who observed decedent.
- Neither Thomas Kelly nor any other members of their group observed decedent to have any difficulty conversing or to have slurring of speech, to be stumbling, or to exhibit any other signs of intoxication at all on that day.
- After the group left the Hotel, they stopped to get gas but did not go into the gas station, and then they began the return trip to the Kellys' home, driving in single file at about 30-40 mph.
- When Thomas Kelly noticed decedent was not with the group at an intersection, he went across the road and found him, then called for help.
- Mr. Kelly and another member of the group performed CPR on the decedent until emergency personnel arrived.
- State, County and Village police all responded to the scene, with the Sheriff's office taking the lead in the investigation.
- A Deputy spoke to the members of the group and did not observe anyone, including Mr. Kelly, to be intoxicated, but he did administer a "preliminary breath test" to each one of them to make sure no one was under the influence of alcohol; everyone was allowed to leave on their snowmobiles.
- The Sheriff's report concluded decedent failed to negotiate a slight left-hand curve, decedent's snowmobile veered off to the right of the trail and impacted the concrete overpass, ejecting decedent.

The Kellys argue that plaintiffs lack standing to bring the lawsuit under a theory of negligent entrustment because decedent's intoxication acts as a bar to the derivative claims of plaintiffs. The Kellys also argue that if plaintiffs have standing, there is no evidence that either of the Kelly defendants knew or should have known that decedent was intoxicated because there were no signs of decedent's intoxication prior to the accident. As to the portion of the motion to dismiss the cross claims of the codefendant Hotel, the Kellys argue that the Hotel cannot be

indemnified for any of their own negligence and they cannot be indemnified if they are not negligent.

Plaintiffs proffer the affidavit of decedent's widow, who claims that decedent and Thomas Kelly ("Kelly") had a history of drinking to the point of intoxication while together, and that their social interactions involved alcohol on prior occasions. Marshalling the deposition testimony of Kelly and the decedent's widow, plaintiffs allege, *inter alia*,

- Kelly and decedent were friends for most of their lives (about 40 years).
- During the marriage of the Stanleys, Kelly urged decedent to socialize and drink alcohol, and there were occasions of drunkenness while the two friends were together, including as recent to the accident as the July 4th weekend of 2016.
- Kelly and decedent had gone snowmobiling together on numerous occasions that involved Kelly loaning a snowmobile to decedent.
- On the day of the subject accident Kelly sent a text that included the image of a glass of alcohol next to it and told decedent to bring a case of bottled water.
- Photos taken at the Hotel from the night of the accident show decedent holding a bottle of alcohol, smiling broadly, and in one image decedent has a reddish flush to his face, one of the other men appears to be falling over, and both Kelly and decedent appear to have pupils smaller than normal.

Plaintiffs review the findings of the medical examiner, who concluded decedent died from multiple traumatic injuries; the finding of four hundred cc's of thin, tan, brown liquid that was not digested; and the toxicology report finding decedent had a BAC of .16 at the time of his death, which is twice the legal limit for operating a vehicle; and the police report findings that speed and alcohol were the biggest contributing factors to the accident.

Finally, plaintiffs offer the opinion of a board-certified toxicologist who reviewed the evidence in the case, including the various records from the Sheriff and the Medical Examiner, the toxicology report, medical records from the emergency room, and deposition testimony of the parties and non-parties. Plaintiffs' expert indicates decedent was 44 years old at the time of the accident, was 71 inches tall, and weighed 263 pounds. Relying upon this information, decedent's zero rate of respiration, pulse and blood pressure starting at 10:54 p.m., and the toxicology results, he opined to a reasonable degree of medical certainty on four (4) issues, as follows:

1. The amount of alcohol decedent consumed to have a 0.16% BAC. Decedent "consumed at least 8.2±0.5 standard drinks prior to his death to achieve his BAC of 0.160% and 9.9 ±1.1 standard drinks if he started drinking alcohol at 8:30 p.m."
2. The BAC decedent would have had if he only consumed 2-3 beers prior to the accident. "[I]f Stanley consumed only 2-3 beers between 8:30-9:45 p.m., then his BAC at the time of the crash incident (if all alcohol consumed was absorbed into his blood) would have been 0.005-0.025 % (range = 0-0.036%). If Stanley only consumed 2-3 beers, then his maximum theoretical blood alcohol concentration (if he consumed all alcohol simultaneously with immediate absorption and distribution) would have been 0.039-0.059%." Decedent "consumed more than 2-3 beers prior to his death."
3. Decedent's stage of alcohol influence and the clinical signs and symptoms associated with his BAC at the time of the accident. Based on the 0.16% BAC, decedent "would have been in the excitement stage of alcohol influence with clinical signs of loss of judgment, impairment of perception, memory and comprehension, increased reaction time, reduced visual acuity and sensory-motor incoordination."
4. Determine whether alcohol was a cause of the crash incident. Decedent's "alcohol consumption and subsequent impairment was a cause of the snowmobile crash incident."

Plaintiffs argue that they have the requisite standing to bring the lawsuit and that there are substantial questions of fact as to whether Thomas Kelly knew or should have known the decedent was intoxicated when he let decedent use his snowmobile. On the issue of standing, plaintiffs argue that they are "innocents", with no negligence contributing to the decedent's death, while Thomas Kelly had the ability to prevent the accident; and that, in any event, decedent's estate has standing to sue for decedent's injuries. Plaintiffs argue the evidence is undisputed that decedent was drunk at the time of the accident and aver that they have contradicted the deposition testimony with unrebutted scientific evidence that decedent would have had to consume about ten drinks prior to his death and he would have been showing signs of intoxication at the time the group left the Hotel. This, according to plaintiffs, together with the proof that decedent and Thomas Kelly were planning to drink on this outing, raises a question of fact to prevent summary judgment to the Kellys.

The Hotel argues that its cross claims against the Kellys must be denied as premature because, if any of plaintiffs' claims survive summary judgment, there would continue to be a question of fact whether Thomas Kelly should have loaned the snowmobile to decedent. The Hotel maintains, however, that the decedent was never visibly intoxicated.

The Kellys' reply to plaintiffs' opposition is that the uncontradicted testimony of the entire group of friends and the bartenders was that no one observed decedent to be visibly intoxicated at any point prior to the accident and, since visible intoxication is the standard, plaintiffs cannot establish a question of fact on this issue. They argue that the toxicologist's findings are irrelevant because the standard is not decedent's BAC, but whether he was visibly intoxicated and whether Thomas Kelly knew or should have known about decedent's intoxication. Kellys further argue that the toxicologist's opinions are pure speculation and have no support in the record, pointing to a bill of $109 for appetizers and drinks for six people to be inapposite to a claim that decedent had at least 10 drinks. The Kellys further argue that the claims of decedent's past intoxication cannot establish a question of fact on his visible signs of intoxication on the night of the accident. They fault the widow's testimony as consisting of self-serving hearsay that contradicts her deposition testimony. The Kellys urge that there is no record evidence that decedent was visibly intoxicated to anyone, including the group of six friends and the two Hotel employees that were deposed.

The Kellys continue to argue in reply that neither decedent nor decedent's distributees, have standing. They agree that the case law cited by plaintiffs correctly reflects the premise that distributees can recover in other types of wrongful death cases of negligent entrustment, but propound that there's an important distinction where the voluntary intoxication of the decedent is involved, based on the premise that if the decedent could not have maintained the action for his own benefit, his estate cannot do so and neither can the distributees derivatively.

Analysis of Plaintiffs' Standing

The cause of action of negligent entrustment has been described as follows:

> "The owner or possessor of a dangerous instrument is under a duty to entrust it to a responsible person whose use does not create an unreasonable risk of harm to others... The duty may extend through successive, reasonably anticipated entrustees... The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion... To establish a

> negligent entrustment cause of action, a plaintiff must show that the defendant had some special knowledge concerning a characteristic or condition peculiar to the [person to whom a particular chattel is given] which renders [that person's] use of the chattel unreasonably dangerous... With respect to motor vehicles, an owner may be liable if [it] had control over the vehicle and if [it] was negligent in entrusting [the vehicle] to one who [it] knew, or in the exercise of ordinary care should have known, was incompetent to operate [the vehicle]". (*Graham v. Jones*, 147 A.D.3d 1369, 1371 [4th Dept 2017] [internal citations omitted] [internal quotations omitted].)

The Kellys rely on Appellate Division case law that states:

> "... plaintiffs have not directed this court's attention to any cases in which the intoxicated driver of a car, or one suing on his behalf, was allowed to recover on the theory of negligent entrustment ... Further, an intoxicated person should not generally be permitted to benefit from his or her own intoxication ... Hence, we agree with Special Term's decision that decedent's estate has no viable common-law cause of action for negligent entrustment against Carr. Since the distributees' alleged cause of action is a derivative of decedent's claim ... their claim based on the common-law theory of negligent entrustment must also fail." (*Shultes v. Carr*, 127 A.D.2d 916, 917 [3rd Dept 1987] [internal citations omitted].)

Plaintiffs question the merit of the Third Department's ruling in *Shultes*, alleging that Court made errors in reaching its decision, despite the fact the case has not been overruled. Plaintiffs urge the Court to follow more recent Third Department case law (not involving intoxicated drivers) and Fourth Department case law (where the driver was intoxicated) that:

1. denied dismissal of a negligent entrustment cause of action against a defendant who loaded a .22 caliber handgun for a woman who he knew to be depressed [on a motion to dismiss for failure to state a cause of action based on the pleadings] (*Splawnik v Di Caprio*, 146 A.D.2d 333 [3rd Dept 1989]);
2. denied summary judgment on a negligent entrustment cause of action against a building contractor that allowed plaintiff to borrow a scissors lift, based on defendant's failure to meet its burden on summary judgment on the issue of whether it knew that plaintiff was likely to use the equipment in a manner that would create an unreasonable risk of harm (*Hull v Pike Co.*, 174 A.D.3d 1092 [3rd Dept 2019]);
3. denied summary judgment on a negligent entrustment cause of action against a defendant auto dealer that allowed a customer to test drive a scooter based on questions of fact whether the dealer checked to see that the customer had a license or the necessary experience and competence to drive the scooter (*Maguire v Upstate*

Auto, Inc., 182 A.D.3d 757 [3rd Dept 2020]); and

4. denied summary judgment to a municipality on the basis that liability could be imposed where a police officer allegedly directed a drunk plaintiff to drive her boyfriend's car and she subsequently got into an accident – ruling based on questions of fact over foreseeability and proximate cause of the officer's voluntary acts (*Snyder v City of Rochester*, 124 A.D.2d 1019 [4th Dept 1986]).

Plaintiffs urge the Court to view the case as if Thomas Kelly was driving while intoxicated, and decedent was killed as a result of Thomas Kelly's operation of the vehicle. Under such circumstances, both the decedent and his family would be allowed to recover for decedent's injuries and the loss of support to the family. Plaintiffs frame the issue as the Kellys allowing the decedent to drive the snowmobile drunk, and argue it is not the same as allowing a drunk person to benefit from his voluntary intoxication.

The Court has not found any Fourth Department case law directly on point with the issues as presented in this case. *Shultes*, however, clearly states that the decedent, as an undisputedly intoxicated driver, may not recover on a theory of negligent entrustment, and neither may his distributees. Therefore, the Court is compelled to find that plaintiffs are barred from prosecuting a negligent entrustment cause of action against the Kellys.

Analysis of Negligent Entrustment Cause of Action

The parties agree that decedent was intoxicated at the time of his accident. Ironically, the Kellys seek to use decedent's intoxication as a shield to prevent them from being liable for his accident under plaintiffs' theory of negligent entrustment, while at the same time arguing that decedent did not show any visible signs of intoxication.

If plaintiffs were found to have standing, the Court would have to decide if the Kellys met their initial burden on the motion to show that Thomas Kelly did not know and could not reasonably have known that decedent was intoxicated when he allowed decedent to drive the Kellys' snowmobile. The Court finds that the Kellys met their initial burden.

On the shifted burden, plaintiffs offer the opinion of a toxicologist who opines decedent must have drank significantly more alcohol than the witnesses testified about, and would have exhibited clinical signs of intoxication based on the factors of his age, height, weight, and BAC. Plaintiffs also urge the Court to consider the long-time friendship between decedent and Thomas

Kelly and their alleged social history, as raising a question of fact on the cause of action against the Kellys. If the Court were to find plaintiffs had standing, plaintiffs' toxicologist and the testimony of the widow would not be sufficient to raise a question of fact on whether the Kellys knew or should have known decedent was not competent to drive their snowmobile on March 17, 2017.

BOONVILLE HOTEL'S MOTION TO DISMISS

The Hotel marshals the deposition testimony of the parties and non-parties in much the same manner as the Kelly defendants, as set forth above. The Hotel further alleges, *inter alia*:

- Its proprietor has owned the Hotel for more than 30 years with a liquor license that has never had any negative action against it.
- The business is more of a family restaurant than a bar and is primarily a food business.
- The employees who were working on the night of decedent's accident had worked there for 10-12 years and about 6 years, respectively.
- All employees are trained not to serve anyone who is under the influence or appears intoxicated.
- Its policy is not to serve alcohol to a person that is intoxicated.
- While at the Hotel, decedent's group ordered appetizers, a couple of beers and possibly a round of shots, with credit card receipts for $109.33 for food and some of the drinks at 9:10 p.m., and $21.00 for three shots of Jameson at around 9:31 p.m.
- Decedent consumed one of the shots of Jameson.
- Neither of the Hotel employees observed decedent to be visibly intoxicated in any manner at any time.

The Hotel argues that plaintiffs cannot prove the decedent ever exhibited visible signs of intoxication when he was served beverages at the Hotel, which is the sole relevant question under General Obligations Law § 11-101. The statements of everyone in decedent's group and the Hotel employees are consistent in that decedent did not appear to be intoxicated at any point while the group was at the Hotel.

Plaintiffs argue that they have established questions of fact over whether decedent was visibly intoxicated at the Hotel through the toxicologist's opinion and through various circumstantial evidence and testimony of various witnesses, *inter alia*:

- Employees of the Hotel were only trained for signs of intoxication at the time of hire, with no subsequent training, and the employees working on the night of decedent's accident had been working there for approx. 12 and 6 years.
- The Hotel proprietor indicated it is hard to tell if a snowmobiler is intoxicated because their faces are flushed from the cold.
- The Hotel employees almost never refused service to a patron for reason of intoxication.
- The Hotel's food and drink orders were done manually; the credit card receipts do not reflect anything paid for by cash; there are no records of other orders.
- The text messages exchanged by Thomas Kelly and decedent leading up to the evening of the accident shows an intent to go drinking and needing water for a hangover remedy.
- There is a history of decedent and Thomas Kelly getting drunk together and decedent exhibiting poor behavior as a result.
- A photo of decedent on the night of the accident shows his face is flushed and his pupils are contracted, which is a sign of his intoxication.
- The Hotel admits that decedent's group was only there for 1-2 hours and there is no evidence decedent drank any alcohol before arriving there or after leaving there.

Plaintiffs argue that any alcohol decedent consumed must have been at the Hotel; the police concluded the accident was caused by speed and intoxication; and the BAC results prove decedent must have had about 10 drinks during his time at the Hotel, in direct contravention of the testimony that he had only two or three drinks and did not appear intoxicated.

In reply, the Hotel argues that plaintiffs' opposition to the motion, which was submitted in the form of a memorandum of law, does not satisfy the requirement of proof in admissible form. On the merits, the Hotel argues that plaintiffs' memorandum of law contains unsupported statements as to the amount of alcohol decedent drank at the Hotel and whether he was visibly intoxicated that night. It avers the toxicologist's report – which the Hotel argues is not properly before the Court on this motion – is speculation without a basis and, in any event, does not

conclude that decedent was visibly intoxicated while at the Hotel, much less when he was served. The Hotel argues plaintiffs have not raised any question of fact whether decedent was visibly intoxicated at the time he was served, and all the evidence indicates he was not; none of the decedent's history has any bearing; and the only relevant inquiry is whether the Hotel illegally served decedent alcohol on the night of the accident.

Analysis of Dram Shop Act Cause of Action

New York General Obligations Law § 11-101 (1), commonly known as the Dram Shop Act, states, in part:

> "Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication."

New York Alcoholic Beverage Control Law (ABC) § 65 states, in part:

> "No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to 1. ...; 2. Any visibly intoxicated person".

The Court finds that the Hotel has met its initial burden on summary judgment to show that decedent was not served alcohol while showing visible signs of intoxication. The form of plaintiffs' opposition, although a memorandum of law, refers to the same documents, identified by the electronically filed document number, that the Hotel relied upon in its motion, and will be considered by the Court to determine the motion on its merits.

There is no question that the standard by which an establishment serving alcohol is to be governed in an action based on the Dram Shop Act is "visible intoxication." When a defendant, such as the Hotel, meets its burden on summary judgment to show that there is no evidence that any witnesses observed the person served to be visibly intoxicated at the time alcohol was sold to him, a plaintiff must produce at least circumstantial evidence of the customer's visible intoxication.

The Court of Appeals considered this issue at length, stating, in part:

> "The Legislature's use of the term 'visible,' however, does not create a rigid requirement that that essential element of the claim be established by direct proof

in the form of testimonial evidence from someone who actually observed the allegedly intoxicated person's demeanor at the time and place that the alcohol was served. To the contrary ... the statutory language [does] not preclude the introduction of circumstantial evidence to establish the visible intoxication of the customer ...

The foregoing leads to the second question ...: the nature and quality of the circumstantial proof that will suffice to establish the 'visibly intoxicated' element of the claim. In cases involving substance abuse, blood and urine tests are the most common source of circumstantial proof. Blood alcohol tests are often administered when alcohol-induced intoxication is suspected ..., and, indeed, our statutory scheme for penalizing drunk driving utilizes a blood alcohol count of .10% or higher as a benchmark for per se intoxication ...

Proof of a high blood alcohol count alone, however, generally does not establish the 'visible' intoxication that [ABC] § 65 (2) requires. First, permitting blood and urine alcohol content to serve as an automatic substitute for perceptible intoxication would run counter to the legislative goal of requiring an innkeeper's actual knowledge or notice of the customer's condition as a predicate for an 'unlawful' sale. Second, it is well known that the effects of alcohol consumption may differ greatly from person to person ... and that tolerance for alcohol is subject to wide individual variation ... Thus, even where it can be established, a high blood alcohol count in the person served may not provide a sound basis for drawing inferences about the individual's appearance or demeanor.

In this case, the proof offered to bridge this evidentiary and logical gap was an expert's affidavit asserting that in view of Stanley's blood alcohol level when she was served ..., she necessarily must have exhibited the symptoms of intoxication that are familiar to trained bartenders: gaze nystagmus, glassy eyes, motor impairment and difficulties in controlling her speech and voice levels. The problem with this proffered proof was not that it was based on laboratory tests, but rather that the expert's ultimate conclusions were both speculative and conclusory. ...

Here, although the underlying facts on which plaintiffs' expert based his opinion--i.e., Stanley's blood and urine alcohol counts and her physical characteristics--were set forth in detail ... there was nothing in the expert's affidavit at all from which the validity of its ultimate conclusions about Stanley's appearance on the evening of the accident could be inferred. ... an expert's affidavit proffered as the sole evidence to defeat summary judgment must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor." (*Romano v. Stanley*, 90 N.Y.2d 444, 450–52 [1997] [internal citations omitted] [internal quotations omitted].)

In *Romano*, plaintiff did not offer any other circumstantial evidence. It is clear that plaintiffs' expert must rely on more than decedent's BAC in drawing conclusions. (*See, e.g., Kish v Farley*, 24 A.D.3d 1198, 1199 [4th Dept 2005].) Where an expert relied upon a police officer's testimony of failed sobriety tests and other visible signs of intoxication upon arrest and at the police station, together with "black box" data that showed the driver had been speeding (*Sheehan v Gilray*, 152 A.D.3d 1179 [4th Dept 2017]), the plaintiff met the shifted burden to raise a triable issue of fact.

Here, plaintiffs' toxicologist reviewed the factual claims in the deposition testimony of the various party and non-party witnesses, the medical records from the emergency responders and the emergency room, the autopsy report and toxicology report, as well as the Sheriff's Report. He considered decedent's age, height, weight, and BAC, together with the foregoing, to reach his conclusion that decedent would have had to consume about 10 drinks to obtain the 0.16% BAC at autopsy if he started drinking at about 8:30 p.m.

None of this analysis, however, speaks to visible signs of intoxication decedent would have been exhibiting at the time he was served at the Hotel. He does state that decedent "Stanley would have been in the excitement stage of alcohol influence with clinical signs of loss of judgment, impairment of perception, memory and comprehension, increased reaction time, reduced visual acuity and sensory-motor incoordination", and refers to an attached Table 1. Table 1 for a BAC level labeled as "0.09-0.25" states a state of alcohol influence as "Excitement" and states prominent clinical signs would be "Emotional instability; loss of judgment. Impairment of perception, memory and comprehension. Increased reaction time. Reduced visual acuity, peripheral vision & slow glare recovery. Sensory-motor incoordination; impaired balance; slurred speech. Vomiting; drowsiness." Table 1 for a BAC level labeled as "0.15 or 0.20" states a stage of alcohol influence as "Excitement (Visible Intoxication)" and states prominent clinical signs would be ">50% of social drinkers are visibly intoxicated at 0.15% and 84% of all drinkers (including heavy drinkers who develop tolerance) are visibly intoxicated at 0.20 %."

The toxicologist had no knowledge and stated no opinion as to what signs decedent actually would have been exhibiting at the Hotel. Given that the Sheriffs' report and medical examiner's opinions that intoxication played a role in the accident also are based on the toxicology report, and the emergency responders had no way to observe whether decedent was showing signs of intoxication at the scene given his unconscious state, the Court cannot find the

expert's report sufficient, standing alone, to raise a question of fact as to whether decedent was visibly intoxicated at the time he was sold alcohol by the Hotel.

The testimony of decedent's widow as to the history of Thomas Kelly and decedent's drinking, or their intentions for that evening, has no bearing on what the Hotel employees or others observed on the night of decedent's accident. The only additional circumstantial evidence proffered by plaintiffs is the widow's interpretation of photos taken at the Hotel in which she states a belief her husband had the appearance of intoxication due to a flushed face and the appearance of his eyes. The Court finds that plaintiffs have not met the shifted burden with the expert report and proffered circumstantial evidence.

CONCLUSION

In accordance with the foregoing, the Kelly defendants' motion for summary judgment is granted. Plaintiffs are prohibited from bringing suit for negligent entrustment on behalf of decedent's estate as a result of decedent's voluntary intoxication, and the distributees also are barred from bringing the claim. If the Court were to find plaintiffs have standing, the motion for summary judgment dismissal on the negligent entrustment cause of action would be granted based on a failure of plaintiffs to meet the shifted burden. The cross claims of the co-defendant Hotel against the Kellys are dismissed. The Hotel defendant's motion for summary judgment is granted.

Counsel for the Kelly defendants shall submit a proposed order, with a copy of this Decision attached, within twenty days of the date of this Decision.

Dated: May 19, 2021
Utica, New York

ENTER,

Hon. David A. Murad
Justice of the Supreme Court