THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

Estate of Edna Mae Thompson, by Linda Kelley, Administratrix of the Estate of Edna Mae Thompson and Dolly Thompson

v.

Clark A. McClure and Barbara McClure

Docket No. 99-C-0084

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs file this law suit seeking damages for injuries the decedent suffered as a result of a car accident involving Jane Morgan, a woman the defendants hired to assist with an engagement party at their home. The plaintiffs allege that Ms. Morgan became intoxicated at the defendants' home and thereafter caused the accident which resulted in Edna Mae Thompson's death. As a result, the plaintiffs claim the defendants are liable as social hosts, that they are vicariously liable as the employer of Ms. Morgan, and that the defendants were negligent in their supervision of Ms. Morgan. The defendants' move for summary judgment on all counts, including counts for intentional infliction of emotional distress and negligent infliction of emotional distress.

Standard of Review

The court may grant summary judgment only if the moving party has demonstrated that there is no genuine issue of material fact

and that it is entitled to judgment as a matter of law. See RSA 491:8-a; Opinion of the Justices (SLAPP Suit Procedure), 138 N.H. 445, 450 (1994). The court must consider the evidence in the light most favorable to the non-moving party and give that party the benefit of all favorable inferences. See id.

Social Host Liability

The defendants first argue that the Supreme Court's decision in Hickinbotham v. Burke, 140 N.H. 28 (1995) requires the plaintiffs to prove that the defendants acted recklessly, rather than negligently, when they permitted Ms. Morgan to consume alcohol at their home. The plaintiffs object, stating the Hickinbotham standard does not apply because the plaintiffs here are innocent third parties and not guests or employees who became intoxicated at the defendants' home. This court is persuaded by Judge Conboy's analysis in Corrine Dunn v. Ralph Dutton and Paula Dutton, 00-C-465 (Hillsborough Cty. Super.Ct., Northern District, April 30, 2001) in which she concluded that innocent third parties need only prove negligence in cases alleging social host liability.

In Dunn the court found that the Hickinbotham Court implicitly recognized a distinction between injured third parties and injured guests in the context of social host liability, when it relied on RSA 507-F to extend social host liability to cases involving adults as well as minors. Though in Hickinbotham the

Supreme Court did not address the precise issue presented here, that is, whether a different standard should apply when innocent third parties are injured, the Court referred to RSA 507-F in reaching its conclusion that adult, as well as minor plaintiffs, can sue under a theory of social host liability.

The Dunn court reasoned that the Supreme Court would likely rely on 507-F in the future to determine the scope and extent of social host liability, and thus it concluded that innocent third parties may sue when a defendant's provision of alcohol is merely negligent. See Dunn, at 2 ("The statute does . . . distinguish between the person who consumes the alcohol and third parties, permitting the former to recover only when a defendant's provision of alcohol is reckless, but allowing the latter to recover in cases involving mere negligence."). This court agrees that "[p]ublic policy supports such a distinction because an innocent third party should be able to recover upon a lesser showing than a guest [or employee], who must bear some responsibility for his own voluntary intoxication." Id.

Even if the Supreme Court were to determine that the recklessness standard should apply regardless of the status of the injured plaintiff, there are material issues of fact in dispute regarding whether the defendants were reckless in their provision of alcohol to Ms. Morgan. This court suggests that the trial court define both the reckless and negligent standards of care to

the jury and provide the jury with a special verdict form where it must indicate whether it finds the defendants were negligent, reckless or neither. Such a procedure will assist the parties in assessing whether an appeal of the case would be prudent.

Accordingly, the court finds the standard of care to be negligence and denies the defendants' motion for summary judgment with respect to social host liability.

Vicarious Liability

The defendants next challenge the plaintiffs' claim that the defendants are vicariously liable for the conduct of Ms. Morgan under the theory of respondeat superior. The court assumes for the purposes of this motion only that Ms. Morgan was acting as the defendants' agent and not as an independent contractor during the time period in question. Under the doctrine of respondeat superior, "an employer may be held vicariously responsible for the tortious acts of an employee committed incidental to or during the scope of employment." Trahan-Laroche v. Lockheed Sanders, 139 N.H. 483, 485 (1995).

Considering the evidence most favorably to the plaintiffs, the court concludes that Ms. Morgan, as a matter of law, was not acting within the scope of her employment, or incidental to it, at the time she collided with the plaintiffs' car. Specifically, Ms. Morgan had completed her duties at the defendants' home by the

time she was involved in the accident. In addition, though Ms. Morgan drank alcohol while at the defendants' home, this conduct was in no way related to the duties she was hired to perform.

The plaintiffs rely on Chalmers v. Harris Motors, 104 N.H. 111, 115 (1962) for the proposition that an employee who becomes intoxicated while performing her duties does not alone compel a finding that the employee was acting outside the scope of her employment. While the court agrees with this general principle, the facts of Chalmers are distinguishable from the present case.

In Chalmers the employee worked on behalf of the defendant as a car salesman. During trial the plaintiff presented evidence to establish that the employee and the decedent were engaged in ongoing negotiations over the sale one of the defendant's cars and that at the time of the accident, the employee was driving the decedent back to the defendant's garage to complete the transaction. In addition, the evidence presented revealed that during the afternoon of the accident, the decedent and the employee were at a bar drinking and discussing the terms of the sale. Under these facts, the Supreme Court determined that the jury could conclude the employee was acting within the scope of his employment at the time of the accident, notwithstanding the fact of his intoxication.

No such ongoing relationship exists here, either between Ms. Morgan and the plaintiff, or between Ms. Morgan and her employers,

the defendants. Thus, while an employee's intoxication alone may be insufficient to terminate liability of an employer under circumstances where the employee continues to pursue the employer's interests, intoxication can constitute a deviation from the normal course of employment such that the employer is relieved from liability. See id. Under the facts of this case, the court finds as a matter of law that Ms. Morgan was not acting within the scope of her employment at the time of the accident. Accordingly, the defendants' motion for summary judgment with respect to vicarious liability is granted.

Negligent Supervision

The defendants next move for summary judgment of the plaintiffs' claim for negligent supervision. As a preliminary matter, the court concludes that a liberal reading of the plaintiffs' pleadings includes a claim for negligent supervision.

"An employer may be directly liable for damages resulting from the negligent supervision of its employee's activities." Trahan-Laroche at 485. In addition, "[t]he employer's duty to exercise reasonable care to control its employee may extend to activities performed outside the scope of employment." Id. Here, the plaintiffs allege the defendants were negligent in their supervision of Ms. Morgan and that because of their negligent supervision, Ms. Morgan was permitted to drink alcohol during her employment. Thus, the plaintiffs have properly stated a claim for

negligent supervision which is supported by facts alleged in the writ.

The defendants claim the standard of care should be governed by Hickinbotham. First, the standards set forth in Hickinbotham apply to a claim for social host liability. The Supreme Court did not intend to limit the scope of all possible theories of liability, including negligent supervision, when they recognized the theory of social host liability. Indeed, the facts of any given case may support several different theories of liability.

Second, even if Hickinbotham could somehow be read to limit the application of any theory of liability to the facts which might support a social host claim, the court has already determined that Hickinbotham permits the plaintiffs to sue for the negligent provision of alcohol since they are innocent third parties.

For the reasons stated above, the defendants' motion for summary judgment with respect to negligent supervision is denied.

Intentional Infliction of Emotional Distress

The plaintiffs conceded at oral argument that they would not pursue a claim for intentional infliction of emotional distress unless the court denied the defendants' motion for summary judgment with respect to vicarious liability. Since the court has granted the defendants' motion, the claim for intentional infliction of emotional distress must likewise fail. Accordingly,

the defendants' motion for summary judgment with respect to the claim for intentional infliction of emotional distress is granted.

Negligent Infliction of Emotional Distress

The defendants' finally argue that Dolly Thompson should not be permitted to proceed on her claim for negligent infliction of emotional distress. The plaintiffs object.

The plaintiff, Dolly Thompson, seeks damages for the mental distress she suffered as a result of witnessing her mother's death. Such a cause of action is allowed, as long as "the harm for which plaintiff seeks to recover [is] susceptible to some form of objective medical determination and proved through qualified medical witnesses." Corso v. Merrill, 119 N.H. 647, 653 (1979). In other words, "the psychic injury [must] manifest itself by way of physical symptoms." Id.

In this case, the plaintiff has presented no expert evidence of her physical manifestations caused by witnessing her mother's death. Nor has she identified any physical symptoms that support her claim for negligent infliction of emotional distress. Accordingly, the defendants' motion for summary judgment with respect to this claim is granted.

Dolly Thompson, however, will be permitted to present evidence of her own pain and suffering she endured as a result of her own injuries.

Conclusion

In summary, the defendants' motion for summary judgment with respect to the claims for vicarious liability, intentional infliction of emotional distress and negligent infliction of emotional distress are granted. The defendants' motion for summary judgment with respect to social host liability and negligent supervision are denied.

SO ORDERED.

Date: December 28, 2001

Tina L. Nadeau
Presiding Justice