

NOTICE

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2017 IL App (4th) 160733-U

NO. 4-16-0733

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

July 13, 2017

Carla Bender

4th District Appellate

Court, IL

JOHN A. SCHRIEFER,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
EJJ, INC., an Illinois Corporation, d/b/a THE)	No. 13L212
PHOENIX; PETER K. SCHMIDT; PKS)	
PROPERTIES, LLC; and CAROLINE DANIELS,)	Honorable
Defendants-Appellants.)	Michael Q. Jones,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed the trial court's judgment entering summary judgment in favor of plaintiff on a Dram Shop Act claim where the evidence showed no genuine issue of material fact as to whether the wrongdoer was intoxicated, whether defendants provided the alcoholic beverages that caused the wrongdoer's intoxication, or whether the wrongdoer's intoxication caused him to attack plaintiff.
- ¶ 2 Plaintiff, John A. Schriefer, filed a complaint against defendants, EJJ, Inc. (the licensee), Peter K. Schmidt (manager of PKS Properties), PKS Properties, LLC (the owner), and Caroline Daniels (manager and owner of EJJ, Inc., d/b/a The Phoenix), pursuant to section 6-21 of the Illinois Liquor Control Act (235 ILCS 5/6-21 (West 2012)) (popularly known as the "Dram Shop Act"). In June 2016, plaintiff filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2014)). Following a hearing, the trial court granted plaintiff's motion for summary judgment.

¶ 3 Defendants appeal, arguing the trial court erred by granting plaintiff's motion for summary judgment on the issue of intoxication. Specifically, defendants argue there was a genuine issue of material fact whether the alleged intoxicated persons were intoxicated at the time of the incident which led to plaintiff's injuries, and if so, whether the intoxication was a cause of that incident. We affirm.

¶ 4 I. BACKGROUND

¶ 5 This suit arises from a December 3, 2012, incident in which Troy Meyers and Shane Valentine attacked and beat plaintiff in the parking lot of The Phoenix, defendants' tavern.

¶ 6 Plaintiff filed a complaint against defendants, alleging defendants owned, rented, leased, or permitted an establishment with knowledge of the sale of alcoholic liquor to the public. The complaint alleged, on December 3, 2012, defendants sold alcoholic beverages to Meyers and Valentine, who consumed the beverages and became intoxicated. As a result of the alleged intoxication, Meyers and Valentine attacked and beat plaintiff as he left defendants' establishment. The complaint further alleged plaintiff sustained great bodily injury during the attack.

¶ 7 A. Defendants' Motion for Summary Judgment

¶ 8 Subsequent to deposing plaintiff, defendants filed a motion for summary judgment, supported by plaintiff's deposition. The motion alleged no genuine issue of fact existed that (1) Valentine and Meyers were not intoxicated, and (2) the alleged intoxication of Valentine and Meyers was not a cause of plaintiff's injuries. Plaintiff filed a response, supported by the counter-affidavit of Troy Markstahler, who stated that while at The Phoenix on December 3, 2012, Valentine consumed several beers and became intoxicated. The trial court denied defendants' motion for summary judgment.

¶ 9

B. Plaintiff's Motion for Summary Judgment

¶ 10 Plaintiff filed a motion for summary judgment, alleging no genuine issues of material fact existed as to liability or damages. In support, plaintiff relied on, in part, (1) the depositions of plaintiff and Markstahler, (2) defendants' admissions in response to plaintiff's request to admit documents and facts, and (3) the affidavits of plaintiff and Markstahler. Below, we summarize only the information necessary to resolve the issues raised in this appeal.

¶ 11

1. *Plaintiff's Deposition*

¶ 12 Plaintiff stated he knew Daniels, the owner of The Phoenix, through mutual friends and from occasional trips to the tavern. Plaintiff acknowledged he was a member of a motorcycle club called "Stone Cold" and said he had known Valentine and Meyers for 20 years. According to plaintiff, Valentine once belonged to the "Stone Cold" motorcycle club. Although Valentine quit "Stone Cold" prior to the December 2012 incident, plaintiff considered him a good friend. According to plaintiff, Meyers was trying to introduce a new motorcycle club called "Hell Bound" in Champaign. At the time of the incident, Valentine was a member of "Hell Bound," but his membership in that group did not cause any "bad blood" between plaintiff and Meyers or Valentine.

¶ 13

In December 2012, plaintiff met Markstahler at The Phoenix around 9:30 p.m. to talk to Daniels about buying some chairs and inventory because the tavern was closing. When plaintiff arrived at The Phoenix, Valentine was sitting at one end of the bar and plaintiff and Markstahler sat with acquaintances near the pool tables. Plaintiff saw Valentine with a beer in front of him but had no knowledge of any additional alcohol Valentine may have consumed. At that point, Valentine did not appear to be intoxicated, and plaintiff did not know if Valentine had bloodshot eyes or difficulty walking.

¶ 14 Plaintiff had one drink and, after approximately 20 minutes, Markstahler left to purchase cigarettes. At that time, plaintiff asked Daniels if she had time to meet with them and she informed him she was too busy. After speaking with Daniels, plaintiff left the bar. Plaintiff estimated he spent approximately one hour at The Phoenix before leaving.

¶ 15 When plaintiff exited the bar, Valentine was to his right and Meyers was in front of him, roughly 10 to 15 feet apart. According to plaintiff, Valentine had a "real angered face" in the parking lot before the attack. Although plaintiff only saw Valentine consume one beer, in plaintiff's opinion Valentine was intoxicated based on his demeanor and conduct. After plaintiff acknowledged Valentine and Meyers in the parking lot, he was hit in the back of the head, punched in the face, and knocked unconscious. Following the attack, Markstahler returned to the bar, discovered plaintiff on the ground, and took him home. Plaintiff's jaw was broken and he had to undergo corrective surgery.

¶ 16 Plaintiff did not know why the men attacked him, but he speculated it might be related to their attempts to start a new motorcycle club. However, plaintiff never had problems with Valentine and the two had not exchanged harsh words prior to the attack. According to plaintiff, it felt as though a steel object hit him in the back of the head, and Valentine was known to carry brass knuckles and get into fights. Plaintiff did not know whether Valentine had a criminal record. However, plaintiff stated Meyers spent most of his life in prison.

¶ 17 *2. Markstahler's Deposition*

¶ 18 Markstahler stated at his deposition he worked as a mechanic and had been a member of the "Stone Cold" motorcycle club for approximately six years. Markstahler had known plaintiff for 15 or 20 years and, approximately 10 years before, Markstahler worked for plaintiff repairing lawn mowers. Plaintiff and Markstahler also socialized once or twice a week.

¶ 19 On December 3, 2012, Markstahler and plaintiff met at The Phoenix tavern, which was closing, to buy tables for the "Stone Cold" clubhouse. According to Markstahler, Valentine and Meyers arrived at The Phoenix around 9 p.m. Markstahler had known Valentine and Meyers his whole life and considered Valentine a friend. However, Markstahler did not consider Meyers a friend because he was "always in jail." Valentine was a former member of "Stone Cold," and he and Meyers unsuccessfully tried to start a new motorcycle club called "Hell Bound."

¶ 20 Before Valentine and Meyers got to The Phoenix, Markstahler received a phone call from someone at Millie's bar, located in Mahomet, telling him the two men were heading to The Phoenix. People told Markstahler that Valentine and Meyers had been drinking at Millie's all afternoon. Approximately a month before the December 2012 incident, plaintiff and Valentine got into a verbal altercation at Walmart, but Markstahler did not know what the men were fighting over.

¶ 21 According to Markstahler, he and plaintiff sat at one end of the U-shaped bar, Valentine and Meyers were at the other end, and the two pairs of men faced each other across the bartending area. Markstahler stated Valentine drank five or six cocktails of "Jim Beam" mixed with 7-Up and Meyers drank five or six beers. Markstahler stated the men also had "a couple" shots. The men were laughing and joking, but Markstahler did not see them stumbling or leaning when they first walked up to the bar. However, Markstahler later spoke to Valentine in the bathroom and Valentine was slurring his words. Although Markstahler did not talk to Meyers, he believed Meyers was intoxicated because of his rowdy manner.

¶ 22 Around 9:30 or 10 p.m., Markstahler left The Phoenix to buy cigarettes, and Valentine and Meyers were ordering more drinks. He was gone for 15 minutes, and when he

returned, Valentine and Meyers were gone. Markstahler discovered plaintiff outside, behind the tavern, near a Dumpster, bleeding from the head. After Markstahler took plaintiff home, he returned to The Phoenix to get his motorcycle and Valentine called and said he had broken plaintiff's jaw.

¶ 23 According to Markstahler, Valentine and Meyers were rowdy and got into fights. When asked if alcohol affected Valentine's behavior, Markstahler stated, "He has a few drinks and he starts hitting people." Valentine was banned from six or seven bars for instigating fights. In Markstahler's opinion, Valentine attacked plaintiff because he was intoxicated. According to Markstahler, if Valentine had been sober, he would not have attacked plaintiff because he wanted to avoid going to jail.

¶ 24 C. The Trial Court's Ruling

¶ 25 At the hearing on plaintiff's motion for summary judgment, the trial court noted defendants' failure to file any counter-affidavits. Defendants argued there was no proof of intoxication in plaintiff's deposition testimony and further argued Markstahler's contradictory deposition testimony created a genuine issue of material fact with respect to whether Valentine was intoxicated. The court rejected this argument and pointed out plaintiff said Valentine did not appear intoxicated at one point in time, but he did not say Valentine was never intoxicated. Rather, plaintiff stated Valentine appeared intoxicated. The court further noted Markstahler's observation of the number of drinks Valentine had and his opinion that Valentine was intoxicated. The court found summary judgment on the question of intoxication appropriate given (1) plaintiff's testimony did not stand for the proposition that he never thought Valentine was intoxicated, and (2) Markstahler's unopposed testimony and affidavit clearly showed Valentine had enough to drink to be—and in fact was—intoxicated.

¶ 26 As to cause, the trial court noted plaintiff's unchallenged testimony there was no "bad blood" between himself and Valentine and Markstahler's unchallenged testimony Valentine would not have attacked plaintiff unless he was intoxicated. The court granted plaintiff's summary judgment motion, finding plaintiff's unopposed evidentiary materials established the elements of a Dram Shop Act action.

¶ 27 This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 Defendants appeal, arguing the trial court erred by granting plaintiff's motion for summary judgment on the issue of intoxication. Specifically, defendants argue there was a genuine issue of material fact whether the alleged intoxicated persons were intoxicated at the time of the incident which led to plaintiff's injuries, and if so, whether the intoxication was a cause of that incident.

¶ 30 A. Standard of Review

¶ 31 "We review a trial court's entry of summary judgment *de novo*." *Essig v. Advocate BroMenn Medical Center*, 2015 IL App (4th) 140546, ¶ 39, 33 N.E.3d 288. The purpose of summary judgment is not to try factual issues but, rather, to determine if genuine issues of material fact exist. *Evans v. Brown*, 399 Ill. App. 3d 238, 243, 925 N.E.2d 1265, 1270 (2010). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014). Summary judgment is a drastic means of disposing of litigation " 'and should be allowed only when the right of the moving party is clear and free from doubt.' " *Bowles v. Owens-*

Illinois, Inc., 2013 IL App (4th) 121072, ¶ 19, 996 N.E.2d 1267 (quoting *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291, 730 N.E.2d 1119, 1127 (2000)).

¶ 32 B. Dram Shop Act Claim

¶ 33 In order to prevail on a claim under the Dram Shop Act, the plaintiff must prove (1) the alleged intoxicated person was intoxicated at the time of the occurrence; (2) the defendant, by and through its owners, agents, or employees, provided intoxicating liquor consumed by the wrongdoer; (3) the liquor provided by the defendant caused the wrongdoer's intoxication; (4) the wrongdoer's intoxication was at least one cause of the incident; and (5) as a result of the incident, the plaintiff suffered injury. *Mohr v. Jilg*, 223 Ill. App. 3d 217, 221, 586 N.E.2d 807, 810 (1992).

¶ 34 Defendants do not dispute The Phoenix tavern provided the intoxicating liquor consumed by Valentine and Meyers. Nor do they dispute plaintiff suffered injury as a result of the incident. Rather, defendants contend genuine issues of material fact exist as to whether Valentine or Meyers were intoxicated, whether the liquor provided by defendants caused their intoxication, and whether their intoxication caused the attack on plaintiff. Plaintiff contends the uncontroverted testimony from plaintiff's and Markstahler's affidavits and depositions must be taken as true. Plaintiff asserts the evidence shows no genuine issue of material fact exists as to whether Valentine was intoxicated and whether his intoxication was one cause of his attack on plaintiff. We first consider whether a genuine issue of material fact exists as to the intoxication of Valentine or Meyers.

¶ 35 1. *Intoxication*

¶ 36 Defendants contend genuine issues of material fact exist as to whether Valentine and Meyers were intoxicated because of conflicting statements about what and how much

Valentine and Meyers consumed. In support, defendants rely on *Nakis v. Amabile*, 103 Ill. App. 3d 840, 431 N.E.2d 1255 (1981). In *Nakis*, the plaintiff testified he went up to the bar in a tavern to get napkins and noticed a group of people loudly laughing. *Id.* at 843, 431 N.E.2d at 1257. Plaintiff tapped one of the people on the shoulder and asked for a napkin and someone else pushed the plaintiff's face away. *Id.* The person who pushed his face was intoxicated and his speech was slurred. *Id.* That same person then punched the plaintiff in the face. *Id.* Five, six, or seven people then engaged in a brawl, kicking and punching the plaintiff. *Id.* Although the plaintiff's cousin witnessed the fight, the plaintiff did not call him as a witness, and the defendants called no other witnesses to testify. *Id.* at 843, 431 N.E.2d at 1258. The trial court denied the plaintiff's motion for a directed verdict on the Dram Shop Act claim. *Id.* at 844, 431 N.E.2d at 1258. The jury subsequently answered a special interrogatory that found the person who hit plaintiff was not intoxicated. *Id.* at 843, 431 N.E.2d at 1258.

¶ 37 The plaintiff appealed, arguing "the trial court erred in refusing to grant his motion for a directed verdict on [the Dram Shop Act claim] on the issue of liability because his testimony was uncontradicted, unimpeached, and unequivocal." *Id.* The appellate court rejected this argument, finding a directed verdict was not mandated when the plaintiff's testimony was un rebutted or uncontroverted. *Id.* at 845, 431 N.E.2d at 1259. The court stated, "Even where testimony is uncontroverted, inconsistent inferences and conclusions may be drawn, thereby making the question one for the jury." *Id.* The court further found the jury had not improperly disregarded the plaintiff's testimony. *Id.* The court's review of the record showed the jury's finding was not against the manifest weight of the evidence. *Id.*

¶ 38 *Nakis* is procedurally distinguishable from the case here, as it involved a claim regarding a directed verdict and we are addressing the entry of summary judgment. We also note

the other cases defendants rely on are similarly distinguishable as none involve summary judgment. See *Weeks v. Witek*, 33 Ill. App. 3d 916, 339 N.E.2d 43 (1975) (the plaintiff introduced sufficient evidence of intoxication to warrant the denial of the defendants' motion for a directed verdict following the close of the plaintiff's case); *Clifton v. Nardi*, 65 Ill. App. 3d 344, 382 N.E.2d 514 (1978) (no error in denying the plaintiff's motion for judgment notwithstanding the verdict because probative facts supported the jury's verdict). In the instant case, we are not reviewing a verdict entered by a jury. Rather, we must assess the undisputed facts provided by plaintiff in support of his motion for summary judgment. Defendants have not placed these facts into dispute and failed to introduce affidavits or depositions to prove a genuine issue of material fact existed as to intoxication. "Where a party moving for summary judgment provides facts which, if not contradicted, would entitle that party to judgment as a matter of law, the opponent of the motion cannot rely solely on his pleadings to raise issues of material fact." *Smith v. South Shore Hospital*, 187 Ill. App. 3d 847, 853, 543 N.E.2d 868, 870 (1989).

¶ 39 To prove intoxication in a Dram Shop Act action, "one must show that the alleged intoxicant consumed alcohol, and must present independent evidence showing that he was in fact intoxicated." *Felker v. Bartelme*, 124 Ill. App. 2d 43, 48, 260 N.E.2d 74, 77 (1970). Opinion evidence that the alleged intoxicant was drunk, together with evidence the wrongdoer consumed alcohol, is sufficient to show intoxication. *Id.* As the trial court noted, plaintiff did not testify that Valentine was never intoxicated. Rather, plaintiff stated Valentine appeared not to be intoxicated when he arrived at The Phoenix. When plaintiff encountered Valentine and Meyers in the parking lot, Valentine looked angry. Plaintiff opined, based on Valentine's conduct and demeanor, that Valentine was intoxicated at the time of the encounter. Although plaintiff stated

he saw Valentine with only one beer in front of him, plaintiff also said he did not pay careful attention to Valentine's consumption.

¶ 40 The conclusion that the wrongdoers were intoxicated is further supported by Markstahler's uncontroverted testimony. Markstahler said he observed Valentine and Meyers consume "at least" five or six drinks each and a "couple" shots. As defendants point out, Markstahler's affidavit stated he observed the men drinking beer, rather than the "Jim Beam" mixed drinks he testified to during his deposition. Although this fact might be disputed, we do not find it material. The material facts establish Valentine and Meyers consumed, at a minimum, five alcoholic beverages while at The Phoenix. There is also evidence Valentine slurred his words during his exchange with Markstahler in the bathroom. Markstahler further opined Valentine was intoxicated because he would not have hit plaintiff had he been sober. Based on these uncontroverted facts, we conclude the discrepancy in the type of alcoholic beverage is not a genuine issue of material fact precluding summary judgment. The only conclusion to be drawn from the undisputed material facts from plaintiff's and Markstahler's deposition testimony is that Valentine was intoxicated. See, e.g., *Walter v. Carriage House Hotels, Ltd.*, 164 Ill. 2d 80, 94, 646 N.E.2d 599, 606 (1995). Accordingly, we affirm the trial court's grant of summary judgment on the issue of intoxication. We turn now to defendants' claim regarding the cause of intoxication.

¶ 41 *2. Cause of Intoxication*

¶ 42 Defendants suggest an issue of material fact exists as to whether the alcohol provided to Valentine and Meyers caused their intoxication. Specifically, defendants argue Markstahler's statements that Valentine and Meyers had spent the afternoon drinking at a different bar before coming to The Phoenix created a factual issue for the jury to decide.

However, "[t]he alcohol furnished at two separate taverns may cause a single intoxication, subject to the limitation that a tavern may not be held liable for a *de minimis* contribution to an individual's intoxication." *Mohr*, 223 Ill. App. 3d at 221-22, 586 N.E.2d at 810. Although plaintiff testified he saw Valentine consume only one beer, Markstahler's testimony was very clear that he observed Valentine and Meyers consume five or six beverages each. Moreover, both plaintiff and Markstahler testified Valentine and Meyers appeared fine when they first arrived at The Phoenix, with Markstahler specifically saying he did not see the men stumbling or leaning. However, plaintiff said that, by the time he encountered the men in the parking lot, Valentine appeared angry and was, in plaintiff's opinion, intoxicated. Markstahler also said Valentine was slurring his speech when the men encountered each other in the bathroom later in the evening. The only conclusion to draw from these undisputed facts is the five or six alcoholic beverages served by defendants "[were] a material and substantial factor in producing or contributing to produce the intoxication." *Thompson v. Tranberg*, 45 Ill. App. 3d 809, 812, 360 N.E.2d 108, 111 (1977).

¶ 43

3. Cause of the Incident

¶ 44 Plaintiff must prove the wrongdoer's intoxication was at least one cause of the incident. *Id.* However, intoxication need not be the sole cause, as "causation giving rise to liability may be the result of two or more independent acts." *Id.*

¶ 45 Defendants argue Valentine attacked plaintiff not because of his intoxication, but because of animosity stemming from their membership in rival motorcycle clubs. However, defendants have introduced no affidavits or deposition testimony to support this argument. Plaintiff asserts his deposition testimony shows he considered Valentine a friend and there was no "bad blood" between the two men. Although Markstahler referenced a verbal altercation

between plaintiff and Valentine approximately one month before the incident at The Phoenix, it is uncontroverted that plaintiff and Valentine did not engage in a verbal altercation—or any other interaction—until Valentine attacked plaintiff in the parking lot the night of the incident. Given this uncontroverted evidence, we find defendants' speculative argument that a motorcycle club rivalry caused the incident unpersuasive.

¶ 46 Also, even if a motorcycle club rivalry was one cause of the incident, it does not preclude Valentine's intoxication from also being a cause of the incident. Markstahler testified Valentine often became physically aggressive after drinking and had been banned from numerous bars for drinking and fighting. Markstahler also said Valentine would not have attacked plaintiff if he were sober because he did not want to spend time in jail. Markstahler opined Valentine attacked plaintiff because he was intoxicated. The only reasonable conclusion to be drawn from these facts is Valentine's intoxication was indeed at least one cause of the attack on plaintiff. Accordingly, we affirm the trial court's entry of summary judgment in favor of plaintiff.

¶ 47

III. CONCLUSION

¶ 48

For the reasons stated, we affirm the trial court's judgment.

¶ 49

Affirmed.