NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0021

ISAAC SPARROW & SABRINA SPARROW GREEN

VERSUS

WHITNEY WHEELER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, C.B. LLC D/B/A REGGIE'S & XYZ INSURANCE COMPANY

Judgment Rendered: June 11, 2010

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 528,673

The Honorable Todd W. Hernandez, Judge Presiding

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Joseph R. McMahon, III **Metairie, LA**	**Counsel for Plaintiffs/Appellants,** **Isaac Sparrow & Sabrina Sparrow Green**
William C. Helm **Baton Rouge, LA**	**Counsel for Defendant/Appellee,** **Triumvirate of Baton Rouge, Inc. D/B/A Fred's Bar & Grill**

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

WHIPPLE, J.

Plaintiffs, Isaac Sparrow and Sabrina Sparrow Green, appeal from a summary judgment granted by the trial court in favor of defendant, Triumvirate of Baton Rouge, Inc. d/b/a Fred's Bar ("Fred's"), which dismissed plaintiffs' claims against Fred's with prejudice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On the evening of Friday, June 18, 2004, and early morning hours of Saturday, June 19, 2004, Whitney Wheeler, an LSU student who was eighteen years of age, drove her 2003 Chevrolet Monte Carlo to Fred's Bar in Baton Rouge, where she met with friends to socialize. While out with friends, Wheeler consumed so much alcohol at Fred's that she did not remember leaving the bar that night. At some point in the evening, she apparently left the bar, as she recalled driving her vehicle around the back of a McDonald's Restaurant. After exiting the McDonald's parking lot, Wheeler drove her vehicle head on into Isaac Sparrow's vehicle.

Sparrow and his mother, Sabrina Sparrow Green, who came upon the accident shortly after it occurred, filed a petition for damages on January 26, 2005 naming Wheeler and her insurer, State Farm Mutual Automobile Insurance Company; Fred's Bar and its insurer; C.B., LLC d/b/a Reggie's and its insurer; and John Doe and his insurer as defendants therein.[1]

Fred's filed a motion for summary judgment on February 23, 2007, contending that Fred's did not sell or serve any alcohol to Wheeler on the night of the accident, and that plaintiffs accordingly could not establish that it breached any duty. In support, Fred's attached Wheeler's deposition testimony, where she stated that she did not purchase any drinks, but that "[r]andom guys offered to buy

[1]Some of the defendants were named in plaintiffs' amended petition for damages filed on September 6, 2005.

[her] drinks." Plaintiffs filed an opposition to Fred's motion for summary judgment, contending that based on the deposition testimony of Marc Fraioli, the owner and manager of Fred's, material facts remained as to whether Fred's "neglected its duty not to provide alcohol to a minor." By judgment dated May 1, 2007, the trial court denied Fred's motion for summary judgment.

On June 15, 2009, Fred's re-urged its motion for summary judgment. In addition to Wheeler's deposition testimony, Fred's also submitted and relied upon a "Request for Admissions of Fact" and "Responses to Admissions of Fact," wherein plaintiffs admitted that they had no eye witnesses to (1) testify that any of Fred's employees served alcohol to Wheeler, and (2) support the contention that anyone transferred alcoholic drinks to Wheeler in plain view of Fred's employees. On September 14, 2009, the trial court heard arguments on the motion and on October 2, 2009, issued a "Ruling" granting Fred's motion for summary judgment and finding that "no evidence exist[s] in the record that the defendant's [sic] breached any duty owed to plaintiff[s]." A judgment conforming to the trial court's ruling was signed on November 5, 2009.

Plaintiffs then filed the instant appeal, contending that the trial court erred in finding that there was a lack of evidence to show that Fred's breached its duty to prevent alcohol from being furnished to Wheeler, and that summary judgment was proper.

DISCUSSION

Summary Judgment

A motion for summary judgment is a procedural device used to avoid a full-scale trial, where there is no genuine factual dispute. Sanders v. Ashland Oil, Inc., 96-1751 (La. App. 1st Cir. 6/20/97), 696 So. 2d 1031, 1034, writ denied, 97-1911 (La. 10/31/97), 703 So. 2d 29. It should be granted only if the pleadings, depositions, answers to interrogatories and admissions on file,

together with the affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966.

The summary judgment procedure is designed to secure the just, speedy and inexpensive determination of every action and is now favored. LSA-C.C.P. art. 966(A)(2). The initial burden continues to remain with the mover to show that no genuine issue of material fact exists. If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. LSA-C.C.P. art. 966(C)(2). If the nonmoving party fails to do so, there is no genuine issue of material fact and summary judgment should be granted. LSA-C.C.P. arts. 966 and 967; Berzas v. OXY USA, Inc., 29,835 (La. App. 2nd Cir. 9/24/97), 699 So. 2d 1149, 1153-1154.

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Bezet v. Original Library Joe's, Inc., 2001-1586, 2001-1587 (La. App. 1st Cir. 11/08/02), 838 So. 2d 796, 800. Because it is the applicable substantive law that determines materiality, whether or not a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Rambo v. Walker, 97-2371 (La. App. 1st Cir. 11/6/98), 722 So. 2d 86, 88, writ denied, 98-3030 (La. 1/29/99), 736 So. 2d 840.

The substantive law applicable in the instant case is the law regarding the liability of alcohol vendors or providers to minors. A vendor of alcoholic beverages has a duty to refrain from selling or serving alcohol to minors. See Berg v. Zummo, 2000-1699 (La. 4/25/01), 786 So. 2d 708, 716; see also Colgate v. Mughal Brothers, Inc., 36,754 (La. App. 2nd Cir. 1/29/03), 836 So. 2d 1229,

1233, writ denied, 2003-0923 (La. 5/16/03), 843 So. 2d 1136; and Crutchfield v. Landry, 2003-0969 (La. App. 4th Cir. 3/17/04), 870 So. 2d 371, 389, writ denied, 2004-1295 (La. 9/24/04), 882 So. 2d 1128. When a bar serves alcohol to a minor, and that minor causes damage to another because of his intoxication, LSA-R.S. 9:2800.1[2] does not immunize it from liability, nor is it absolutely liable; instead, the court must determine whether the vendor violated general negligence principles, applying the traditional duty/risk analysis. Berg v. Zummo, 786 So. 2d at 714; Stewart v. Daiquiri Affair, Inc., 2008-1804 (La. App. 1st Cir. 5/13/09), 20 So. 3d 1041, 1046, writ denied, 2009-1337 (La. 10/16/09), 19 So. 3d 477.

Thus, under the duty/risk analysis, the plaintiff must prove five separate elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant failed to conform his conduct to the appropriate standard (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and (5) actual damages (the damages element). Berg v. Zummo, 786 So. 2d at 715-716 (citing Roberts v. Benoit, 605 So. 2d 1032, 1051 (La. 1991) (on rehearing)). A negative answer to any of the elements of the duty/risk analysis prompts a determination of no liability. Crutchfield v. Landry, 870 So. 2d at 387.

Here, Fred's candidly acknowledges that it had a duty to refrain from selling or serving alcoholic beverages to minors. With reference to the next

[2]In 1986, the Louisiana Legislature enacted LSA-R.S. 9:2800.1, entitled "Limitation of liability for loss connected with sale, serving, or furnishing of alcoholic beverages," which places the responsibility for and consequences of intoxication on the intoxicated person by legislatively mandating and providing that it is the consumption of alcohol, rather than the sale, service, or furnishing of alcohol, that is the proximate cause of any injury inflicted by an intoxicated person. Berg v. Zummo, 786 So. 2d at 714. However, this immunity is only provided for damages resulting from the sale or service of alcohol to persons over the age for the lawful purchase of alcohol. Berg v. Zummo, 786 So. 2d at 714.

element in the duty/risk analysis, the breach of duty element, Fred's contends that it did not breach its duty to refrain from selling or serving alcohol to minors, and more importantly, that plaintiffs cannot establish that Fred's breached this duty. In support of its motion for summary judgment, Fred's presented the uncontradicted testimony of Wheeler that she did not pay for any drinks at Fred's, but that "random guys" purchased drinks for her. As noted above, Fred's also submitted its Request for Admissions of Fact and plaintiffs' Responses to Admissions of Fact, wherein plaintiffs admitted that they had no witnesses to (1) testify that any of Fred's employees served alcohol to Wheeler, and (2) support the contention that anyone transferred alcoholic drinks to Wheeler in plain view of Fred's employees.

Thereafter, the burden of proof shifted to the plaintiffs to produce factual support sufficient to satisfy their evidentiary burden at trial, i.e., that Fred's breached its stated duty not to serve or sell alcohol to Wheeler on the night of the accident. See Spears v. Bradford, 94-0892, 94-0893 (La. App. 1st Cir. 3/3/95), 652 So. 2d 628, 632-33. Plaintiffs clearly failed to do so. Rather than showing that they could meet their evidentiary burden of proving at trial that Fred's breached a duty owed herein, plaintiffs argue that the trial court should have imposed a "heightened duty" on the vendor. Specifically, plaintiffs argue that even if Fred's did not sell or serve alcohol to Wheeler, Fred's had a duty to ensure that she did not otherwise obtain alcohol while in the bar. Specifically, plaintiffs contend that vendors have a "duty to do everything in [their] power to prevent alcoholic beverages from being furnished to [minors]."

To the extent that plaintiffs ask this court to create and impose a heightened duty herein, we find no support and decline to do so. See Colgate v. Mughal Brothers, Inc., 36,754 (La. App. 2nd Cir. 1/29/03), 836 So. 2d at 1233-34 and

Crutchfield v. Landry, 2003-0969 (La. App. 4th Cir. 3/17/04), 870 So. 2d at 387-90.[3]

Thus, because plaintiffs admittedly cannot make the necessary showing to establish that Fred's sold or served alcohol to Wheeler on the night of the accident, and thus failed to conform its conduct to the appropriate standard, the trial court correctly determined that the defendant was entitled to judgment in its favor as a matter of law.

This assignment of error lacks merit.

CONCLUSION

For the above and foregoing reasons, the November 5, 2009 judgment of the trial court, dismissing plaintiffs' claims against Triumvirate of Baton Rouge, Inc. d/b/a Fred's Bar, is affirmed. All costs associated with this appeal are assessed to the plaintiffs/appellants, Isaac Sparrow and Sabrina Sparrow Green.

AFFIRMED.

[3]In Colgate v. Mughal Brothers, Inc., the plaintiff similarly argued that the vendor's duty to refrain from selling or serving alcohol to minors should be extended where a witness saw a minor take two glasses of beer from the main bar counter, but saw no money exchange hands between the bartender and minor. The Second Circuit Court of Appeal disagreed. While acknowledging the vendor's duty to refrain from selling or serving alcohol to minors, in determining how the minor obtained alcohol while in the bar, the court further noted that "[p]robabilities, surmises, speculations, and conjectures are insufficient to prove negligence by a preponderance of the evidence." Colgate v. Mughal Brothers, Inc., 836 So. 2d at 1234. The court further noted that the minor's actions of taking two glasses of beer from the bar were insufficient to show that the vendor "served" the alcohol in breach of its duty. Colgate v. Mughal Brothers, Inc., 836 So. 2d at 1234. Notably, the court held that without evidence to rule out possibilities such as someone of drinking age purchasing drinks for a minor, or that the minor fraudulently obtained a bracelet indicating that she was twenty-one years of age and able to purchase drinks, plaintiff's claims were merely speculative. Colgate v. Mughal Brothers, Inc., 836 So. 2d at 1234; see also Crutchfield v. Landry, 870 So. 2d at 386-390 (where the court of appeal reversed a finding of liability on the Holiday Inn where the facts surrounding how and when the minor obtained drinks at a Holiday Inn bar were "speculative").