

**MARGOLIS
EDELSTEIN**

DRAM SHOP/LIQUOR LIABILITY IN PENNSYLVANIA

Carol Ann Murphy

HARRISBURG OFFICE
3510 Trindle Road
Camp Hill, PA 17011
717-975-8114

PITTSBURGH OFFICE
535 Smithfield Street
Suite 1100
Pittsburgh, PA 15222
412-281-4256

WESTERN PA OFFICE:
983 Third Street
Beaver, PA 15009
724-774-6000

SCRANTON OFFICE
220 Penn Avenue
Suite 305
Scranton, PA 18503
570-342-4231

**MARGOLIS
EDELSTEIN**

**Carol Ann Murphy, Esquire
The Curtis Center, Suite 400E
170 South independence Mall West
Philadelphia, PA 19106-3337
Direct 215-931-5881
Cell 215-803-0356
Fax 215-922-1772
cmurphy@margolisedelstein.com**

CENTRAL PA OFFICE
P.O. Box 628
Hollidaysburg, PA 16648
814-695-5064

SOUTH JERSEY OFFICE
100 Century Parkway
Suite 200
Mount Laurel, NJ 08054
856-727-6000

NORTH JERSEY OFFICE
Connell Corporate Center
400 Connell Drive
Suite 5400
Berkeley Heights, NJ 07922
908-790-1401

DELAWARE OFFICE:
300 Delaware Avenue
Suite 800
Wilmington, DE 19801
302-888-1112

DRAM SHOP/LIQUOR LIABILITY IN PENNSYLVANIA

A. LIQUOR CODE

The Pennsylvania Liquor Code, Section 4-493(1) provides the basis for imposing liability for negligent service of alcohol by liquor licensees.

1. Section 4-493 of the Liquor Code provides, in pertinent part:

It shall be unlawful –

- (1) Furnishing liquor or malt or brewed beverages to certain persons. For any licensee or the board, or any employee, 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, or to any minor: Provided further, that notwithstanding any other provision of law, no cause of action will exist against a licensee or the board or any employee, servant or agent of such licensee or the board for selling, furnishing or giving any liquor or malt or brewed beverages or permitting any liquor or malt or brewed beverages to be sold, furnished or given to any insane person, any habitual drunkard or person of known intemperate habits unless the person sold, furnished or given alcohol is visibly intoxicated or is a minor.

2. Section 47 P.S. 4-497 provides as follows:

No licensee shall be liable to third persons on account of damages inflicted upon them off the licensed premises by customers of the licensee unless the customer who inflicts the damages was sold, furnished or given liquor or malted or brewed beverages by the said licensee or his agent, servant or employee when the said customer was visibly intoxicated.

The Pennsylvania courts have clearly held that in order for a liquor licensee to be liable to a third person there must be service of alcohol to a visibly intoxicated person. *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 198 A.2d 550 (1964). Furthermore, the courts have held that Section 4-497 "does not create a cause of action against the licensee but in fact limits the extent of a licensee's liability." *Detwiler v. Brumbaugh*, 441 Pa. Super. 110, 656 A.2d 944 (1955).

The Court in *Detwiler* explained that:

Traditionally, liability is established after a finding is made that a duty existed, a breach of that duty occurred and the resulting harm was proximately caused by the breach. *Fennell v. National Mutual Fire Insurance Company*, 412 Pa. Super. 534, 603 A.2d 1064 (1992), *allocatur denied*, 533 Pa. 600, 617 A.2d 1274 (1992). Section 4-493 of the Liquor Code sets forth the duties associated with the service of alcohol.

Id. at 946.

Additionally, the Court in *Detwiler* stated that:

This section clearly imposes a duty on those parties identified to refrain from selling liquor to a visibly intoxicated individual. ‘A violation of the requirements of this statute is deemed negligent per se, and if the violation is the proximate cause of plaintiff’s injuries, then the defendant is liable.’

Id. at 946.

It is clear from the *Detwiler* case as well as other cases that the Pennsylvania Liquor Code, Sections 4-493 and 4-497, provides the basis for a claim concerning the service of alcohol.

Id. The law is quite clear that visible intoxication is a necessary element to establish liability against a licensee. 47 P.S. §4-497. That is, Section 4-497 specifically states that there will be no liability unless there is service of alcohol to one who is visibly intoxicated. Furthermore, as noted above, if plaintiff proves a violation has occurred, plaintiff must still prove that the violation was the proximate cause of the plaintiff’s injuries.

As stated in *Fandozzi v. Kelly Hotel*, 1998 Pa. Super. ___, 711 A.2d 524, 525-26 (1998) appeal denied, 558 Pa. 601, 735 A.2d 1269 (1999), plaintiff must prove two things in order to establish liability against a liquor licensee. That is, the plaintiff must prove the following:

1. That an employee or agent of the licensee served alcoholic beverages to a customer while visibly intoxicated; and

2. That this violation of the statute proximately caused the plaintiff's injuries.

Id. It is not sufficient for a plaintiff to establish merely that alcoholic beverages were served to a patron or that the patron was intoxicated at the time he or she caused injury to another. For civil liability to attach, evidence must be produced indicating that the patron was served alcohol at a time when he or she was visibly intoxicated. *Id.* at 527.

B. PROOF OF VISIBLE INTOXICATION

To establish a state of visible intoxication, proof of service and consumption of alcohol is not sufficient; instead, to establish that a patron was served alcoholic beverages while visibly intoxicated, the plaintiff must prove that the patron exhibited signs of visible intoxication before being served their last drink and that someone saw the patron exhibit such signs. *McDonald v. Marriott*, 388 Pa. Super. 121, 564 A.2d 1296, 1299 (1989).

However, it would appear, based on Pennsylvania case law that both direct and circumstantial evidence will be considered in evaluating whether the plaintiff can establish that an individual was served alcohol at a time when said individual was visibly intoxicated in the absence of direct eyewitness evidence. Although from a defense perspective, one would like to argue that the *McDonald* case, as noted above, and the case of *Johnson v. Harris*, 419 Pa. Super. 541, 615 A.2d 771 (1992) require that direct eyewitness evidence of the alleged intoxicated person is necessary for plaintiff to meet her burden of proof, the Pennsylvania Superior Court, in *Fandozzi v. Kelly Hotel, Inc.*, *supra*, 711 A.2d at 527, held differently:

We note, however, that in the 18 years since *Couts* was decided, neither this court nor our Supreme Court has held that direct evidence is required to prove that a patron was served alcohol while visibly intoxicated. Subsequent decisions of this court have addressed *Couts*, noting that it is not binding, but nevertheless examining whether similar circumstantial evidence has been presented. ... Accordingly, we conclude that a plaintiff can prove

dram shop liability in the absence of direct eye witness testimony that an individual was served at a time when he or she was visibly intoxicated. *Id.* at 527.

One way a plaintiff may attempt to establish visible intoxication has been the use of the results of a blood alcohol test performed after the happening of the accident and "the relation back" by an expert to establish that the individual would have appeared intoxicated at the time he was served the alcohol. However, the Pennsylvania Superior Court in *Conner v. Duffy*, 438 Pa. Super. 277, 652 A.2d 372 (1994) held that such evidence, without more, is insufficient to permit the case to go to a jury. *Id.*

In discussing this issue, the Court in *Conner*, noted that the evidence in that case could not rise to the level of establishing a general issue of material fact simply through the "relation back" testimony of the expert. *Id.* at 375. The Court noted that in *Johnson v. Harris*, 419 Pa. Super. 541, 615 A.2d 771 (1992), the Superior Court warned:

The Pennsylvania Supreme Court has on various occasions discussed the complexity of "relation back" and has indicated that it should be used guardedly. We are accordingly wary of any attempt to create genuine issue of fact as to "visible intoxication" based on medical testimony of what the average person's reaction might have been assuming [the driver's] "probable" blood alcohol concentration.

Furthermore, the Pennsylvania Superior Court in *Suskey v. Loyal Order of Moose Lodge No. 86*, 325 Pa. Super.94, 472 A.2d 663 (1994), held that a jury instruction on the presumption of legal intoxication that is set forth in the motor vehicle Code 75 Pa. C.S.A. §1547(d) is not proper since a person who might be "legally" intoxicated under that presumption would not necessarily be "visibly" intoxicated as required by the Dram Shop Act. Also, see *Estate of Mickens v. Stevenson*, 2002 Pa. Dist. and Cnty. Dec. Lexis 131; 57 Pa. D. & C. 4th 287 (2002) . In said case, the Court of Common Pleas of Fayette County granted the Motion for Summary Judgment of the owner of the first bar as there was no evidence of negligence or violation of the

Dram Shop Act. The court found no liability under the Dram Shop Act, Pa. Stat. Ann. Tit. 47. The court found that the evidence produced failed to establish that the patron in question was served alcoholic beverages at defendant's establishment while he was visibly intoxicated within the meaning of the statute. In said case, the court set forth the proper meaning of "visibly intoxicated" as:

In defining the violation as the dispensation of alcoholic beverages to a person 'visibly intoxicated,' the statute displays considerable logic in placing stress upon what can be seen. The law does not hold a licensee or its agent responsible on any basis, such as blood alcohol level of a patron, which would not be externally apparent; instead, the law decrees that the alcoholic beverage dispenser shall not provide more alcohol when the signs of intoxication are visible. *The practical effect of the law is to insist that the licensee be governed by appearances, rather than by medical diagnoses.*" *Johnson vs. Harris*, 419 Pa. Super., 541, 551, 615, A.2d 771, 776 (1992) (emphasis [*16] in original) quoting *Laukemann vs. Commonwealth of Pennsylvania.*, 82 Pa. Cmwlth. 502, 475, A.2d 955 (1984).

Furthermore, the Court found that:

...mere breach of the statutory duty to refrain from serving alcohol to visibly intoxicated persons does not alone establish liability, as plaintiff must also show that the breach was the proximate cause and cause in fact of an injury. *Id.* Thus, in order for an injured plaintiff to recover under the Dram Shop Act provision prohibiting service of alcohol to visibly intoxicated persons, the following two things must be proven: (1) that the plaintiff was served alcoholic beverages while visibly intoxicated, and (2) that the violation proximately caused injuries. See *Johnson vs. Harris*, 419 Pa. Super. 541, 550, 615 A.2d 771, 775 (1992). See also, *Fandozzi vs. Kelly Hotel, Inc.*, 711 A.2d 524 (Pa. Super. 1998), allocatur denied, 558 Pa. 601, 735 A.2d 1269 (1999).

However, if the plaintiff is able to establish other evidence, the Courts have allowed expert testimony of the toxicologist. See *Fandozzi v. Kelly Hotel, Inc.*, *supra*, 711 A.2d at 527. In that case, the Court concluded that the blood alcohol content and the opinions of the toxicology expert were supported by additional circumstantial evidence indicating that the decedent was visibly intoxicated while in the bar. Therefore, although the Court noted that this

court had been "wary of an attempt to create a general issue of material fact as to 'visible intoxication' based on medical testimony of what the average person's reaction might have been assuming [the patron's] 'probable' blood alcohol concentration", the Court found that in this case there was other evidence. *Fandozzi v. Kelly Hotel, Inc., supra*, 711 A.2d at 528-529. Also see, *Jardine v. Upper Darby Lodge No. 1993, Inc., supra*, 198 A.2d at 550. In *Jardine*, the Pennsylvania Supreme Court discussed the use of expert opinion in a dram shop case. The Court found that the doctor's testimony about the patron's physical condition and his opinion that he would have been intoxicated when served his last drink at the bar were admissible because the testimony did not stand alone. However, the Pennsylvania Superior Court in the *Estate of Cron v. Club North 40*, No. 0168 M.D. appeal DKT. 1997, 552 Pa. 269, 714 A.2d 1024 found that the expert opinion of the toxicologist "relating back" to the blood alcohol level was not sufficient to create a genuine issue of fact as to visible intoxication and found in favor of the liquor establishment. The Honorable Judge Russell Nigro wrote a dissenting opinion in which he believed that there was sufficient evidence of visible intoxication by individuals on the scene after the accident and that such evidence as well as the expert opinion should have been considered and should have prevented summary judgment from being granted.

The plaintiff may attempt to introduce the criminal conviction of a DUI in a case in which the driver and the bar establishment have been sued. The defense should object to the admission of a such a conviction. As noted above, although one may be found legally intoxicated, this does not establish visible intoxication. Furthermore, evidence of the criminal conviction would be highly prejudicial to the bar establishment.

C. LIABILITY FOR SERVICE OF ALCOHOL TO MINORS

Originally, the Superior Court in *Simon vs. Shirley*, 269 Pa. Super. 364, 409 A.2d 1365 (1979) held that mere service by a liquor establishment of alcoholic beverages to a minor was

not sufficient to render the licensee liable. The Superior Court in that case indicated visible intoxication was needed. However, in a series of cases by the Pennsylvania Supreme Court thereafter, the Pennsylvania Supreme Court overruled *Simon vs. Shirley*.

In *Matthews vs. Konieczny*, 515 PA. 106, 527 A.2d 508 (1987) and *Mancuso vs. Bradshaw*, 338 Pa. Super. 328, 487 A.2d 990 (1985), the Pennsylvania Supreme Court, in the consolidated appeals, held that: (1) The service of alcoholic beverages to minors in violation of the liquor code formed the basis for a finding of negligence with regard to those subsequently affected by the legal service, even if beverages were served to one other than the ultimate actor in the ensuing automobile accident, i.e. the driver; and (2) the statutory "immunity" found at 47 P.S. 4-497 applied only to "legally competent" customers and did not, therefore, insulate a licensee from liability resulting from sales to minors, thus, negating the necessity of showing that the minor customer was visibly intoxicated at the time of purchase.

In *Matthews*, Matthew Capriatti, age 17 purchased a case of beer from the defendant distributor without being asked for verification or proof of age. In the Capriatti vehicle was another minor, James Matthews. Later, Capriatti and Matthews picked up John Konieczny. Eventually, Konieczny elected to be the driver of the automobile in which the three minors were riding. By that time, Konieczny had consumed five (5) or six (6) 16 ounce beers. He lost control of the car and struck a tree. James Matthews was killed. In *Mancuso*, William McGee (age 20) bought a case of beer from the defendant beer distributor. Thereafter, defendant, Richard Bradshaw, 19 years old, consumed approximately one-half of the case of beer. After consumption of the alcohol, Bradshaw operated a motor vehicle which was involved in an accident with the plaintiff, Christina Mancuso.

Furthermore, the Pennsylvania Superior Court in *Thomas vs. Duquesne Light Company*, 396 Pa. Super. 1, 545 A.2d 289 (1988) held that a beer distributor's duty to refrain from selling

alcohol to minors can be breached by an indirect sale to a minor through an adult intermediary if it is known or should have been known by the licensee that the alcohol was being purchased for the use of a minor. Also, see *Reber vs. The Commonwealth PA Liquor and Control Board*, 101 Pa. Cmwlth. 397, 516 A.2d 440 (1986) in which the Commonwealth Court held that the Pennsylvania Liquor Control Board also owes a duty not to furnish liquor to minors either directly or through likely intermediaries. A breach of this duty will yield liability if the breach is the cause of the injuries suffered.

Also, the Pennsylvania Supreme Court, in *Congini vs. Porterville Value Company*, 504 PA. 157 470 A.2d 515 (1983), found that social hosts may be liable for supplying minors with alcohol. In this case, the Pennsylvania Supreme Court determined that social hosts serving alcohol to minors to the point of intoxication are negligent *per se* and can be held liable for injuries resulting from the minor's intoxication. The Court found that the social host would be responsible for injuries caused to the minor himself or to third parties. The court explained the reason for having a different rule for minors as opposed to adults served alcohol by a social host as follows:

However, our legislature has made a legislative judgment that persons under twenty-one years of age are incompetent to handle alcohol. Under Section 6308 of the Crimes Code 18 Pa. C.S. Section 6308, a person 'less than twenty-one years of age' commits a summary offense if he 'attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malt or brewed beverages'. Furthermore, under the Section 306 of the Crimes Code, 18 Pa. C.S. Section 306, an adult who furnishes liquor to a minor would be liable as an accomplice to the same extent as the offending minor.

The legislative judgment compels a different result from *Klein*, for here we are not dealing with the ordinary able bodied men. Rather, we are confronted

with persons who are, at least in the eyes of the law, incompetent to handle the affect of alcohol. *Id.* at 517.

The Pennsylvania Supreme Court, in *Orner vs. Malick*, 432 Pa. 580, 515 Pa. 132, 527 A.2d 521 (1987), further interpreted the decision in *Congini* to hold that the service of intoxicating liquors to a minor by a social host is negligence per se, even if the liquors are not served to the point of intoxication. The Pennsylvania Supreme Court found that the Superior Court, in *Orner*, had narrowly interpreted *Congini* to indicate that the plaintiff had to prove service to the point of intoxication before liability would be imposed on a social host. Instead, the Pennsylvania Supreme Court in *Orner* rejected such a narrow reading of *Congini* and made it clear that any service of alcohol to a minor can yield liability and again emphasized the reasons for such a strict rule. *Orner vs. Malick, supra*, 527 A.2d at 521.

In *Orner*, the plaintiff, 19 ½ years old, attended a series of high school graduation parties during a particular night in June of 1981. At the home of an acquaintance, plaintiff was served intoxicating liquor. The same was true at a home of a second acquaintance. Finally, at the Regency Hotel, the minor plaintiff was served intoxicating beverages again. At the Hotel, the plaintiff, now intoxicated, fell over a second floor railing and sustained serious injuries. The defendants/social hosts filed preliminary objections which, were argued before the issuance of the Supreme Court decision in *Congini vs. Porterville*. Therefore, the lower court held that no social host liability existed even for service to a minor and dismissed the complaint. However, after the decision in *Congini*, the Superior Court affirmed the lower court's order finding that even under *Congini*, the plaintiff had failed to state a cause of action against one of the social hosts whom he had visited before going to the Regency Hotel.

However, as noted above, the Pennsylvania Supreme Court, found that the Superior Court narrowly read its prior holding and, instead, found that the holding in *Congini* was to be

read that any service of alcohol to a minor can yield liability. Thus, the social host of the plaintiff could be liable.

The Pennsylvania Superior Court in *Jefferis vs. The Commonwealth of Pennsylvania*, 371 Pa. Super. 12, 537 A.2d 355 (1988) established a tripartite test to determine whether a social host would be subject to liability for injuries arising out of a minor's intoxication. The Court outlined the following test to be used:

- (1) the defendant must have intended to act in such a way as to furnish, agree to furnish or promote the furnishing of alcohol to a minor,
- (2) the defendant must of acted in a way which did furnish, agree to furnish, or promote the furnishing of alcohol to a minor; and
- (3) the defendant's act must have been a substantial factor in furnishing, agreement to furnish, or the promotion of alcohol to the minor.

The Court also noted that factors relevant to determining whether the defendant's act was a substantial factor in the commission of the tort included the nature of the act incurred, the amount of assistance given, the defendant's presence or absence at the time of the tort, the defendant's relation to the tortfeasor and foreseeability of the harm that occurred. *Id.* at 358 citing Section 876 of the Restatement (Second) of Torts.

After *Jefferis*, the Pennsylvania Supreme Court again addressed the issue of social host liability in *Alumni Association vs. Sullivan*, 524 Pa. 356 Pa. 572 A.2d 1209. In *Alumni*, the Pennsylvania Supreme Court concluded that the social hosts liability extends only to persons who "knowingly furnish" alcohol to minors. Consequently, the court refused to impose liability on a university and the national fraternity for injuries suffered by a minor after an alcohol party held in a dormitory and hosted by a fraternity's local chapter. The court refused to impose

liability because there was no indication that either the fraternity or the university was involved in the planning or serving, supplying or purchasing the alcohol. The Pennsylvania Superior followed this reasoning in *Millard vs. Osbourne*, 416 Pa. Super. 475 , 611 A.2d 715 and *Kapres vs. Heller*, 1992 Pa. Super. Lexis 2310, 612 A.2d 987 (1992).

As to the liability of a minor social hosts to another minor, the Pennsylvania Supreme Court in *Kapres vs. Heller*, 536 Pa. 550, 640 A.2d 888 (1994), held that a minor cannot be liable for serving alcohol to another minor. The Pennsylvania Supreme Court affirmed the Superior's Court decision in *Kapres*. For discussion of the difference in a civil case versus criminal case, see *Commonwealth of PA vs. Lawson*, where the court noted that although liability did not exist in a civil case, a minor could be criminally liable for furnishing alcohol to another minor.

As to defenses available to a party in cases involving minors, see discussion below concerning defenses.

D. LIABILITY OF SOCIAL HOSTS (ADULTS)

The Pennsylvania Courts have refused to extend liability under the liquor code to non licensed persons who furnish intoxicants to individuals in a state of visible intoxication. See, *Manning vs. Andy*, 454 Pa. 237, 310 A.2d 75 (1973). Also, see *Klein vs. Raysinger*, Pa. 141 470 A.2d 507 (1983).

As to liquor liability being found against an employer, the Pennsylvania Superior Court in *Burkhart vs. Brockway Glass Company*, 325 Pa. Super. 204 507 A.2d 844 (1986) found that an employer is not liable for the harm that results from its furnishing of alcoholic beverages to its visibly intoxicated employee and/or its failure to warn the employee against driving or failing to prevent the employee from operating a motor vehicle. The Court found that an employer has no greater duty than any social host who furnished alcoholic beverages to an adult guest. *Id.*

Also, see *Sites vs. Cloonan*, 328 Pa. Super. 481, 477 A.2d 547 (1984).

In *Sites*, the Court held that a non commercial organization which sponsored a private social gathering and acted strictly as a social host and gratuitously supplied liquor could not be held liable to third parties injured when struck by an automobile driven by a guest who became intoxicated at the event.

E. LIABILITY OF VALET SERVICE

In *Moranko vs. Downs Racing, L.P.*, 2015 W L 3609361, 2015 Pa. Super. 137, (2015) the Pennsylvania Superior Court, in a case of first impression, held that there is no duty under Pennsylvania law of a valet service when an automobile is returned to an allegedly intoxicated person. The entry of summary judgment for defendants was affirmed.

The estate claimed that the decedent consumed “copious amounts of alcohol” while at Mohegan Sun. *Id.* Thereafter, the decedent retrieved his vehicle from valet services, despite his alleged visible intoxication. *Id.*

The Superior Court accepted the plaintiff’s contention that the decedent was visibly intoxicated while at Mohegan. The Superior Court found that the crux of the case hinged upon whether Pennsylvania law imposes a duty upon Mohegan Sun and its valet service to withhold the keys to a vehicle if the owner appears visibly intoxicated. The Superior Court found that there is no such duty. *Id.* In this case, plaintiff presented no evidence that Mohegan Sun served alcohol to the decedent while he was at the casino prior to the accident in question.

As to plaintiff’s argument that the valet service owed an affirmative duty to the decedent, plaintiff provided no specific case law and, instead, relied upon general concepts of “ordinary care” and public policy to create such a duty. More specifically, plaintiff relied upon Section 324A of the Restatement (Second) of Torts, Liability to Third Person for Negligent Performance

of Undertaking. *Id.* The Superior Court found that Section 324A provides no basis for relief. *Id.*

Alternatively, plaintiff argued that Mohegan's duty is based upon internal organizational policies "designed to identify visibly intoxicated patrons and to prevent them [sic] from the gaming floor". *Id.* However, the Pennsylvania Superior Court found that this policy did not place a legal duty on Mohegan Sun. *Id.*

Plaintiff also relied on an employee training program regarding alleged prohibition of serving of alcohol to visibly intoxicated gaming patrons. However, the Superior Court found that this internal policy did not require valets to withhold an automobile. *Id.*

Although plaintiff, on appeal, for the first time, raised that the issue that Section 323 of Restatement (Second) of Torts is applicable, the Superior Court found that plaintiff waived said argument. *Id.* Therefore, this argument was not addressed except by Judge Mundy in his dissenting opinion. *Id.*

Lastly, the Superior Court found that "Although no Pennsylvania appellate decision addresses the specific issue of parking attendant/valet liability, a number of other jurisdictions have reached the same conclusion as in *Mills vs. Continental Parking Corp.*, 86 Nev. 724, 475 P. 2nd 673 (1970)]." *Id.* In *Mills*, the court held that a parking lot attendant could not be liable for surrendering a vehicle to its intoxicated driver. *Id.* In *Moranko*, the Superior Court found that the reasoning in *Mills* applied. *Id.*

F. BYOB

In *State Police, Bureau of Liquor Control Enforcement v. D'Angio, Inc.*, 1995 Pa. Commw. LEXI 454, 666 A.2d 1114 (Pa. Cmwlth 1995), the Pennsylvania Commonwealth Court noted that "There is no dispute that BYOB establishments are not subject to any regulation by the [Liquor Control] Board." citing *Dean v. City of Harrisburg*, 128 Pa. Commw. 431, 563 A.2d

965 (Pa. Cmwlth 1989). In *Dean*, the Pennsylvania Commonwealth Court found that “the Liquor Code does not regulate the use or possession of alcoholic beverages lawfully obtained by patrons of bottle clubs. Consequently, bottle clubs are not part of the alcoholic beverage industry and local regulation by ordinance is appropriate.” *Id.* At 436.

G. GOVERNMENTAL IMMUNITY AND LIQUOR LIABILITY

In *Williams v. Searfoss*, 2019 Pa. Commw. Unpub. LEXUS 246 (Cmwlth. 2019), the Commonwealth Court addressed the issue of whether a tort claim under the Liquor Liability Code is an exception under the Tort Claims Act. The court found that “a tort claim under Sections 493(1)(1) and 497 of the Liquor Code does not fall within any of the exceptions to governmental immunity in the Tort Claims Act, 42 Pa. C.S. Section 8542. The trial court properly determined municipal defendants and agent defendants are shielded by governmental immunity.” *Id.*

In *Williams*, Plaintiff Robin Williams, individually and as administrator of the estate of decedent Robin Taneisha Williams brought suit against several defendants. Two sets of defendants (municipal defendants and agent defendants) filed preliminary objections which were granted. The plaintiff went to trial against the remaining defendant, Barry M. Searfoss. Mr. Searfoss was the driver of a vehicle which struck the rear of decedent’s vehicle while traveling on the Pennsylvania Turnpike.

The preliminary objections of defendants Warminster Township and Five Ponds Golf Club (jointly referred to as municipal defendants) and defendants D’Angelo Foundation, D’Angelo & Company, Christine Cole, P.J. Hansen and Charles and Lisa Williams (collectively referred to as agent defendants) were granted. After the trial against Mr. Searfoss, plaintiff filed an appeal as to the trial court granting the preliminary objections of the municipal defendants

and agent defendants.

Before the accident in question, defendant driver Searfoss attended a charity golfing event at the Five Ponds Golf Club (Golf Club). The Golf Club hosted the event. D'Angelo Foundation and D'Angelo & Company sponsored the event. Plaintiff, in her complaint, identified that Christine Cole, P.J. Hansen and Charles and Lisa Williams were "agents" or "employees" of the municipal defendants, D'Angelo Foundation and D'Angelo & Company.

It was alleged that while defendant driver Searfoss was at the event, he consumed alcoholic beverages to the point where he became legally intoxicated.

Plaintiff, in her lawsuit, claimed that the municipal defendants and agent defendants were negligent in serving alcohol at the event without monitoring consumption, and specifically in serving defendant driver Searfoss while he was visibly intoxicated.

Municipal defendants and agent defendants filed preliminary objections asserting governmental immunity, which the trial court granted.

The issue on appeal related to governmental immunity and liquor liability. Plaintiff contended that the Political Subdivision Tort Claims Act does not provide immunity for municipal golf course liquor licensees from tort liability for serving alcoholic beverages to visibly intoxicated persons. Plaintiff asserted that the Pennsylvania Liquor Code does not provide local government liquor licensees with any exception from tort liability for serving alcoholic beverages to visibly intoxicated person. Furthermore, plaintiff argued that the Political Subdivision Tort Claims Act does not provide immunity from liability to agents and employees of municipal court licensees for intentional, wanton and willful conduct in serving alcoholic beverages to visibly intoxicated persons, who then caused injuries to third persons away from the licensed premises.

The Commonwealth Court, in reviewing this matter, noted “under the Torts Claim Act, as a general rule, governmental agencies enjoy immunity from tort liability; no local agency shall be liable for any damages on the account of injury to persons or property caused by any act of the local agency or an employee thereof or any other person.” *Williams v. Searfoss*, 2019 Pa., Unpub. LEXUS at 246.

The Commonwealth Court found that exceptions to the governmental immunity, as set forth in Section 8542 of the Tort Claims Act, did not apply in this case. *Id.*

The court, in reviewing the plaintiff’s claim that tort immunity does not apply to the municipal defendants or the agent defendants, discussed the decisions of *Guinn v. Alburtis Fire Company*, 531 Pa. 500, 614 A.2d 218 (Pa. 1992) and *Sphere Drake Insurance Company v. Philadelphia Gas Works*, 566 Pa. 541, 782 A.2d 510 (Pa. 2001). The court found that the findings in both decisions were applicable and that the trial court properly determined that the Tort Claims Act provides agent defendants with immunity from plaintiff’s tort claims in this case. Furthermore, the Commonwealth Court found that the trial court properly determined that the municipal defendants are local agencies entitled to immunity under the Torts Claim Act and cited both decisions of *Guinn* and *Sphere Drake*. *Id.* at 246. There is no dispute that the golf club was owned and operated by the Township and that the Township owned the liquor license issued to the golf club. The Commonwealth Court further noted that the trial court properly found that the agent defendants, as agents of municipal defendants, also enjoyed immunity.

The court then discussed at length the Pennsylvania Liquor Liability Code in conjunction with the Tort Claims Act.

The Commonwealth Court rejected the plaintiff’s contention that “the Liquor Code essentially preempts the Tort Claims Act for tort claims asserted under Sections 493 and 497 of

the Liquor Code.” The Commonwealth Court noted “by the plain terms of the Tort Claims Act, the general assembly expresses clear intention that no other statute or pronouncement will modify the immunity granted therein.” *Id.*

Furthermore, the court noted that none of the eight exceptions in Section 8542(b) of the Political Subdivision Tort Claims Act covers a tort claim for an off premises injury inflicted by a third party. *Id.* The Commonwealth Court noted that “consequently, even if plaintiff might otherwise have a tort cause of action under 497 of the Liquor Code, because that negligent claim does not fall within any exception to governmental immunity, municipal defendants are entitled to immunity. *Id.*

Accordingly, the Commonwealth Court found that the defendants were entitled to governmental immunity from plaintiff’s claims.

Lastly, the court addressed plaintiff’s claims concerning that the agent defendants lost the right to claim governmental immunity by engaging in outrageous and willful misconduct within the meaning of 42 Pa. C.S. Section 8550. However, the court noted that the plaintiff did not properly set forth the allegations within the complaint. Therefore, plaintiff’s willful misconduct claim under 42 Pa. Section 8550 was ineffective to overcome the immunity of municipal defendants and agent defendants.

Accordingly, the Commonwealth Court found that “a tort claim under Sections 493(1) and 497 of the Liquor Code does not fall within any of the exceptions to governmental immunity in the Tort Claims Act, 42 Pa. C.S. Section 8542. The trial court properly determined municipal defendants and agent defendants are shielded by governmental immunity.”

H. PLEADINGS

A significant number of complaints filed on behalf of plaintiffs include allegations of

common law negligence in addition to the allegations of the liquor liability under the liquor code. Specifically, plaintiffs may assert theories of common law negligence in which the plaintiff claims that the defendant failed to have policies or protocols in place to train employees with regard to the use and consumption of alcohol; defendant failed to have limits on the time during which patrons may consume alcohol; defendant failed to have in place a program or written courses of action to be taken when a person is visibly intoxicated; defendant failed to train, educate and supervise employees so as to prevent service or sale of alcohol to persons so as to cause intoxication; defendant failed to provide transportation for the alleged intoxicated patron; or defendant failed to prevent the alleged intoxicated patron from operating his/her vehicle.

A defendant when faced with such allegations of common law negligence should file preliminary objections to said allegations. (If the time period for Preliminary Objections has expired, then defendant can file a Motion for Judgment on the Pleadings or a Motion for Summary Judgment regarding these allegations.) Defendant should assert that there are no common law liabilities of a bar establishment to third persons arising from the sale of alcohol. That is, the bar establishment should argue that the only cause of action permitted by Pennsylvania law is contained in Section 4-497 of the Dram Shop Act, which limits liability to a showing that a patron was served alcoholic beverages by a licensee while visibly intoxicated and that such service was the proximate cause of the plaintiff's injury.

Some Pennsylvania trial courts have granted preliminary objections on the basis that there does not exist a common law negligence claim under Pennsylvania law.

The United States District Court for the Eastern District of Pennsylvania, addressed said issue in *Druffner v. O'Neill*, No. 10-04298, 2011 WL 1103647 (E.D. Pa. March 24, 2011). In

Druffner, the estate of Patricia Murphy Waggoner filed a Complaint alleging a claim for violation of the Pennsylvania Dram Shop Act, 47 P.S. Sections 4-493(1) and 4-497 and a claim for common law negligence against a licensed server of alcohol. In said case, the common law negligence claim specifically alleged that the licensee was negligent in failing to ensure that the intoxicated person did not operate a vehicle, for failing to make any effort to notify the intoxicated person's friend of her condition and/or failing to contact police to advise of the danger posed by the intoxicated person. *Druffner v. O'Neill*, No. 10-04298, 2011 WL 1103647 (E.D. Pa. March 24, 2011).

The *Druffner* court held that "it is clear that plaintiff has failed to state a cognizable claim under common law principles of negligence." *Druffner v. O'Neill*, No. 2011 WL 1103647 at *4. In dismissing the common law negligence claim, the court reasoned that "there was no duty to control the conduct of a third party to prevent another from harm, except where defendant stands in some special relationship with the intended victim of the conduct which gives the intended victim a right to protection." *Druffner, supra*, 2011 WL 1103647 at *4. Furthermore, the Court's survey of the law (including that of other jurisdictions), indicated that there is no duty of an alcohol licensee to prevent an intoxicated person from driving. *Id.* at *5.

Also, the Honorable Kevin A. Hess of the Cumberland County Court of Common Pleas in the matter of *Liberty Mutual Fire Insurance Company a/s/o Pamela S. Wolfe v. Tilden, et al.*, No. 11-2140 sustained the additional defendant's preliminary objections to the defendant/third-party plaintiff's Joinder Complaint striking all allegations of negligence. In *Wolfe*, original defendant Tilden filed a Joinder Complaint against several bar establishments seeking recovery under common law theories of liability and the Pennsylvania Dram Shop Act. In sustaining the additional defendant's preliminary objections, the *Wolfe* court held that 47 P.S. Section 4-497

provides the exclusive prerequisite for third-party seeking to impose liability on a licensee. As such, the defendant/third-party plaintiff's claims for negligence were dismissed from the Joinder Complaint.

Also, in Philadelphia County, the Honorable Allan L. Tereshko in the consolidated matters of *Buskirk v. Linda K. Woodward, Inc., et al.*, January Term 2012, No. 3031 granted preliminary objections. The court found that the common law negligence claims alleged by the plaintiffs were not permissible claims under the scope of 47 P.S. Section 4-497 and/or 47 P.S. Section 4-493. The Court noted that said sections limit the circumstances in which a plaintiff can bring a claim under said liquor code. The Court held that the law is clear that statutes control who and under what circumstances a third party can attach liability to a defendant. The Court noted that the Pennsylvania Superior Court in *Detwiler v. Brumbaugh*, 441 Pa. Super 110, 656 A.2d 944 (1995) held "Section 4-497 is clearly a limiting provision designed to specifically shield licensees from liability to third party except in those instances when the patron served was visibly intoxicated". Accordingly, the Court struck the paragraphs relating to common law negligence and allegations that were not specifically identified as establishing liability under 47 P.S. Section 4-497 and 47 P.S. Section 4-496.

Additionally, in Lycoming County, The Honorable Richard A. Gray in the matter of *Barr vs. Easton, Docket No. 13-02461, CCP Lycoming County*, PICS Case No. 14-1141, July 7, 2014, granted the preliminary objections of defendants, The Loyalsock Hotel Inc. and d/b/a The Loyalsock Hotel, Estate of Mary E. Temple, David J. Eck and Earl J. Eck, co-executors, as to the common-law-dram shop claim brought by plaintiff.

The Court held that:

While no appellate court had dealt squarely with the question of

www.margolisedelstein.com

whether 47 P.S. Section 4-493 precludes common law claims, the statute provides that “No cause of action will exist” unless the alcohol was furnished to an individual who is “visibly intoxicated or is a minor”.

That is, the Court found that the plain meaning of the statute made it clear that a licensee or agent may only be liable for serving a visibly intoxicated person. Consequently, the court found, as a practical matter, other ways of establishing liability under common law dram shop negligence become moot. Therefore, the Court granted said defendants’ preliminary objection and struck Count 5 of Plaintiff’s complaint regarding dram shop common-law negligence.

However, the Honorable Henry S. Perkin, United States Magistrate of the Eastern District of the United States, in denying the preliminary objections of defendants in *Dougherty v. KWLTL LLC*, 2017 US District Lexis 158126, FN 3, noted that:

The Pennsylvania courts are split on whether or not the Dram Shop Act is the exclusive remedy for plaintiffs... . We agree that the Pennsylvania courts are split on this issue and no brightline rule currently exists. At this stage of the litigation, however, we find that a determination as to whether Dram Shop liability is an exclusive remedy is premature, as it is common practice to allow parties to plead alternate theories of liability. *Id.* at FN 3.

Also, see above discussion where the Pennsylvania Superior Court found no duty of a valet service. *Moranko vs. Downs Racing, LP*, 2015 WL 3609361. (Pa. Super. 2015)

I. DEFENSES

1. Minors

As to the defense of contributory negligence, initially, the Pennsylvania Supreme Court in *Majors vs. Broadhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965), held that defendant licensee was not entitled to a charge of contributory negligence because of the patron’s consumption of intoxicating liquors resulting in his jumping or falling from a ledge onto the roof of the hotel’s

kitchen. The Pennsylvania Supreme Court held that contributory negligence was not a bar to recovery. The Court reasoned that if the defendant's negligence consisted of a violation of a statute enacted to protect the class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by the violation of such a statute.

However, in claims brought by minors against social hosts for the service of intoxicating liquors, the Pennsylvania Supreme Court allowed the defense of "contributory negligence". In *Congini vs. Porterville*, *supra*, 470 A.2d at 518, the Pennsylvania Supreme Court while noting that it was ruling upon the dismissal of a complaint following the sustaining of preliminary objections, did hold that the social host may assert as a defense the minor's contributory negligence. The Pennsylvania Supreme Court cited with approval the fact that under *Kuhns vs. Brugger*, 390 Pa. 331, 135 A.2d 395 (1957) an 18 year old person such as *Congini* would be "presumptively capable of negligence." The Pennsylvania Supreme Court also noted that an 18 year old would be liable as an adult for the knowing consumption of alcohol as a minor, thereby being guilty of a summary offense. 18 PA. C.S. Section 6308. Also, see *Matthews vs. Konieczny*, *supra*, 527 A.2d at 508; *Barrie vs. P.L.C.B.*, 1990 Pa. Dist. & Cnty. Dec. Lexis 335, 5 Pa. D & C 4th 174, 137 Pa. Cmwlth., 518, 517, 586 A.2d 1017, 1019 (1991). In *Barrie*, the Court discussed the issue of contributory negligence of a minor. The court discussed the decision of *Majors vs. Broadhead Hotel* and noted that this case was decided before the comparative negligence statute. Also, it noted the decisions of *Matthews* and *Congini*. *Barrie vs. P.L.C.B.*, *supra*, 586 A.2d at 1019. The court in *Barrie* stated:

Thus, although we recognize that an 18 year old minor may state the cause of action against an adult social host who has knowingly served him intoxicants, the social

host in turn may assert as a defense the minor's contributory negligence. Thereafter, under the comparative negligence act... it will remain for the fact finder to resolve whether the defendant's negligence was such as to allow recovery.

It should also be noted that the P.L.C.B. attempted to argue that it was not a social host. However, the court in *Barrie* noted that in *Matthews* a distinction between a social host and a licensee was without merit.

2. Adults

As noted above, the decision of *Majors v. Broadhead* would appear to eliminate the defense of contributory negligence. However, the subsequent decisions involving minors questioned how the defense of contributory negligence could not be raised in a case involving an adult when such a defense was permitted in a case involving a minor. This issue was raised and addressed in *Miller vs. The Brass Rail Tavern*, 1997 Pa. Super., 702 A.2d 1072 (1997).

In *Miller vs. The Brass Rail Tavern*, the adult decedent with a group of friends had consumed numerous alcoholic beverages throughout the course of the afternoon of July 8, 1989 before arriving at the Brass Rail Tavern early that evening where they stayed until "last call". Thereafter, the decedent was involved in a one car accident a number of hours after he had left the Brass Rail Tavern.

The trial court in *Miller* declined the bar establishment's request to apply the Pennsylvania Comparative Negligence Act. However, the Pennsylvania Supreme Court remanded the case back to the Court of Common Pleas "to allow the trial court to evaluate whether decedent's negligence, if any, bars recovery". The Court, in so holding, noted the following:

It makes no sense to permit a defendant to raise the contributory or comparative negligence of an intoxicated minor and yet prohibit a

defendant from raising the contributory or comparative negligence of an adult especially when minors are presumed by our legislature to be incompetent to handle alcohol. *Congini* at 161, 470 A.2d 517; 18 Pa.C.S.A. Section 6308 (prohibiting the purchase, possession and consumption of alcohol by minors). In the present case, however, the trial court found that 'any notion of contributory negligence ... on the part of [decedent] [is] so interwoven with the improper serving of alcoholic beverages that any negligence ... by [decedent] would hardly be the product of his own volition." This finding misinterprets existing case law by failing to hold decedent accountable for any acts of negligence on his part. Moreover, it was erroneous since it effectively prohibited the Brass Rail from raising and establishing the contributory negligence of decedent, an adult.

In *Miller*, the Pennsylvania Superior Court also addressed the issue of assumption of risk. The Superior Court in *Miller* discussed the doctrine of assumption of risk and found that the bar establishment could not utilize an assumption of the risk defense. The Court found that under either theory of assumption of risk, the bar could not establish such defenses. The bar establishment did note the case of *Herr vs. Booten*, 398 Pa. Super. 166, 580 A.2d 1115 (1990) appealed dismissed, 532 PA. 211, 615 A.2d 338 (1992). However, the Superior Court distinguished the *Herr* case.

The Pennsylvania Superior Court again addressed the issue of comparative negligence in the case of the estate of *Stefancin vs. Kitchen*, 2001 Pa. Super., 781 A.2d 1201 (2001). The Court in this case rejected the affirmative defense of the assumption of risk and instead applied the Pennsylvania Comparative Negligence Act to the conduct of both the intoxicated passenger and operator both of whom were killed in a one vehicle accident. The trial court had found the plaintiff contributory negligent as the court had found said passenger was subjectively aware that the decedent operator was too intoxicated to drive when the passenger agreed to ride with the decedent operator. In that case, the trial court, sitting non-jury, assessed liability on the part of

the decedent operator of 20%, the decedent passenger 20% and the defendant licensee 60%.

Accordingly, the defendant should be able to successfully request a charge on comparative negligence, although it is very questionable that any court would allow for an assumption of risk charge to be given.

J. INVESTIGATION AND DISCOVERY

From a defense perspective, full investigation, if possible, can be beneficial. However, at times, plaintiff may not place the bar establishment on notice until well after the event. Consequently, employees may no longer work at the establishment or the employees may simply have no recollection of a given night or any given patrons that were allegedly present on a given night.

No matter when notice is received of any alleged claim against a bar, one should still be able to secure from the bar establishment what their general policy and procedures are concerning service of alcohol. Several inquiries should be made of the owners, managers and employees of the bar.

First, you will want to determine if the owner, manager and/or employees have received any training concerning service of alcohol and the effects of alcohol.

A determination should be made if certification has been received concerning TIPS and/or RAMP. Also, even if certification has not been secured, you need to determine what training has been received by the owner, manager and/or employee who was serving alcoholic beverages. Also, a determination as to the method of "carding" individuals should be made, including determining the use of identification machines/scanners, "We ID" and driver's license books. Also, inquiries should be made as to how drinks are served.

Also, in evaluating a case, a determination must be made as to whether or not there are

any witnesses. If there are witnesses, then one must determine the knowledge of the witness, such as what observations were made, when said observations were made, etc. The Pennsylvania Courts have allowed introduction of circumstantial evidence as to the issue of intoxication. Therefore, one must determine if there exists any circumstantial evidence and if so, what the evidence is and how reliable the evidence is and if there is any basis to preclude its introduction into evidence. Also, time of service of alcohol and amount and type of alcohol is important. Therefore, you should attempt to establish a time line as to where the patron had been, how long the patron had been at the establishment, how much time elapsed between each establishment and the size/amount, type and contents of the drinks. Also, you need to determine if any food was ingested at any time and how much as well as whether or not any drugs, legal or illegal, were ingested.

Also, one needs to determine the patron's weight, height, and other physical aspects as well as any history of alcohol use and/or drug use. It is important to secure all information about the alleged intoxicated individual as a liability expert will need as much information concerning the alleged intoxicated individual. It may be that a patron, due to a high tolerance level and/or the use of drugs, may be able to mask his/her level of intoxication such that a bartender would not perceive that the patron was "visibly" intoxicated.

Also, the status of the claimant, is important. Juries will have different views depending on the status of the claimant. If the claimant is the intoxicated person, then there can always be of an issue of comparative negligence. See discussion above, concerning defenses. If the claimant is an innocent victim, then the jury may be sympathetic to the innocent victim and be more willing to find against a bar establishment, assuming the issue goes to the jury. However, as noted above, there may be an issue of the passenger being negligent if in fact the passenger

was aware of the intoxicated level of the driver and knowingly and voluntarily took a ride from the intoxicated driver. Again, investigation as to all facts surrounding the claimant and the other parties involved is very important.

Additionally, social media investigation as to all parties involved should be done. It is important to know about materials, photographs, videos, etc. that exist on social media concerning your client as well as the alleged intoxicated patron, the claimant and any other parties and/or witnesses.

K. OTHER ISSUES INVOLVING ALCOHOL

In addition to issues involved in dram shop cases, there are issues as to the admission of intoxication. In a dram shop case, as visible intoxication is a required element (except in the case of a minor), defendant bar establishment should, wherever possible, move to preclude any evidence of intoxication, including a criminal conviction of DUI. The defense should argue while evidence of blood alcohol level may be relevant to a showing that a person was under the influence of alcohol, such evidence is not relevant to, nor proof of, visible intoxication under Pennsylvania Law. See *Suskey vs. Loyal Order of Moose Lodge No. 86*, 325 Pa. Super. 94, 472 A.2d 663 (1984). In some cases, where the plaintiff has sued parties other than the bar establishment, the other parties may wish to introduce evidence of intoxication. For example, evidence of intoxication of the plaintiff may assist a codefendant (another driver) in which it would be beneficial to argue that the plaintiff/intoxicated driver was intoxicated and was the cause of the accident as opposed to the other driver. Also, where the claimant is an innocent victim and claims that a defendant driver was intoxicated and that the bar establishment served the intoxicated driver while visibly intoxicated, the claimant may attempt to introduce a DUI conviction. However, the bar establishment should attempt to preclude any such conviction as a

DUI conviction can be established without any evidence of visible intoxication in the criminal action. Also, the bar establishment should argue that evidence of intoxication is highly prejudicial and would unjustifiably affect the liability of the bar establishment.

In a case where a bar establishment is not a party, then either the plaintiff or the defendant may attempt to introduce evidence of intoxication. From a defense perspective, the defendant may want to introduce evidence of intoxication on the part of the plaintiff so that argument can be made that the plaintiff was contributorily/comparatively negligent and, therefore, the plaintiff can not recover at all or plaintiff's damages would be significantly reduced in light of the comparative negligence. On the other hand, a plaintiff may want to introduce evidence of intoxication on the part of the defendant to either establish liability or to increase the percentage of liability of a defendant. Also, a plaintiff may attempt to introduce evidence of the defendant's intoxication to establish outrageous conduct or reckless indifference such as to provide a basis for punitive damages.

Clearly, introduction of evidence of intoxication on either party can influence a jury.

In *Critzer vs. Donovan*, 289 Pa. 381, 137 A. 665 (1927) the Pennsylvania Supreme Court ruled upon the use of evidence of a party's consumption of alcohol. In said case, the Pennsylvania Supreme Court held that because of the odor of liquor on the driver's breath was an insufficient basis to conclude that he was intoxicated, admitting this evidence alone, without other facts to support the allegation of intoxication, would have been error on the part of the trial court. *Id.* at 665. Decisions after *Critzer* have found that were recklessness or carelessness is at issue, proof of intoxication is relevant, but the mere fact of consuming alcohol is unfairly prejudicial, unless it reasonably establishes intoxication. *Cusatis vs. Reichert*, 267 Pa. Super. 247, 249 - 50, 406 A2.d 787, 788 - 789 (1979). Also, see *Swords vs. Bucher*, 57 Pa. D & C 4th

258, 2002, Pa. D & C Lexis 42 (CCP, Adams County 5/29/02). Moreover, such evidence of intoxication must reasonably establish a degree of intoxication which proves unfitness to drive where reckless driving is the matter at issue. *Id.* The Pennsylvania Courts are well aware that the mention of the consumption of the intoxicating beverages is extremely prejudicial and unless, in the court's opinion, the evidence is sufficient to permit the jury to make a finding of fact on the issue of intoxication, no mention of intoxication should go before the jury. *Couts vs. Ghion*, 281 Pa. Super. 135, 421 A.2d 1184 (1980).

The mere fact that a person was in a bar is not sufficient evidence of intoxication and should be excluded as it is unfairly prejudicial. Also, the mere consumption of alcohol is not admissible. In order for evidence of alcohol consumption and evidence of being in a bar to be admissible, the evidence must reasonably establish a degree of intoxication which proves unfitness to drive. See *Morreal vs. Prince*, 436 Pa. 51, 258 A.2d 508 (1969).

An issue in many cases involving alcohol is the use of a blood alcohol test result. The general rule is that a blood alcohol test result, standing alone, is insufficient to establish a degree of intoxication which proves unfitness to drive and, therefore, is inadmissible. *Ackerman vs. Delcomico*, 336 Pa. Super. 569, 486 A.2d 410 (1984).

However, the Pennsylvania Supreme Court in *Coughlin vs. Massaquoi*, 170 A. 3d 399 (Pa. 2017) affirmed the trial court's decision to allow into evidence the blood alcohol level of a deceased pedestrian. The plaintiff filed a pretrial motion in limine to exclude the evidence of the decedent's intoxication, including the toxicology report and the expert testimony of Richard Saferstein, Ph.D.

In *Coughlin*, the decedent of the plaintiff was killed while walking across Castor Avenue in the northeast section of the City of Philadelphia. He was struck by a car operated by

defendant Massaquoi. Defendant admitted at trial to never seeing the decedent at any time prior to the impact. There were no eyewitnesses to this accident. Furthermore, there were no witnesses as to where the decedent had been prior to the accident. There were no witnesses who had previously observed the decedent displaying any signs of intoxication or to his overall condition before he was killed. Prior to being struck, the whereabouts of the decedent were unknown. *Id.*

The jury found that although the defendant driver operated her vehicle in a negligent manner prior to the time of impact, the jury did not conclude that the defendant's negligence was a factual cause of the decedent's death. *Id.*

The decedent was pronounced dead shortly after the accident and his body was transported to the office on the medical examiner where a complete autopsy, including drug and alcohol screens, was performed. Defendant retained an expert toxicologist, Richard Saferstein, Ph.D., who testified at trial that the decedent's blood alcohol level (BAC) of .313 would have rendered him unfit to safely walk or cross the street on the night in question. *Id.*

The plaintiff estate had filed a motion in limine noting that the investigating police officer did not indicate anywhere in his report that the decedent had exhibited signs of intoxication. The first indication of intoxication was through post-mortem blood and urine testing, which revealed the decedent's blood alcohol level was elevated and that he also had trace amounts of other illegal substances in his blood. *Id.*

The trial court denied the plaintiff estate's motion in limine and permitted the admission of both the BAC test results and Dr. Saferstein's testimony into evidence at trial. However, Dr. Saferstein was precluded from opining as to the ultimate question of causation. *Id.*

On appeal, the plaintiff estate/appellant argued that the trial court erred as a matter of law

and/or abused its discretion by denying plaintiff's motion in limine and admitting the post-mortem blood alcohol content of the decedent when there was no additional, independent corroborative evidence of intoxication. Appellant further argued that the trial court erred as a matter of law and/or abused its discretion in allowing the testimony of the defense toxicology expert, where the sole piece of evidence of independent "intoxication evidence" upon which Dr. Saferstein's testimony was based was the purported post-mortem BAC of the decedent. Lastly, appellant argued that the trial court erred as a matter of law and/or misapplied the law set forth in *Gallagher vs. Ing*, 532 A.2d 1179 (Pa. Super. 1987) in denying plaintiff's motion for reconsideration and upholding the court's decision to admit evidence on the decedent's BAC without additional independent evidence to corroborate intoxication. *Id.*

At trial, Dr. Saferstein testified that, in terms of the general public, an individual who was at .31 would be severely intoxicated. Dr. Saferstein explained that you would expect that a normal human being at .31 would have very poor muscular coordination, very poor body coordination, slow and unsteady hand movements and poor hand-to-eye and foot-to-eye coordination. Moreover, Dr. Saferstein testified that you can expect that an average person with this level of BAC would be suffering from a significant deterioration in judgment and self-control. *Id.*

The Pennsylvania Supreme Court, in its opinion, provided a recitation of the history regarding evidence of intoxication in the civil context. Specifically, it addressed the decision in *Ackerman v. Delcomico*, 336 Pa. Super. 569, 486 A.2d 410 (Pa. Super. 1984). The court in *Coughlin* noted that in *Ackerman*, the Superior Court expanded upon the admissibility requirements for BAC evidence. Specifically, the *Ackerman* court held that "[BAC] alone may not be admitted for the purpose of proving intoxication", but rather, must be accompanied by

“other evidence showing the actor’s conduct which suggests intoxication.” *Ackerman, supra*, 486 A.2d at 414. The *Coughlin* court noted that the *Ackerman* court “provided no support or policy basis for this ‘over evidence’ requirement.” *Coughlin, supra*, 170 A.3d at 399. The *Coughlin* court, after reviewing the facts and the arguments of the parties, :

reject[ed] the standard advance by the estate and utilized by the Superior Court in *Ackerman* and its progeny that requires independent, corroborating evidence of intoxication before BAC evidence may be admitted...and held, as with other evidence of the consumption of alcohol, that BAC evidence is admissible if the trial court determines that it reasonably establishes a pedestrian’s unfitness to cross the street.” *Id.* The Court found that “this evidence [the testimony of Dr. Saferstein]”, as noted above, was “sufficient to establish Coughlin’s unfitness to cross the street...[therefore] the trial court properly exercised its discretion in denying [Coughlin’s] motion in limine...”. *Id.*

At the trial level, the Honorable Frederica A. Massiah-Jackson issued an opinion in *Kochmer v. Joseph Hopfner and Apple Construction, Inc.*, 2017 Phila. Ct. Com. Pl. Lexis 3 (Court of Common Pleas of Philadelphia County, January 12, 2017) concerning admission of BAC and expert opinion relating thereto.

In *Kochmer*, the trial court noted that there were independent and corroborative facts and data beyond the expert’s opinion of toxicologist, Francis R. Pfeiffer, Ph.D. The trial court noted that “no matter how the Pennsylvania Supreme Court ultimately rules in the *Coughlin v. Massaquoi* decision, the point here is that our trial record, unlike *Coughlin*, includes overwhelming independent and corroborative evidence of unfitness for this plaintiff-pedestrian to attempt to cross the street. *Kochmer, supra*, 2017 Phila. Ct. Com. Pl. Lexis 4. Accordingly, the trial court properly allowed into evidence the expert opinion testimony proffered for the purpose of establishing that plaintiff/pedestrian was impaired and unfit to cross the street in a safe manner. *Id.*

In a product liability case, evidence of plaintiff's intoxication may be relevant and admissible. However, it will only be admissible where intoxication is offered to prove that the accident was caused solely by the plaintiff's conduct as opposed to a product defect. *Madonna vs. Harley Davidson Inc.*, 1998 Pa. Super. 708 A.2d 507 (1978). In *Madonna*, the Court, in affirming the Superior Court's ruling admitting evidence of plaintiff's intoxication, noted that negligence concepts are not to be introduced into a strict liability case. However, the plaintiff's conduct in products liability case is not always irrelevant or inadmissible. The plaintiff's use of a product may be relevant as it relates to causation. See, also, *Suroweic vs. General Motors Corp.*, 448 Pa. Super. 510, 672 A.2d 333 (1996). In said case, the Superior Court held that expert testimony of the driver's intoxication as well as other evidence was admissible "to establish the intoxication of the driver to a degree that intoxication was a cause of the accident." *Id.*

Lastly, defendant may want to introduce evidence of drug and/or alcohol abuse. Such evidence is admissible concerning the issue of life expectancy. See *Krauss vs. Taylor*, 1998 Pa. Super., 710 A.2d 1142 (1998). In *Krauss vs. Taylor*, the Pennsylvania Superior Court affirmed the trial's court's ruling admitting evidence of plaintiff's chronic drug and alcohol abuse for purposes of evaluating plaintiff's life expectancy. The court in *Krauss* noted "evidence of (plaintiff's) chronic drug and alcohol abuse strongly suggest that his life expectancy deviates from the average". However, also, see *Capan vs. Divine Providence Hospital*, 270 Pa. Super. 127, 410 A.2d 1282.

The Pennsylvania Superior Court in *Pulliam III vs. Fannie, et. al.*, 2004 Pa. Super 116, 2004 Pa. Super. Lexis 616 (April 14, 2004), ruled that admission of a plaintiff's juvenile drug rehabilitation records was proper. The Superior Court in *Pulliam* cited the case of *Kraus vs.*

Taylor, supra, and noted that in *Kraus* that the Superior Court found that by filing a lawsuit for permanent personal injury, the plaintiff impliedly waives, among other things, statutory privileges relating to confidentiality of drug and alcohol treatment records. The court in *Pulliam* further noted that in this dram shop liability case, the evidence of drug and alcohol abuse history as well as his DUI conviction and the fact that his urine tested positive for marijuana and cocaine were highly probative of the issues raised in the this Dram Shop liability case and, therefore, this evidence was not unfairly prejudicial. Moreover, the Superior Court in *Pulliam* noted that the trial court had found that this evidence was highly probative of the life expectancy of the claimant and his tolerance to intoxicants. Accordingly, the holding in *Pulliam* will assist the defense regarding the issues of causation regarding liability and damages.

August 2021

Carol Ann Murphy has extensive trial and appellate experience in the Pennsylvania Federal and State Courts. Ms. Murphy represents contractors, business owners, product manufacturers, restaurant and bar establishments, municipalities and other governmental authorities and their officials. Also included within Ms. Murphy's client base are insurers, homeowners, industrial plants, apartment complexes, animal owners and rescuers, and vehicle operators.

Ms. Murphy has experience in all trial, appellate and mediation forums including arbitration hearings (UM/UIM, state court and binding high/low), jury and bench trials and appellate courts.

Ms. Murphy has lectured to attorneys for CLE credits and clients on such topics as liquor liability, municipal liability, dog bite liability, premises liability, civil procedure and discovery strategy as well as having several publications on such topics.