

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROBERT EVAN SPIERER and)
MARY CHARLENE SPIERER,) Case No. 1:13-cv-991-TWP-MJD
)
Plaintiffs,)
)
v.)
)
COREY E. ROSSMAN,)
JASON ISAAC ROSENBAUM and)
MICHAEL B. BETH,)
)
Defendants.)
)

DEFENDANT MICHAEL B. BETH'S MOTION TO DISMISS
PURSUANT TO F.R.C.P. 12 (B)(6)

COMES NOW Defendant, Michael B. Beth, by counsel, pursuant to F.R.C.P. 12(B)(6) hereby moves to dismiss Count 1 of Plaintiffs' Complaint alleging Negligence resulting in the Disappearance, Death or Injury of an Adult Child for failure to state a claim upon which relief may be granted. Defendant, Michael B. Beth incorporates his Memorandum in Support of his Motion to Dismiss.

GARRISON LAW FIRM, LLC

By: s/ J. Gregory Garrison, Atty.# 7061-49
Counsel for the Defendant, Michael Beth

CERTIFICATE OF SERVICE

I hereby certify that on July XX, 2013, the foregoing document was duly served via first-class United States mail, postage pre-paid, upon the following counsel of record:

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Defendants.)
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DEFENDANT MICHAEL B. BETH’S MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS

COMES NOW Defendant, Michael B. Beth, by counsel, in support of his motion to dismiss Count I of Plaintiffs’ Complaint alleging Negligence Resulting in the Disappearance, Death or Injury of an Adult Child pursuant to F.R.C.P. 12(B)(6) for failure to state a claim upon which relief may be granted and states the following:

I. Introduction

This lawsuit arises out of the disappearance of Lauren Spierer (hereafter “Spierer”) on or about June 3, 2011 in Bloomington, Indiana. The Plaintiffs, Spierer’s parents, brought this action against the three Defendants claiming the Defendants were negligent and that they violated the Dram Shop Act. Defendant Michael B. Beth (hereinafter “Beth”) is named only in regards to Count I of Plaintiffs’ Complaint seeking damages for “Negligence Resulting in the Disappearance, Death or Injury of an Adult Child.”

Plaintiffs allege that Beth owed Spierer a duty of care and that the Defendants' actions and omissions caused her disappearance. Plaintiffs further allege that Spierer's disappearance resulted in her injury and death.

Beth shared a residence with Defendant Corey E. Rossman (hereinafter "Rossman"). Both men were present with Spierer at a party on June 2, 2011 at the residence of Defendant Jason I. Rosenbaum (hereinafter Rosenbaum). Plaintiffs allege Beth "observed that Spierer was extremely intoxicated and witnessed Rossman encourage Spierer to join him at Kilroy's Sports Bar, located approximately three blocks from Rossman's residence in Monroe County, Indiana, in order to consumer more alcoholic beverages." (Complaint ¶ 16).

When Beth arrived back to his residence in the early hours of June 3, 2011 he found Rossman and Spierer inside. Beth became concerned for Spierer because of her level of intoxication and "attempted to convince Spierer to sleep on his and Rossman's couch." (Complaint ¶ 30). According to Plaintiffs' Complaint Spierer requested to return to her apartment but Beth escorted her instead to Rosenbaum's residence. (Complaint ¶ 31). Beth then expressed "concern about Spierer's well-being and safety" and he "attempted to contact mutual friends to pick up Spierer and take her back to her apartment." (Complaint ¶ 32).

After Beth had left Rosenbaum allowed Spierer to leave his residence and witnessed her walking away. (Complaint ¶ 34). Rosenbaum was the last known person to see Spierer. (Complaint ¶ 35).

The lawsuit was originally filed in Monroe Circuit Court on May 31, 2013. The Defendants removed the case to federal court based on diversity jurisdiction. Defendant Beth seeks to dismiss Count I of Plaintiffs' Complaint as he owed no duty to Spierer, did not breach a duty to Spierer, Beth's acts and/or omissions were not the proximate cause of Spierer's alleged injury or

death, and because Plaintiffs' cannot prove damages as there is no evidence of Spierer's death or any injury to her.

II. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) permits the dismissal of a claim for "failure to state a claim upon which relief can be granted." "When considering a motion under this rule, the Court must examine the sufficiency of the plaintiff's complaint, not the merits of the lawsuit." *United States of America v. Clark County Indiana*, 113 F. Supp. 2nd (S.D. Ind. 2000). "Dismissal is only appropriate if it appears to a certainty that the plaintiff cannot establish any set of facts which would entitle him to the relief sought." *Id.* The reviewing court "accept[s] as true all well-pleaded factual allegations and draw[s] reasonable inferences in favor of the plaintiff." *Id.*

III. Beth owed no duty to Lauren Spierer, Beth did not breach a duty to Spierer, Beth's acts and/or omissions were not the proximate cause of Spierer's alleged injury and death, and Plaintiffs cannot prove damages and no evidence exists that Spierer is dead or was injured.

To recover in negligence a Plaintiff must prove "(1) a duty on the part of the defendant to conform his conduct to a standard of care arising from his relationship with the plaintiff; (2) a failure on the part of the defendant to conform his conduct to the requisite standard of care; and (3) an injury to the plaintiff proximately caused by the breach." *Merchants Nat'l Bank v. Simrell's Sports Bar & Grill, Inc.*, 741 N.E.2d 383, 386 (Ind. Ct. App. 2000).

a. Beth did not owe a duty and therefore did not breach a duty

Plaintiffs contend that Beth owed Spierer a duty of care and that Beth breached that duty of care by "failing to exercise reasonable care to ensure Spierer's safe return to her apartment."

(Complaint ¶ 44). In order to determine whether a duty exists the Court should balance three factors: the relationship between the parties, the foreseeability of the occurrence, and public policy concerns. *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991).

Duty can be implied by the relationship between the parties. For example a landowner or a tavern owner may have an implicit duty to a person. *See for example Valinet v. Eskew*, 574 N.E.2d 283 (Ind. 1991) and *Gunter v. Vill. Pub.*, 606 N.E.2d 1310 (Ind. Ct. App. 1993).

The relationship between Beth and Spierer created no such duty. Beth observed Spierer in an intoxicated state and witnessed Rossman encourage Spierer to join him at a bar. (Complaint ¶ 16). Beth later returned to his residence to find Rossman and Spierer. (Complaint ¶ 17). Spierer had become more intoxicated and Beth was concerned for her safety. (Complaint ¶s 29 and 30). Later that night Beth escorted Spierer to Rosenbaum's residence and left her with Rosenbaum. (Complaint ¶ 31).

Whether the harm suffered was foreseeable must also be weighed in determining whether a duty exists. In *Delta Tau Delta v. Johnson*, 712 N.E.2d 968 (Ind. 1999), the Indiana Supreme Court used a "totality of the circumstances" test to determine whether a fraternity owed a duty of care to an invitee who was sexually assaulted at the fraternity house based on the foreseeability of the incident. The court noted that the totality of the circumstances test "does not impose on landowners a duty to ensure an invitee's safety, but requires landowners to take *reasonable* precautions to prevent *foreseeable* criminal acts against invitees." *Id.* Further, "[a] substantial factor in the determination of duty is the number, nature, and location of prior similar incidents." *Id.* The fraternity was found to have a duty as within two years of the incident there had been two prior similar incidents at the fraternity house and the fraternity had been given a pamphlet at a convention regarding sexual assault at fraternities. *Id.*

Spierer's alleged disappearance was not foreseeable. Plaintiffs' complaint fails to provide any reason why Beth should have foreseen Spierer's disappearance. Further, Beth took Spierer to Rosenbaum's residence and left her with Rosenbaum. It was Rosenbaum who allowed Spierer to leave his residence unescorted.

Lastly, public policy does not dictate that Beth had a duty to ensure Spierer's safe return to her apartment. After unsuccessful attempts to convince Spierer to sleep on the couch at his residence Beth escorted her to Rosenbaum's residence and ensured her safe arrival there. Public policy does not require anything more of Beth and probably required less of him than he did.

Plaintiffs also contend that Beth breached his duty to Spierer "by failing to exercise reasonable care to ensure Spierer's safe return to her apartment." Complaint paragraph 44. As no duty existed there can be no breach. "Absent a duty, there can be no breach and, therefore, no recovery in negligence." *Merchants Nat'l Bank v. Simrell's Sports Bar & Grill, Inc.*, 741 N.E.2d 383, 386 (Ind. Ct. App. 2000).

b. Beth's acts and/or omissions were not the proximate cause of Spierer's alleged injury and death

Even if we assume that Spierer was injured or killed, Beth's acts and/or omissions were not the proximate cause of those presumed injuries and/or death. "In determining whether an act is the proximate cause of another's injury, [the court] consider[s] whether the injury was the natural and probable consequence of the negligent act which, in light of the attending circumstances, could have been reasonably foreseen or anticipated." *Merchants Nat'l Bank v. Simrell's Sports Bar & Grill, Inc.*, 741 N.E.2d 383, 389 (Ind. Ct. App. 2000).

Again, Beth took Spierer to Rosenbaum's residence and left her with Rosenbaum. It was Rosenbaum who allowed Spierer to leave his residence unescorted. There is perhaps no more

improbable consequences to Beth's actions than for Spierer to have disappeared. Spierer's disappearance is not the natural and probable consequence of Beth's decision to take her to Rosenbaum's residence instead of Spierer's own residence.

c. Plaintiffs cannot prove damages

Plaintiffs' prayer for relief seeks damages pursuant to Indiana Code §34-23-2-1(f) (wrongful death) and Indiana Code §7.1-5-10-15.5 (dram shop). In order for Plaintiffs to recover under Indiana's wrongful death statute they must prove that the Defendants' "wrongful act or omission caused the injury or death of a child." I.C. 34-23-2-1(c). Indiana Code § 34-23-2-1(f) allows a plaintiff to recover damages "(1) for the loss of the child's services; (2) for the loss of the child's love and companionship" and additional expenses associated with the death and burial of the child.

Before allowing for recovery, the wrongful death statute requires that an injury or death must have occurred. Simply put Plaintiffs cannot prove that Spierer was injured or killed. Plaintiffs admit as much in Paragraph 39 of the Complaint stating "Spierer and her parents, Robert and Charlene Spierer, suffered damages as the result of Spierer's disappearance and *presumed* injuries and death." (emphasis added).

Additionally Plaintiffs cannot rely on Spierer's two year absence to presume she has died. "Indiana law dictates that a person is presumed dead if the following conditions are met: first, that the individual has been inexplicably absent for a continuous period of seven years; second, that the individual has not communicated with those persons who would be most likely to hear from him; and third, that the missing individual cannot be found despite diligent inquiry and search." *Malone v. Reliastar Life Ins. Co. et al.*, 558 F3d 683, 688 (7th Cir. 2009) (internal

citations omitted). Plaintiffs' inability to prove injury or death to Spierer prohibits their recovery for negligence.

IV. Conclusion

Plaintiff's claim against Defendant Michael Beth for Negligence Resulting in the Disappearance, Death or Injury of an Adult Child should be dismissed as Plaintiffs have failed to state a claim upon which relief can be granted. Plaintiffs cannot prove any of the elements of negligence nor can they prove damages. Even when the Court examines that complaint viewing, for purposes of the Motion, all its allegations as true, no claim is stated. Therefore, Defendant, Michael Beth, respectfully requests that this Honorable Court grant his 12(b)(6) Motion to Dismiss, and dismiss Count I, Negligence Resulting in the Disappearance, Death or Injury of an Adult Child, with prejudice, and for all other just and proper relief in the premises.

GARRISON LAW FIRM, LLC

By: s/ J. Gregory Garrison, Atty.# 7061-49
Counsel for the Defendant, Michael Beth

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I hereby certify that on July XX, 2013, the foregoing document was duly served via first-class United States mail, postage pre-paid, upon the following counsel of record:

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