UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

DEFENDANT JASON ISAAC ROSENBAUM'S BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM

Defendant, Jason Isaac Rosenbaum ("Rosenbaum"), by counsel, submits this brief in support of his Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim pursuant to Fed. R. Civ. P. 12(b)(6).

I. INTRODUCTION

Plaintiffs have brought suit under the Child Wrongful Death Act ("CWDA"), Indiana Code§ 34-23-2-1, against Rosenbaum for negligence, negligence per se, and violations of the Dram Shop Act that resulted in the alleged injury and death of their daughter, Lauren Spierer ("Spierer"). Rosenbaum moves to dismiss Plaintiffs' Complaint for the reason that pursuant to Indiana common law Spierer is not presumed dead. The undisputed legal presumption is that Spierer is alive until such time as she has been missing for seven (7) years. Further, Plaintiffs' claims fail to identify the proximate cause of her alleged disappearance, injury, and death. Rosenbaum owed no duty to Spierer as a matter of law to ensure her return to her apartment from his residence. Accordingly, Plaintiffs' Complaint is insufficient to state a claim upon which

relief can be granted and is fundamentally flawed as a matter of law. Thus, Plaintiffs' Complaint, as brought against Rosenbaum, is properly dismissed.

II. ALLEGATIONS OF PLAINTIFFS' COMPLAINT AGAINST ROSENBAUM[1]

Spierer was a student at Indiana University in June 2011. Spierer attended a party at the residence of Rosenbaum on the night of June 2 and early morning hours of June 3, 2011. (Complaint, ¶ 11). Rosenbaum interacted with Spierer at the party and observed that she appeared intoxicated. (Complaint, ¶ 12). Spierer consumed alcohol supplied by Rosenbaum at Rosenbaum's residence. (Complaint, ¶¶ 11-13). Spierer left the Rosenbaum residence with Defendant Corey E. Rossman ("Rossman") and went to Rossman's residence located in the same complex. (Complaint, ¶ 14). An hour later, Rossman and Spierer went to Kilroy's Sports Bar ("Kilroy's"), located three blocks from Rossman's residence. (Complaint, ¶¶ 16, 18). Spierer appeared intoxicated as she entered Kilroy's. (Complaint, ¶ 19). Spierer consumed alcohol purchased by Rossman at Kilroy's from 1:30 a.m. to 2:30 a.m. (Complaint, ¶¶ 20-21). At approximately 2:30 a.m. Rossman and Spierer left Kilroy's and went to the Smallwood Plaza, where Spierer's apartment was located. (Complaint, ¶ 21). Spierer was observed leaving Kilroy's in an intoxicated state without her shoes or cellphone. (Complaint, ¶ 21). Rossman and Spierer left Smallwood Plaza and returned to Rossman's residence which he shared with Defendant Michael Beth ("Beth"). (Complaint, ¶¶ 27-28).

Beth and Spierer then went to Rosenbaum's residence. (Complaint, ¶ 31). Rosenbaum attempted to contact mutual friends to pick up Spierer and return her to her apartment. (Complaint, ¶ 32). Beth returned to his residence, leaving Spierer at Rosenbaum's residence. (Complaint, ¶ 33). Rosenbaum allowed Spierer to leave his residence on her own at

[1] Rosenbaum disputes Plaintiffs' allegations in the Complaint and reserves his right to deny the allegations if he does not prevail on this Motion to Dismiss. Rosenbaum merely restates Plaintiffs' allegations for purposes of the Motion to Dismiss.

approximately 4:30 a.m. (Complaint, ¶ 34). Spierer has not been seen since 4:30 a.m. on June 3, 2011. (Complaint, ¶¶ 35-38). Rosenbaum is the last known person to see Spierer as she was walking in the direction of 11th Street and College Avenue. (Complaint, ¶ 34).

III. ARGUMENT

A. Motion to Dismiss Standard.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, an action may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. Pro. 12(b)(6). A motion to dismiss tests the sufficiency of the complaint, not the merits of the suit. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). In reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, the court must accept as true all well-pled allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *Moransi v. General Motors Corp.*, 433 F.3d 537, 539 (7th Cir. 2005). "Dismissal of a complaint for failure to state a claim is proper if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "But where the well-pled facts do not permit the court to infer more than the mere possibility of misconduct, the complainant has alleged-but has not shown- that the pleader is entitled to relief." *Id.* at 1950 citing Fed. R. Civ. Pro. 8(a)(2). "While legal conclusions can provide the framework for a complaint, they must be supported by factual

allegations." *Id.* "[D]etermining whether a complaint states a plausible claim is content-specific requiring the reviewing court to draw on its experience and common sense. *Id.* at 1940.

B. Plaintiffs' claims brought pursuant to the CWDA fail as a matter of law.

Plaintiffs' claims are governed by the CWDA and should be dismissed because it is not legally presumed that Spierer is deceased. Pursuant to the CWDA, "[a]n action may be maintained under this section against the person whose wrongful act or omission caused the injury or death of the child." [2] I.C. § 34-23-2-1(c). *See Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001) (the purposes of the wrongful death statute was "to create a cause of action to provide a means by which those who have sustained a loss by reason of the death may be compensated.").

Indiana common law presumes that one who has been absent for less than seven (7) years is still alive.[3] *Malone v. Reliastar Life Ins. Co.*, 558 F.3d 683, 688 (7th Cir. 2009) (applying Indiana law); *Prudential Ins. Co. of America v. Moore*, 149 N.E. 718 (Ind. 1925) ("[a]t common law a person was presumed to be living for seven years after his disappearance, and a presumption of death arose only from an unexplained absence for that length of time"); *Cooper v. Cooper*, 86 Ind. 75, 77 (Ind. 1882) (where a party has been absent seven years without having been heard of, the presumption is that he is then dead, though there is no presumption as to the

[2] Someone killed by the tortious conduct of another had no right to recover damages at common law, and likewise, the victim's dependents or parents had no recognized cause of action. *Bolin v. Wingert*, 764 N.E.2d 201, 203 (Ind. 2002). The common law did not recognize an action for wrongful death, and the CWDA is in derogation of the common law. *Id*. at 207; *see also Indiana Patient's Compensation Fund v. Anderson*, 661 N.E.2d 907, 909 (Ind. Ct. App. 1996). Plaintiffs have no common law right to pursue a claim for any alleged injury to Spierer outside the CWDA, including damages for the loss of her services, love and companionship and the pecuniary losses stemming from her alleged death.

[3] Although the Indiana Probate Code only requires that a person be missing for five years before they are presumed dead, it is clear that this statutory exception to the common law applies only to administration of the estate and has no application outside of probate matters. *Malone*, 558 F.3d at 686 n.4 citing *Prudential Ins. Co. of America*, 149 N.E. at 722 and I.C. § 29-2-5-1.

time when he died); *Connecticut Mut. Life Ins. Co., v. King*, 93 N.E. 1046 (Ind. App. 1911) ("[t]he presumption of life is strong, and continues until it is overcome by the presumption of death, which arises after seven years of unexplained absence; but there is no presumption as to the time of death within the seven years").

In this case, Plaintiffs are seeking damages for the death of Spierer pursuant to the CWDA. Complaint, ¶¶ 6, 37-39, 41, 45, 51, and 56. Plaintiffs' Complaint refers to Spierer as "the decedent" and themselves as the "heir of the decedent." Complaint, ¶¶ 4-5, 46, 52, and 57. The Prayer for Relief seeks damages as provided under the CWDA including monetary damages for the loss of services of their daughter, costs, and attorneys' fees. However, absent from the Plaintiffs' Complaint are any allegations that Spierer is indeed deceased. Rather, Plaintiffs specifically allege "[a]fter nearly two years of intensive searches, Spierer has never been located and ***is presumed to have suffered injuries that resulted in her death***." Complaint, ¶ 37 (emphasis added). As established by common law, a person missing for two (2) years is not sufficient as a matter of law to presume that the person is deceased. Rather, Indiana law dictates that a person is presumed dead if the person has been missing for seven (7) years. It is undisputed that Spierer has not been missing for seven (7) years. Thus, a common law presumption of death cannot be established. Plaintiffs' Complaint is premature as one cannot maintain an action for the wrongful death until it is known, or legally presumed, that the person is deceased.[4] Accordingly, Plaintiffs' Complaint must be dismissed in its entirety because all of

[4]Allowing a claim under CWDA for a missing person who is presumed at common law to be alive is clearly improper, and we are aware of no Indiana cases recognizing such a cause of action. Illinois addressed a similar issue in *Praznik v. Sport Aero, Inc.*, 355 N.E.2d 686 (Ill. App. 1976). In *Praznik*, the decedents went missing when their plane disappeared during a flight to the Bahamas on March 23, 1969. *Id.* at 688. The wreckage from the flight was not discovered until November of 1971, two years and eight months after the decedents went missing. *Id.* The administrator of the decedents' estate filed a wrongful death complaint more than two years after the decedents went missing. *Id.* In rejecting the defendants' statute of limitations argument, the Illinois Court of Appeals stated:

Plaintiffs' claims including common law negligence, negligence per se, and Drama Shop liability are brought under the CWDA.

C. Plaintiffs' claims fail to establish an injury proximately caused by Rosenbaum.

Plaintiffs' allegations fail to establish an injury proximately caused by Rosenbaum's actions in order to create viable claims for common law negligence, negligence per se, and Drama Shop liability. Plaintiffs' negligence per se and Dram Shop liability claims are premised on Rosenbaum's alleged violation of Indiana Code § 7.1-5-10-15.5. Complaint ¶¶ 50-51 and 57. "Indiana common law liability for negligence in the provision of alcoholic beverages is restricted to cases involving the breach of a statutory duty." *Thompson v. Ferdinand Sesquicentennial Committee, Inc.*, 637 N.E.2d 178, 180 (Ind. Ct. App. 1994). Indiana Code 7.1-5-10-15 identifies the specific conduct and proof of which will provide evidence of negligence for furnishing alcohol to an intoxicated individual. *Id.* Indiana Code 7.1-5-10-15 provides in pertinent part as follows:

> (a) As used in this section, "furnish" includes barter, deliver, sell, exchange, provide or give away.
>
> (b) A person who furnishes an alcoholic beverage to a person is not liable in a civil action for damages caused by the impairment or intoxication of the person who was furnished the alcoholic beverage unless:

> Regardless of her knowledge of decedents' disappearance . . . it is obvious plaintiff did not know, nor could she have known with any degree of certitude, of her right to sue until the fact of decedents' deaths and the wreckage of the Sport Aero aircraft were discovered in November of 1971. Until that time there existed a remote possibility decedents were still alive. No legal presumption of their death would arise until seven years after their disappearance.

Id. at 691. Other jurisdictions addressing wrongful death claims of missing persons have similarly found that such claims cannot be brought until the presumption of death has been established and that the statute of limitations does not begin to run until the date or presumption of death has been established. *See Brown v. Pine Bluff Nursing Home*, 199 S.W.3d 45, 49 n. 2 (Ark 2004) (stating that a wrongful death action for a nursing home patient who wandered away and was never found does not arise until the patient was declared deceased by the probate court); *Nelson v. Schubert,* 994 P.2d 255 (Wash. Ct. App. 2000) (wrongful death claim accrued for limitations purposes when legal presumption that woman was dead arose seven years after her disappearance); *Myers v. McDonald's*, 635 P.2d 84, 86 (Utah 1981) (wrongful death action not barred by two year statute of limitation where body of missing boy killed in an automobile accident was not discovered until three years after fatal accident).

> (1) the person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished; and
>
> (2) ***the intoxication*** of the person to whom the alcoholic beverage was furnished ***was a proximate cause of the death, injury, or damage alleged in the complaint.***
>
> (c) If a person who is at least twenty-one (21) years of age suffers injury or death proximately caused by the person's involuntary intoxication, the:
>
> (1) person;
>
> (2) person's dependents;
>
> (3) person's personal representative; or
>
> (4) person's heirs;
>
> may not assert a claim for damages for personal injury or death against a person who furnished an alcoholic beverage that contributed to the person's intoxication, unless subsection (b)(1) and (b)(2) apply.

I.C. § 7.1-5-10-15.5 (emphasis added).

The conclusory allegation that Spierer's intoxication resulted in her death is insufficient to overcome the undisputed legal presumption that Spierer is alive to maintain claims for common law negligence, negligence per se, and Dram Shop liability. Moreover, the allegations fail to state claims for an essential element required by common law and statute – proximate cause. Plaintiffs' claims are presumptuous and conclusory as they cannot establish that the intoxication of Spierer "was a proximate cause of the death, injury, or damage alleged in the complaint." I.C. § 7.1-5-10-15.5(b)(2). It is well settled that when deciding a Rule 12(b)(6) motion, the court must accept "the well pleaded facts in the complaint as true, but ***legal conclusions and conclusory allegations merely reciting the elements of the claim are not entitled to this presumption of truth***." *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011) (emphasis added). The Supreme Court held that a complaint stating only "bare legal

conclusions," even under notice pleading standards, is not enough to survive a Rule 12(b)(6) motion. *Bissessur v. Ind. Univ. Bd. Of Trustees*, 581 F.3d 599, 602 (7th Cir. 2009) citing *Bell Atlantic Corp. v. Twombly*, 550 U.S.544, 547 (2007). The Seventh Circuit has explained:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff has the obligation to provide the factual "grounds" of his entitlement to relief (more than "mere labels and conclusions"), and a "formulaic recitation of a cause of action's elements will not do." *Id.* The complaint must contain "enough facts to state a claim to relief that is plausible on its face" and also must state sufficient facts to raise a plaintiff's right to relief above the speculative level.

Id.

Plaintiffs' Complaint presumes that Spierer's intoxication resulted in her death. Complaint, ¶¶ 38-39, 51 and 56. Plaintiffs acknowledge that she was alive when she left Rosenbaum's residence to walk to her apartment. Complaint, ¶ 34. Any allegations as to what occurred after she left Rosenbaum's residence and what was the proximate cause of her alleged disappearance, injury, and death rely on nothing more than mere speculation and are conclusory allegations. Further, the undisputed legal presumption is that Spierer, a person missing less than seven (7) years, is alive. The mere allegation that Spierer is deceased is not sufficient to overcome the legal presumption. Accordingly, Plaintiffs' claims for common law negligence, negligence per se, and Drama Shop liability fail to establish the requisite element of proximate cause and must be dismissed.

D. Rosenbaum owed no duty to Spierer as a matter of law.

Plaintiffs cannot show that Rosenbaum owed a legal duty of care to Spierer. To prevail in a negligence action, Plaintiffs must establish three elements: (1) a duty on the party 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. *See Merchants Nat. Bank v. Simrell's Sports Bar & Grill*, 741 N.E.2d 383, 386 (Ind. Ct. App. 2000). Absent a duty there can be no breach, and therefore, no recovery in negligence. *Id.* "Whether the law recognizes any obligation on the part of a particular defendant to conform his conduct to a certain standard for the benefit of the plaintiff is a question of law exclusively reserved for the trial court." *Weida v. Dodwden*, 664 N.E.2d 742, 751 (Ind. Ct. App. 1996) citing *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514 (Ind. 1994).

In this case, Plaintiffs allege that Rosenbaum had a duty to ensure Spierer's safe return to her apartment from his residence. Complaint, ¶ 44. Indiana law does not recognize such a duty. *See Lather v. Berg*, 519 N.E.2d 755, 767 (Ind. Ct. App. 1988) (social host was not liable for ordering a minor friend off his premises even though he knew that the minor was intoxicated and would drive). In *Lather*, the social host argued that imposing liability would constitute an unprecedented change in the law with untoward consequences for social hosts. *Id.* The court in *Lather* agreed with the social host and held that the social host was not liable for injuries to a third party caused by the intoxicated guest. *Id.* The *Lather* court explained that "Indiana courts have recognized the relationship of parent-child, master-servant, and custodian-dangerous person as imposing on the act a duty to control the conduct of a third person." *Id.* The court concluded that absent some special relationship or the right to control the automobile, the social host owed no duty to the public. *Id.* In this case, Plaintiffs allege that Rosenbaum allowed Spierer to leave his residence. Similar to *Lather*, absent some special relationship or the right to control the actions of Spierer, imposing such a legal duty on Rosenbaum is contrary to *Lather* and would extend the purported duty once a social guest left the social host's premises.

In *Culver v. McRoberts*, 192 F.3d 1095 (7th Cir. 1999), a truck driver who was injured in a car accident caused by an intoxicated driver sued the social host for negligence per se under the Dram Shop Act and common law negligence for failure to supervise the intoxicated driver who had been a guest at the social host's boat where the intoxicated driver served himself drinks. With respect to the common law negligence claim, the Seventh Circuit stated that a social host has no common law duty to supervise his guests. *Id.* at 1100. The Seventh Circuit stated that the injured party's claim for common law negligence for failing to supervise the intoxicated driver "failed to state a claim for which relief can be granted." *Id.* at 1101. Plaintiffs essentially allege that Rosenbaum failed to supervise Spierer by not ensuring that she returned to her apartment due to her alleged intoxicated condition. Indiana does not recognize a duty to control or otherwise supervise an intoxicated person. In fact, Indiana law is well established that "[o]wners and occupiers of land are not insurers against the recklessness of their *non sui juris*[5] social guests." *Johnson v. Pettigrew*, 595 N.E.2d 747, 752-53 (Ind. Ct. App. 1992). To require a legal duty on Rosenbaum once Spierer left his residence to ensure the return to her apartment is contrary to Indiana law. Absent such a duty, Plaintiffs' negligence claim against Rosenbaum fails as a matter of law.

Even if Rosenbaum owed a legal duty to Spierer to not allow her to leave his residence or ensure Spierer's safe return to her apartment from his residence, Plaintiffs' negligence claim is premature as they cannot maintain an action for negligence for Spierer's alleged injury and death when it is legally presumed that she is alive.

[5] *Non sui juris* means lacking legal age or capacity. *Black's Law Dictionary* 1084 (8th ed. 2004).

IV. CONCLUSION

For the foregoing reasons, Defendant, Jason Isaac Rosenbaum, by counsel, respectfully requests that Plaintiffs' Complaint be dismissed for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) and for all just and proper relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing upon all counsel of record, as follows, via the Court's electronic filing system, this 25th day of July 2013:

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I hereby certify that a copy of the foregoing has been served upon the following counsel of record, by First Class U.S. Mail, postage prepaid, this 25th day of July, 2013:

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