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# Commonwealth of Kentucky

# Court of Appeals

NO. 2011-CA-000862-MR

CODY MARTIN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 08-CI-012114

KEITH ELKINS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND STUMBO, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Cody Martin appeals from a summary judgment of the Jefferson Circuit Court holding that Keith Elkins breached no duty under

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Kentucky law by allowing his son to host a party at his residence where alcohol was consumed by teenagers. On appeal, Martin argues that the Jefferson Circuit Court erred in its decision.

**History**

On May 31, 2008, Elkins's son, Justin, hosted a high school graduation party at Elkins's residence. Between thirty and fifty people attended the party, most of whom were underage, and many of whom were unknown to Elkins and Justin. Elkins and his fiancé had asked Justin not to host a party on that particular night since he and his fiancé would both be working. However, Justin proceeded with the party anyway.

Elkin's fiancé arrived home from work that evening to find that a party was already underway. At that time, she called Elkins at work and informed him of the situation. Elkins then called Justin to confront him about the party. Instead of telling Justin to call it off, Elkins acquiesced and merely advised Justin to be responsible. Elkins suspected that alcohol would be involved and that many of the partygoers would be underage.

Alcoholic beverages were, indeed, present at the party. However, Elkins and Justin did not provide them. Rather, another individual brought a partially consumed keg of beer to the party and charged $5 per cup, while other individuals brought their own alcoholic beverages. When Elkins returned home from work, he told Justin to keep the noise down and to end the party at a reasonable hour. Elkins then went to sleep.

Appellant Martin was present at the party. He drank beer from the keg and his friend, Cody Byrd, drank eight to ten cans of Keystone which he had brought to the party himself. Martin and Byrd, upon seeing that the party was becoming more raucous, and fearing that the police might show up, decided to leave the party with another group of individuals. In fact, their suspicions were correct, as Justin called the police shortly thereafter to come and break up the party.

Martin and Byrd drove in separate cars upon leaving the party. When they arrived at their destination, Byrd's vehicle came into contact with Martin's vehicle, and an altercation broke out between Martin and Byrd. The two began fistfighting, which culminated in Byrd throwing a punch to Martin's eye. Martin went to the hospital, where he discovered that he had fractures to his orbital socket which diminished his eyesight. Martin underwent four separate surgical procedures in an attempt to correct the damage.

Martin filed an action against Elkins alleging that Elkins: (1) negligently allowed minors to consume alcohol at the party, (2) negligently failed to supervise the party, and (3) negligently allowed intoxicated minors to leave the premises.

The trial court granted summary judgment in favor of Elkins. In its opinion, the trial court noted that it was an issue of first impression in the Commonwealth whether a social host owes a duty to underage guests who consume alcoholic beverages at the host's home. The trial court answered the

question in the negative under the facts of this particular case, holding that there was no duty. Martin now appeals to this Court.

**Analysis**

The question presented here is whether a social host owes a duty to underage guests who consume alcoholic beverages on the host's property. This presents an issue of first impression as prior cases involving the Dram Shop Act are inapplicable to a social host serving (or allowing guests to consume) liquor in his own home.[2] *See, e.g*., *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328, 335 (Ky. 1987); *Estate of Vosnick v. RRJC, Inc*., 225 F. Supp. 2d 737, 740 (E.D. Ky. 2002). Further, no cases in Kentucky discuss this particular issue with respect to minors. *Wilkerson v. Williams*, 336 S.W.3d 919 (Ky. App. 2011). We review this question of law *de novo*. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Social host liability is a fledgling area of the law in this jurisdiction. To date, there is only one state law case which addresses it (outside of the Dram Shop context). In 2002, the Sixth Circuit noted Kentucky's lack of case law on social host liability, stating as follows:

> Kentucky law on social host liability is nonexistent. The parties do not cite and the Court is unable to find a Kentucky case addressing the liability of social hosts to third parties for the negligent acts of intoxicated guests. To be clear, the Court is faced with a total dearth of precedent[.]

[2] Despite Martin's arguments to the contrary, KRS 244.085(3) is inapplicable to the present case as Elkins neither served nor assisted minors in obtaining alcohol. As stated above, the minors themselves brought alcohol to the party with them.

> Given the vacuum of precedential authority, the Court is faced with the task of predicting how the Kentucky courts would rule. The Court is aided in this enterprise by a review of the law in other jurisdictions[.]
>
> Judging from the academic scholarship, other jurisdictions handle the question of social host liability in one of three ways. First, a minority have refused to impose social host liability altogether. Examples include Minnesota, Mississippi, Ohio, Pennsylvania, and Vermont. Second, some have imposed liability by statute. Examples include Georgia and Oregon. Finally, the majority have imposed liability based on common law negligence principles. This final set is further subdivided into two groups—those that extend social host liability for the provision of alcohol to both minors and adults, and those that limit social host liability to the provision of alcohol to minors only. Among the former group are California, Indiana, Iowa, Massachusetts, and New Jersey. Among the latter group are Michigan, North Carolina, and Wisconsin.

*Estate of Vosnick*, 225 F. Supp. 2d at 740-41 (E.D. Ky. 2002) (internal citation and footnote omitted).

This Court was presented with the opportunity to address social host liability in 2011 in *Wilkerson*, 336 S.W.3d 919. In *Wilkerson*, we stated that,

> [As a general rule,] "an actor whose own conduct has not created a risk of harm has no duty to control the conduct of a third person to prevent him from causing harm to another." *Carneyhan,* 169 S.W.3d at 849. . . . [However,] a duty could arise to exercise reasonable care to prevent harm by controlling a third person's conduct where "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct[.]"
>
> . . . .

> [Nonetheless,] "[t]he foreseeability of the injury defines the scope and character of a defendant's duty." *Norris v. Corrections Corp. of America,* 521 F. Supp. 2d 586, 588 (W.D. Ky. 2007). "The most important factor in determining whether a duty exists is foreseeability." *Pathways, Inc. v. Hammons,* 113 S.W.3d 85, 89 (Ky. 2003) (citation omitted). "[C]ourts have held that, except under extraordinary circumstances, individuals are generally entitled to assume that third parties will not commit intentional criminal acts." *James v. Meow Media, Inc.,* 300 F.3d 683, 693 (6th Cir. 2002).

*Id*. at 923. Unfortunately, *Wilkerson* is not directly on point, as it involved a tortfeasor of the age of majority.

Nevertheless, we noted in *Wilkerson*, that "[t]he foreseeability of the injury defines the scope and character of a defendant's duty." *Id.,* quoting *Norris,* 521 F. Supp.2d at 588. In the present case, Elkins, an adult landowner who was aware that minors were imbibing in alcohol on his property, had a special relationship with those minors. Where minors and alcohol are concerned, the scope of foreseeability is expanded. Many ugly outcomes may be foreseeable when minors consume alcohol, including alcohol poisoning, drunk driving accidents, drowning, and other non-intentional torts.

However, the alleged tortious conduct in this case was an assault by Byrd on Martin, an act which occurred at another location and due to an automobile fender bender. This conduct was beyond the scope of reasonable foreseeability by Elkins. *Wilkerson*, 336 S.W.3d at 923. As previously stated, persons are generally entitled to assume that third parties will not commit intentional criminal acts. *Id*. Indeed, even the Dram Shop statutes, which are

intended to be more stringent as they apply to businesses rather than individual social hosts, place the primary liability for injuries to third parties upon the intoxicated person rather than the business establishment. KRS 413.241(3); *Isaacs v. Smith*, 5 S.W.3d 500 (Ky. 1999).

In *Wilkerson*, this Court held that a social host could not foresee that a drunken party guest would punch another guest in the face. *Wilkerson*, 336 S.W.3d at 923. In *Isaacs*, the Supreme Court stated that, in the dram shop context, a night club owner could not foresee that a bar patron who got into a shouting match with another patron would later in the evening draw a weapon and shoot the other patron. *Isaacs*, 5 S.W.3d at 503. The law is clear that intentional torts against third parties, such as bar fights, assaults, and shootings, are not foreseeable to social hosts or bar owners. Thus, viewing the evidence in a light most favorable to Martin, Elkins is entitled to judgment as a matter of law. As the Supreme Court noted in *Isaacs*, although proximate cause is typically a question for the jury, "a duty applies only if the injury is foreseeable." 5 S.W. 3d at 502. Without a duty, there can be no breach or causation.

Thus, the trial court was correct in granting summary judgment. As has oft been stated, the proper purpose of a summary judgment "is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor[.]" *Id*. at 503.

Accordingly, we affirm the Jefferson Circuit Court.

ALL CONCUR.

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