



ATTORNEYS FOR APPELLANT
WEOC, INC. D/B/A WINGS, ETC.
J. Thomas Vetne
Brian R. Gates
Hunt Suedhoff Kearney, LLP
South Bend, Indiana

ATTORNEYS FOR APPELLEE
Jon F. Schmoll
Steven L. Langer
Sara A. Langer
Langer and Langer
Valparaiso, Indiana

ATTORNEYS FOR APPELLANT ROMO, LLC
D/B/A EL CANTARITO
Orfej P. Najdeski
Amalia J. Gemelas
Kopka Pinkus Dolin, P.C.
Crown Point, Indiana

IN THE
COURT OF APPEALS OF INDIANA

WEOC, Inc. d/b/a Wings, Etc.
and Romo, LLC d/b/a El
Cantarito,

Appellants-Defendants,

v.

Leah Niebauer, as Special
Representative of the Estate of
Nathan Blount, Deceased,

Appellee-Plaintiff

March 15, 2023

Court of Appeals Case No.
22A-CT-1869

Interlocutory Appeal from the
LaPorte Superior Court

The Honorable Richard R.
Stalbrink, Jr., Judge

Trial Court Cause No.
46D02-2107-CT-1342

Opinion by Judge Crone

Judges Robb and Kenworthy concur.

Crone, Judge.

Case Summary

- [1] WEOC, Inc. d/b/a Wings, Etc. (Wings) and Romo, LLC d/b/a El Cantarito (El Cantarito) (collectively Defendants) bring this interlocutory appeal of the trial court’s denial of their joint motion to dismiss Count 3 of the wrongful death suit brought by Leah Niebauer, special representative of the Estate of Nathan Blount, deceased (the Estate). Defendants argue that the Estate’s common law claim for negligent furnishing of alcoholic beverages does not state a claim upon which relief can be granted. We conclude that it does and therefore affirm.

Facts and Procedural History

- [2] The facts as alleged in the Estate’s complaint show that in March 2021, Eric Adair went to Wings, where he was served alcoholic beverages. After drinking there, Adair went to El Cantarito’s, where he was served more alcoholic beverages. Adair was visibly intoxicated at both locations. Defendants furnished alcohol beverages to Adair when they knew or should have known that he was visibly intoxicated. After he left El Cantarito’s, “the drunken” Adair drove his vehicle “left of center in an unsafe lane movement” and crashed into the vehicle driven by Nathan Blount, who sustained serious injuries which proximately caused his death. El Cantarito’s App. Vol. 2 at 25.

[3] The Estate filed a complaint seeking damages for the wrongful death of Blount against Adair, Wings, and El Cantarito. Count 1 involves Adair and is not relevant to the issues on appeal. Count 2 alleges that Defendants both “knew or should have known that [Adair] was visibly intoxicated at the time [they] were furnishing alcoholic beverages to [him]” in violation of Indiana Code Section 7.1-5-10-15(a) (the Dram Shop Criminal Provision or Section 15), which prohibits the sale of alcoholic beverages to an intoxicated person. *Id.* at 26. Count 3 re-alleges that Defendants both “knew or should have known” that Adair was visibly intoxicated at the time they furnished alcoholic beverages to him and alleges that Defendants violated “their common law duties in furnishing alcoholic beverages to [Adair]” by (1) “fail[ing] to exercise reasonable care under the circumstances when they furnished alcoholic beverages” to Adair, (2) “carelessly and negligently allowing [him] to drive a motor vehicle from each of their premises when both [D]efendants knew or should have known that [he] was inebriated and impaired,” (3) “carelessly and negligently fail[ing] to notify law enforcement that [he] had left each of their premises in an inebriated and impaired state,” and (4) “carelessly and negligently failing to obtain alternative transportation for [him] to prevent [him] from operating a motor vehicle in an inebriated and impaired state.” *Id.* at 27-28.

[4] Wings filed a motion to dismiss Count 3 under Indiana Trial Rule 12(B)(6) for failure to state a claim upon which relief could be granted, arguing that in Indiana a common law negligence action for furnishing alcoholic beverages to a

person who later causes injury does not exist independent of Indiana Code Section 7.1-5-10-15.5 (the Dram Shop Civil Provision or Section 15.5). El Cantarito joined in Wings’s motion. Following a hearing, the trial court issued an order denying the motion to dismiss. Defendants sought certification for an interlocutory appeal, which the trial court granted. We accepted jurisdiction.

Discussion and Decision

[5] Defendants assert that the trial court erred in denying their motion to dismiss the common law negligence claim in Count 3. We review de novo a trial court’s grant or denial of a motion to dismiss for failure to state a claim upon which relief can be granted. *Price v. Ind. Dep’t of Child Servs.*, 80 N.E.3d 170, 173 (Ind. 2017). “A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint: that is, whether the allegations in the complaint establish any set of circumstances under which a plaintiff would be entitled to relief.” *Trail v. Boys & Girls Clubs of Nw. Ind.*, 845 N.E.2d 130, 134 (Ind. 2006). In determining whether a claim has been stated, we accept as true the facts alleged in the complaint and consider the pleadings in the light most favorable to the plaintiff. *Arflack v. Town of Chandler*, 27 N.E.3d 297, 302 (Ind. Ct. App. 2015). Indiana Trial Rule 8(A), our notice pleading provision, requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.”

[6] Count 3 alleges that Defendants violated “their common law duties in furnishing alcoholic beverages to [Adair].” El Cantarito’s App. Vol. 2 at 27. In a negligence claim, a defendant is liable to a plaintiff if “(1) the defendant has a

duty to conform its conduct to a standard of care arising from its relationship with the plaintiff, (2) the defendant has failed to conform its conduct to that standard of care, and (3) an injury to the plaintiff was proximately caused by the breach.” *Pierson ex rel. Pierson v. Serv. Am. Corp.*, 9 N.E.3d 712, 715 (Ind. Ct. App. 2014), *trans. denied*. “A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” *Key v. Hamilton*, 963 N.E.2d 573, 580 (Ind. Ct. App. 2012) (quoting W. Prosser & W. Keeton, *Prosser & Keeton on Torts* § 53 (5th ed. 1984)), *trans. denied*.

[7] Generally, “[u]nless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable [person] under like circumstances.” *Id.* at 579 (quoting Restatement (Second) of Torts § 283 (1965)) (alteration in *Key*). “Lack of reasonable care that an ordinary person would exercise in like or similar circumstances is the factor upon which the presence or absence of negligence depends.” *Jones v. Gleim*, 468 N.E.2d 205, 207 (Ind. 1984).

[8] The parties vigorously dispute the impact of the 1986 passage of the Dram Shop Civil Provision on the common law duty of a furnisher of alcoholic beverages to third parties to exercise ordinary and reasonable care in furnishing alcoholic

beverages.¹ Our supreme court has said that the Dram Shop Civil Provision “imposes civil liability for ‘furnishing’ alcohol to visibly intoxicated people who, in turn, cause injury.” *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 74 (Ind. 2006). The Dram Shop Civil Provision provides,

(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*:

(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.

¹ The parties often frame their dispute as whether common law liability survives or exists despite “Indiana’s Dram Shop Act.” However, *Wings* refers to Section 15.5 as the Dram Shop Act, while the Estate refers to Section 15 as the Dram Shop Act. Our courts have referred to both sections as the Dram Shop Act. *Compare Nat’l R.R. Passenger Corp. v. Everton by Everton*, 655 N.E.2d 360, 364 (Ind. Ct. App. 1995) (referring to Section 15 as the Dram Shop Act), *with Gray v. D & G, Inc.*, 938 N.E.2d 256, 257 (Ind. Ct. App. 2010) (referring to Section 15.5 as the Dram Shop Act). For clarity, we have differentiated between Section 15 and Section 15.5. We further note the potential confusion in the parties’ use of the phrase “statutory violation,” in that it is unclear whether the parties are referring to a violation of Section 15, Section 15.5, or both. Section 15.5 does not criminalize conduct, so in that sense, one cannot violate it. However, our courts have sometimes phrased civil liability in terms of violating Section 15.5. *See, e.g., Rogers v. Martin*, 63 N.E.3d 316, 327 (Ind. 2016) (“As a second basis for holding Martin liable, plaintiffs argue Martin ‘furnished’ alcohol to Brothers in violation of Indiana’s Dram Shop Act, codified at Indiana Code section 7.1-5-10-15.5.”).

(c) If a person who is at least twenty-one (21) years of age suffers injury or death proximately caused by the person's voluntary 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 subsections (b)(1) and (b)(2) apply.

Ind. Code § 7.1-5-10-15.5 (emphases added).

[9] Defendants proclaim that our courts have not yet “squarely decided whether common-law negligence claims untethered to a statutory violation survive [Section 15.5's] enactment [and] ask [this] Court to expressly determine that common-law negligence claims untied to [Section 15.5] fail to state cognizable

claims.”² Wings’s Br. at 10. We emphasize that this case is in its early stages, and therefore the broad proclamation that Defendants seek is inappropriate. Given the procedural posture of this case, we address only whether Count 3 states any set of circumstances that would entitle the Estate to relief.

[10] In determining the effect of the Dram Shop Civil Provision, we apply the rules of statutory interpretation:

The primary purpose in statutory interpretation is to ascertain and give effect to the legislature’s intent. The best evidence of that intent is the language of the statute itself, and we strive to give the words in a statute their plain and ordinary meaning. A statute should be examined as a whole, avoiding excessive reliance upon a strict literal meaning or the selective reading of individual words. The Court presumes that the legislature intended for the statutory language to be applied in a logical manner consistent with the statute’s underlying policy and goals.

² The supreme court has addressed whether common law negligence actions exist independent of a violation of Section 15 or Section 7.1-5-7-8, the statute prohibiting sales of alcohol to minors. See *Elder v. Fisher*, 247 Ind. 598, 603, 217 N.E.2d 847, 852 (1966) (recognizing common law duty of persons selling alcoholic beverages to exercise due care and that violation of statute prohibiting sale of alcohol to minors constituted negligence per se); *Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217, 1219 (Ind. 1988) (holding that Section 15 did not “modify the common law with respect to liability of persons negligently furnishing alcoholic beverages,” but that a violation of Section 15 provided evidence of negligence); *Gariup Constr. Co. v. Foster*, 519 N.E.2d 1224, 1228 (Ind. 1988) (holding that “common law liquor liability shall not be extended to the purely social host, except in cases involving a breach of a statutory duty.”) However, these cases were all based on conduct that occurred prior to the enactment of Section 15.5 and therefore do not address the effect of that statute.

We note that although the *Gariup* court referred specifically to the “purely social host,” some appellate courts have omitted this language. See *Rauck v. Hawn*, 564 N.E.2d 334, 337 (Ind. Ct. App. 1990) (“In Indiana, common law liability for negligence in the provision of alcoholic beverages is restricted to cases involving a breach of a statutory duty.”); *Thompson v. Ferdinand Sesquicentennial Comm., Inc.*, 637 N.E.2d 178, 180 (Ind. Ct. App. 1994) (citing *Rauck*, 564 N.E.2d at 337); *Weida v. Dowden*, 664 N.E.2d 742, 747-48 (Ind. Ct. App. 1996) (citing *Thompson*, 637 N.E.2d at 180), *trans. denied* (1999).

State v. Oddi-Smith, 878 N.E.2d 1245, 1248 (Ind. 2008) (citations omitted).

[11] By its plain and unambiguous terms, Section 15.5 applies to “a person who furnishes an alcoholic beverage to a person [in] a civil action for damages caused by the impairment or intoxication of the person who was furnished the alcoholic beverage.” Further, Section 15.5 declares that a person who furnishes an alcoholic beverage to the person who caused those damages is “not liable” “unless” two requirements are met. In other words, a person who has furnished alcoholic beverages is liable only if the two requirements are established. Section 15.5 unambiguously applies to civil actions to limit liability when the action is against the person who furnished alcoholic beverages and the damages were caused by the intoxication of the person who consumed the beverages. In this respect, Section 15.5 confers a level of immunity to those who furnish alcoholic beverages. *See BGC Ent., Inc. v. Buchanan ex rel. Buchanan*, 41 N.E.3d 692, 698 n.3 (Ind. Ct. App. 2015) (noting that this Court has referred to Section 15.5 as an immunity provision and that Indiana Code Chapter 34-30-2 includes Section 15.5 on its list of statutes outside that title that confer immunity);³ *Thompson v. Ferdinand Sesquicentennial Comm., Inc.*, 637 N.E.2d 178, 180 (Ind. Ct. App. 1994) (referring to “the immunity provisions” of Section 15.5).

³ Indiana Code Chapter 34-30-2 was recodified as Indiana Code Chapter 34-30-2.1 effective July 1, 2022. Indiana Code Section 34-30-2.1-73 identifies Section 15.5 as a statute conferring immunity from civil liability outside of Article 34. However, Section 34-30-2.1-1 states, “Listing in this chapter does not equate to the creation of an immunity from civil liability[.]”

[12] Although not binding on us, we agree with the United States District Court’s persuasive analysis in *Buffington v. Metcalf*, 883 F. Supp. 1190 (S.D. Ind. 1994), which is the only case applying Indiana law cited by the parties that involves a motion to dismiss. There, the district court reviewed the denial of a motion to dismiss a common law cause of action involving the furnishing of alcoholic beverages. The defendant argued it did not state a claim because non-statutory dram shop liability was “disallowed in light of the Indiana General Assembly’s enactment of § 15.5.” *Id.* at 1191-92. The district court rejected that argument, reasoning as follows:

Section 15.5 is in derogation of common law and, therefore, must be narrowly construed. *See Indianapolis Power & Light Co. v. Brad Snodgrass, Inc.*, 578 N.E.2d 669, 673 (Ind.1991) (“[i]t is well settled that the legislature does not intend by a statute to make any change in the common law beyond what it declares either in express terms or by unmistakable implication”). There is nothing, either in the express terms of § 15.5 or in what may be implied therefrom, that indicates ... that § 15.5 intended to preclude common law liability for those furnishing alcohol.

Id. at 1194. The court then noted, “Of course, § 15.5 provides the standard for liability for a defendant in any common law claim such as this, involving the furnishing of alcohol.” *Id.* at n.4. The court concluded that the common law action stated a claim because it alleged that the defendant furnished intoxicating beverages to its customer with actual knowledge of his visible intoxication.

[13] In this case, the Estate has brought a civil action for damages proximately caused by Adair’s impairment or intoxication against those who furnished

Adair with alcoholic beverages. Thus, the Estate’s common law negligence claim falls squarely within the scope of Section 15.5. In this case, then, Section 15.5 provides a defense to liability in the absence of actual knowledge of visible intoxication. The Estate alleged that Defendants “knew or should have known” that Adair was visibly intoxicated. The allegation that Defendants “should have known” that Adair was visibly intoxicated does not state a claim because that would not satisfy the requirement of Section 15.5 that “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.” However, under notice pleading, the allegation that Defendants “knew” that Adair was visibly intoxicated is sufficient to state a claim under which relief could be granted under Section 15.5.

[14] As for the Estate’s allegations that Defendants were negligent in allowing Adair to drive a motor vehicle from their premises, failing to notify law enforcement, and failing to obtain alternative transportation for him, Defendants argue that these do not state claims because Defendant did not owe such duties to Blount, a third-party motorist. “To prevail in a negligence action, it must first be shown that the defendant owed a duty to the plaintiff.” *Weida v. Dowden*, 664 N.E.2d 742, 750 (Ind. Ct. App. 1996), *trans. denied* (1999).

Recovery is permitted only when the plaintiff establishes that the defendant breached a duty owed to the plaintiff that was the proximate cause of the injuries. Absent a duty, there can be no

breach of duty, and no negligence or liability based upon an alleged breach will attach.

Id. at 750-51 (citations omitted). “Generally, whether a duty exists is a question of law for the court to decide.” *Rhodes v. Wright*, 805 N.E.2d 382, 386 (Ind. 2004).” However, “factual question[s] may be interwoven with the determination of the existence of a relationship, thus making the ultimate existence of a duty a mixed question of law and fact.” *Id.* (quoting *Douglass v. Irvin*, 549 N.E.2d 368, 370 n.1 (Ind. 1990)).

[15] Our courts have considered whether a furnisher of alcohol is liable for damages caused to a third person where the furnisher of alcohol had a duty to the third person that stemmed from circumstances in the particular case that went beyond the mere fact that the defendant furnished alcohol. *Compare Gariup Constr. Co. v. Foster*, 519 N.E.2d 1224, 1229 (Ind. 1988) (employer owed duty to third-party motorist to supervise employee at employer party because party was held on employer’s premises, employer provided the alcohol, the game encouraging drinking that employee participated in occurred at the party, and the intoxicated person was an employee), *and BGC Ent., Inc. v. Buchanan ex rel. Buchanan*, 41 N.E.3d 692, 702-03 (Ind. Ct. App. 2015) (bar owner not entitled to summary judgment on third-party pedestrian’s claim based on common-law theory of negligent supervision of employee), *with Weida*, 664 N.E.2d at 751 (facility where wedding reception was held did not owe duty to third-party motorist to supervise or control wedding guest’s behavior), *and Est. of Cummings by Heck v. PPG Indus.*, 651 N.E.2d 305, 310 (Ind. Ct. App. 1995) (employer did

not owe duty to third-party motorist to supervise or control behavior of minor employee who consumed alcohol at off-premises employer event), *trans. denied* (1996). We note that none of these cases involved a motion to dismiss.

[16] To determine whether a duty exists when it has not been established by law, three considerations are balanced: “(1) the relationship between the parties, (2) the reasonable foreseeability of harm, and (3) public policy concerns.” *Neal v. IAB Fin. Bank*, 68 N.E.3d 1114, 1117 (Ind. Ct. App. 2017), *trans. denied*. In general, when addressing the duty to control the conduct of others, our courts follow the principles set forth in Section 315 of the Restatement (Second) of Torts:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(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, or

(b) a special relation exists between the actor and the other which gives the other a right to protection.

Id. at 1118.

[17] Although the existence of a duty is a question of law for the court, it is also dependent upon the specific facts of a given case.⁴ *See Rhodes*, 805 N.E.2d at 386. At this early stage in the proceedings, it would be inappropriate to make such a determination. Thus, the trial court did not err in denying Defendants' joint motion to dismiss. Accordingly, we affirm.

[18] Affirmed.

Robb, J., and Kenworthy, J., concur.

⁴ Whether there is a special relationship between the parties in this case may be impacted by Defendants' statutory obligation not to serve alcoholic beverages to intoxicated persons.