

Rel: November 9, 2023

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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

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SC-2023-0338

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Octavi Perez

v.

Roman's Restaurant, L.L.C., d/b/a Roman's Night Club

Appeal from Jefferson Circuit Court  
(CV-19-904206)

SELLERS, Justice.

Octavi Perez ("the plaintiff") appeals from a summary judgment entered by the Jefferson Circuit Court in favor of Roman's Restaurant,

L.L.C., doing business as Roman's Night Club ("Roman's") on his claims for damages asserted pursuant to § 6-5-70, Ala. Code 1975 ("the Civil Damages Act"), and § 6-5-71, Ala. Code 1975 ("the Dram Shop Act"). We affirm.

### Facts

On July 7, 2019, 18-year-old Edgar Perez, who earlier that evening had been a patron of the nightclub operated by Roman's, was killed when the vehicle he was driving left the roadway and hit a tree. An autopsy report indicated that ethanol intoxication was a factor contributing to Edgar's death. Edgar was a citizen of Honduras and came to the United States in 2016. He lived in an apartment located in Birmingham with, among others, his father, Rigoberto Perez, and his two uncles, Ramon Perez and Octavi Perez (the plaintiff) -- also citizens of Honduras. While living in the apartment, Edgar paid for his share of the rent, utility expenses, and grocery expenses. Edgar also usually paid his own cellular-telephone bill, although the plaintiff had paid the bill two or three times when Edgar had been out of town. In 2018, Rigoberto returned to Honduras, leaving the plaintiff "in charge" of Edgar. For

approximately two months before the accident, Edgar had been working full-time as a roofer in North Carolina.

In September 2019, the plaintiff commenced this action against Roman's, alleging that it had served alcoholic beverages to Edgar, a minor, while he was in an intoxicated condition and that the plaintiff was, therefore, entitled to damages pursuant to the Civil Damages Act and the Dram Shop Act. Roman's filed a motion for a summary judgment, pursuant to Rule 56(c), Ala. R. Civ. P., arguing, in relevant part, (1) that the plaintiff lacked the capacity to commence an action under the Civil Damages Act because, it said, the plaintiff was neither Edgar's parent nor stood in loco parentis to Edgar and (2) that the plaintiff could not maintain an action under the Dram Shop Act because, it claimed, the plaintiff had not been "injured in person, property, or means of support," as required by that act. Following a hearing, the trial court entered a summary judgment in favor of Roman's. This appeal followed.

### Standard of Review

This Court reviews a summary judgment de novo, and we use the same standard used by the trial court to determine whether the evidence presented to the trial court presents a genuine issue of material fact. Rule

56(c), Ala. R. Civ. P.; Nettles v. Pettway, 306 So. 3d 873 (Ala. 2020). The movant for a summary judgment has the initial burden of producing evidence indicating that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Once the movant produces evidence establishing a right to a summary judgment, the burden shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact. We consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor. Id.

### Discussion

On appeal, the plaintiff argues that the trial court erred in entering a summary judgment in favor of Roman's on his claims for damages asserted pursuant to the Civil Damages Act and the Dram Shop Act. We examine each claim separately.

#### A. The Claim Asserted Pursuant to the Civil Damages Act

The Civil Damages Act provides:

"Either parent of a minor, guardian, or a person standing in loco parentis to the minor having neither father nor mother shall have a right of action against any person who unlawfully sells or furnishes spirituous liquors to such minor and may recover such damages as the jury may assess, provided the person selling or furnishing liquor to the minor

had knowledge of or was chargeable with notice or knowledge of such minority. Only one action may be commenced for each offense under this section."

§ 6-5-70 (emphasis added).

The Civil Damages Act provides a right of action to a parent, a guardian, or a person standing in loco parentis to the minor. The plaintiff asserts that, before he returned to Honduras, Rigoberto had left the plaintiff "in charge" of Edgar; thus, he claims that he stood in loco parentis to Edgar. In Smith v. Smith, 922 So. 2d 94, 99 (Ala. 2005), this Court adopted the following standard for determining whether a nonparent stands in loco parentis to a minor child:

"In Alabama, a nonparent stands in loco parentis if he or she (1) assumes the obligations incident to parental status, without legally adopting the child, and (2) voluntarily performs the parental duties to generally provide for the child.

"A person assuming the status and obligations of in loco parentis must intend to assume that status and those obligations. See Hamilton [v. Foster], 260 Neb. [887], 903, 620 N.W.2d [103,] 116 [(2000)]; Fevig [v. Fevig], 90 N.M. [51,] 53, 559 P.2d [839,] 841 [(1977)]; and Rutkowski [v. Wasko], 286 A.D. [327,] 331, 143 N.Y.S. 2d [1,] 5 [(1995)]. In making a determination as to whether a nonparent stands in loco parentis, courts consider the totality of the circumstances and cannot lightly infer the intent of the person seeking to be considered as standing in loco parentis. See Rutkowski, 286 A.D. at 331, 143 N.Y.S.2d at 5. A person taking the child into his or her custody and treating the child as a member of his or her own family constitutes the clearest evidence of an

intent to stand in loco parentis. See Simms v. United States, 867 A.2d 200, 206 (D.C. 2005).

"The duties incidental to a parental relationship involve more than aiding or assisting a child, and more than feeling kindness, affection, or generosity toward the child. Simms, 867 A.2d at 207. Performing parental duties generally means: (1) providing support and maintenance for the child, North Carolina v. Pittard, 45 N.C. App. 701, 703, 263 S.E.2d 809, 811 (1980); (2) providing day-to-day care for the child, Hamilton, 260 Neb. at 904, 620 N.W.2d at 116; (3) displaying a true interest in the well-being and general welfare of the child, Rutkowski, 286 A.D. at 331, 143 N.Y.S.2d at 5; and (4) educating, instructing, and caring for the child. Rutkowski, 286 A.D. at 331, 143 N.Y.S.2d at 5. These factors are not exhaustive, and courts should determine from the facts of each case whether the person claiming in loco parentis status is performing parental duties. See Rutkowski, 286 A.D. at 331, 143 N.Y.S.2d at 5. We observe that in analyzing both prongs of the in loco parentis standard we today adopt, courts must consider the totality of the circumstances."

Relying on the standard outlined in Smith, the trial court determined that the plaintiff had failed to present substantial evidence demonstrating that he stood in loco parentis to Edgar:

"This Court does not disagree that there is evidence that Plaintiff aided, assisted, demonstrated kindness, affection, and generosity toward Edgar. However, under the totality of circumstances, any of the adult family members of the extended family would have, in the course of typical family relations, extended such to Edgar. Reviewing prong one, Plaintiff must first provide substantial evidence, not of his intent to look after Edgar or be there when Edgar needed something or be in charge of Edgar, but of his intent to assume 'parental obligations.' But in this case, Edgar was almost 19,

was working full time, had been living out of town for two months, paid his share of the rent and all apartment expenses, and the only evidence of expense testified to by Plaintiff that he spent on Edgar amounted to nothing more than from a feeling of 'affection or generosity' ... which the Smith case establishes is insufficient. Even if the statements by Plaintiff that Edgar was under his care, that he treated Edgar like a son, [and] that Rigoberto left him in charge are true, there is no evidence that Plaintiff ever intended to assume payment of care and maintenance for Edgar. In fact, the evidence confirms that Plaintiff never paid for the care and maintenance of Edgar. There is overwhelming evidence of the opposite in that Edgar paid his own way, other than a few generous offers of payment here and there from Plaintiff, which Edgar offered to pay back."

The plaintiff essentially argues that, in applying the Smith standard, the trial court failed to give proper consideration to the totality of the circumstances that are unique to an older child such as Edgar. He states that older children, unlike younger children, are less dependent, have different responsibilities and expectations, and enjoy a different relationship with parents. Under these circumstances, he asserts, the record supports a finding that he intended to assume a parental role over Edgar because, he says, he treated Edgar like his own son, he shared things with Edgar, and Edgar obeyed him. However, to establish that he stood in loco parentis to Edgar, the plaintiff was required to show specifically how he acted in place of Edgar's parents. It is true that, as a

child matures, the child typically requires less parental oversight as the child is able to act more independently to assume greater accountability for himself or herself; therefore, it stands to reason, establishing that a person stands in loco parentis to an older child requires significant evidence indicating that the person provided for the support, education, health, and maintenance of the child. Such evidence was absent here, and what evidence there was regarding the relationship between the plaintiff and Edgar showed that the plaintiff shouldered few of the functions of a parent. Indeed, the totality of the circumstances reveal that Edgar was almost 19 years old at the time of his death, that he had been self-sufficient, and that any payments made by the plaintiff on behalf of Edgar were merely gratuitous in nature. Those circumstances do not reflect that the plaintiff intended to assume the obligations incident to parental status or that he voluntarily performed any parental duties to generally provide for Edgar. See Smith, 922 So. 2d at 98. Because the plaintiff failed to present substantial evidence demonstrating that he stood in loco parentis to Edgar, he lacked the capacity to commence an action pursuant to the Civil Damages Act. Accordingly, the trial court did not err in entering a summary judgment



in favor of Roman's on the plaintiff's claim for damages asserted pursuant to the Civil Damages Act.

B. The Claim Asserted Pursuant to the Dram Shop Act

The Dram Shop Act provides, in pertinent part:

"Every wife, child, parent, or other person who shall be injured in person, property, or means of support by any intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving, or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages."

§ 6-5-71(a) (emphasis added).

The Dram Shop Act creates a right of action in favor of a "wife, child, parent, or other person who shall be injured in person, property, or means of support by any intoxicated person or in consequence of the intoxication of any person." (Emphasis added.) The plaintiff contends that he can maintain an action under the Dram Shop Act because, he says, he falls within the broad "other person" category and that he was injured in "means of support" as a consequence of Edgar's death. In other words, the plaintiff claims that, before the accident, he had depended on Edgar

as a means of financial support.<sup>1</sup> In Ward v. Rhodes, Hammonds, and Beck, Inc., 511 So. 2d 159, 164 (Ala. 1987), this Court held that the class of potential plaintiffs falling within the "other person" designation includes "anyone who is proximately 'injured in person, property or means of support by any intoxicated person or in consequence of the intoxication of any person.' And ... this category of plaintiffs is as broad as proof of proximate cause will permit." The trial court concluded that the plaintiff had failed to produce substantial evidence demonstrating that he had been injured in "means of support" as required by the Dram Shop Act:

"The Court finds that while Plaintiff may have provided an argument or evidence that he lost a person who was contributing to sharing the rent and expenses, he has failed to provide substantial evidence that he has lost the 'support' of Edgar. The evidence is undisputed that Plaintiff was paying for his own share of the rent and his own share of the expenses, that Plaintiff had a full-time job, and [was]

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<sup>1</sup>In its summary judgment, the trial court noted the conflicting positions taken by the plaintiff in seeking damages under the Civil Damages Act and the Dram Shop Act. Specifically, in his claim asserted pursuant to the Civil Damages Act, the plaintiff alleged that he had provided support and maintenance to Edgar, while, in his claim asserted pursuant to the Dram Shop Act, he alleged that he had depended on Edgar for such support. We view these allegations as having been pleaded in the alternative and, at this stage of the litigation, as not necessarily being mutually exclusive.

supporting himself, as Edgar was supporting himself. [The apartment] was shared by other family members and each paid their own share. Payments by Edgar for his share of the rent and other utilities or expenses were for Edgar's benefit himself, not for Plaintiff. The evidence that [Edgar and the Plaintiff] occasionally purchased each other clothing, or that Plaintiff may have paid a cell phone expense occasionally, does not establish sufficient evidence that Plaintiff lost 'support' from Edgar, necessary to give him [a right of action] under the Dram Shop Act."

In other words, to have a right of action under the Dram Shop Act, the plaintiff had to show that he had been injured in his "means of support" as a consequence of Edgar's death.<sup>2</sup> In this case, the plaintiff presented no evidence, much less substantial evidence, demonstrating that he had actually received any financial support from Edgar before the accident. See, e.g., Angeloff v. Raymond, 70 Ill. App. 3d 594, 596, 388 N.E. 2d 1128, 1129, 27 Ill. Dec. 165, 166 (1979) ("It is a well settled rule that one cannot establish injury to 'means of support' within the meaning of the Dramshop Act when the decedent had actually provided no support prior to the time of his death."). Accordingly, the trial court did not err

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<sup>2</sup>In this appeal, we are not called up to decide whether, to maintain an action under the Dram Shop Act, a plaintiff alleging a loss of means of support must show that the deceased owed him or her a legal duty of support or whether it is necessary to show only that an actual loss of support has been suffered.

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in entering a summary judgment in favor of Roman's on the plaintiff's claim for damages asserted pursuant to the Dram Shop Act.

Conclusion

Based on the foregoing, the summary judgment entered in favor of Roman's is affirmed.

AFFIRMED.

Parker, C.J., and Wise, Stewart, and Cook, JJ., concur.