STATE OF MICHIGAN

COURT OF APPEALS

MARGIE CHIESA,

Plaintiff-Appellant,

v

DELTA M.P., INC, d/b/a TONY M's and RITE AID OF MICHIGAN, INC, d/b/a RITE AID DISCOUNT PHARMACY,

Defendants-Appellees,

and

ESTATE of ERUARDO ESPINOZA

Defendant.

UNPUBLISHED
October 7, 1997

No. 190034
Shiawasee Circuit
LC No. 94-003882-NS

AMENDED

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

In this dram shop action, plaintiff appeals the circuit court's August 24, 1995 order dismissing defendant Rite Aid of Michigan, Inc ("Rite Aid") and the September 13, 1995 order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant Delta M.P., d/b/a Tony M's ("Tony M's").[1] We affirm.

Plaintiff was injured at about 11:00 p.m. on December 14, 1993, when a pick-up truck driven by Eruardo Espinoza struck plaintiff's vehicle. Espinoza, who died in the accident, had a blood alcohol level of .25%. Plaintiff contends that Espinoza and his coworker and drinking companion, Nick Chambers, drank beer at Tony M's after their work shift ended (approximately 3:30), went from there to the home of a mutual friend, drove to a Rite Aid Pharmacy in Lansing where more beer was purchased, then returned to the friend's home briefly, before Espinoza left to drive home and was involved in the fatal accident. However, there is a serious problem with plaintiff's evidence. Chambers and Espinoza left Tony M's not later than 6:30 p.m., and Espinoza left the friend's home by 8:45 at the

latest. The accident did not occur until 11:00 p.m. and there were numerous empty beer cans on the back seat of Espinoza's vehicle.

Defendant Rite Aid filed a motion for security for costs pursuant to MCR 2.109, seeking an order requiring plaintiff to post a $5,000 bond "in light of the dubious merits of her claim, and the probable difficulty that [Rite Aid] would experience in collecting taxable costs from Plaintiff, should it prevail" because of plaintiff's indigency. The trial court found that the "inconsistencies" in plaintiff's case did rise to a level requiring security for costs, but that plaintiff's indigency dictated setting the security amount at $1,000 – 20% of what Rite Aid requested. When plaintiff was unable to post this bond after eight weeks, Rite Aid was dismissed.

I

Plaintiff asserts that the trial court erred first in requiring such a bond to be posted, and then in dismissing her claims against Rite Aid due to her failure to post the required bond. MCR 2.109(A) authorizes the trial court to require the filing of a bond:

> (A) Motion. On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion.
>
> * * *
>
> (C) Exceptions. Subrule (A) does not apply in the following circumstances:
>
> (1) The court may allow a party to proceed without furnishing security for costs if the party's pleading states a legitimate claim and the party shows by affidavit that he or she is financially unable to furnish a security bond.

"While a plaintiff's poverty alone is not a substantial reason to order security, the assertion of a tenuous legal theory of liability may constitute a substantial reason." *Farleigh v Local 1251,* 199 Mich App 631, 634; 502 NW2d 371 (1993). MCR 2.109 is by its terms discretionary. We see no abuse of discretion.

As to plaintiff's first assignment of error, the trial court here did not err in finding that Rite Aid demonstrated substantial reason for imposition of security. *Hall v Harmony Hills Rec'n Inc,* 186 Mich App 265, 270; 463 NW2d 254 (1990). We reach this conclusion in light of the absence of evidence concerning Espinoza's whereabouts for the two and a half hours preceding the accident, the fact that Espinoza's drinking companion for the evening testified that Espinoza was *not* visibly intoxicated when he purchased beer at Rite Aid, and the testimony that Espinoza purchased Budweiser "Tall Boys" at

Rite Aid, despite the affidavit from the Lansing Budweiser distributor that it had never supplied this item to Rite Aid. Rite Aid was entitled to security, and the trial court did not err in so concluding.

However, plaintiff seems to assume that, if she is indigent, the trial court could not require her to post security, despite its findings that this is an appropriate case for security to be posted. Plaintiff is in error. The rule by its nature is discretionary; that is, the court *may* decline to impose security for costs on grounds of indigence. Here, the trial court considered Rite Aid's request for a $5,000 bond in light of plaintiff's evidence of indigency (plaintiff is an unemployed single mother attending college, whose sole income -- outside her parents -- was Social Services, ADC of $185.50, and Medicaid). The court balanced the competing interests and assessed only a $1,000 bond and gave her eight weeks to meet the requirement. Contrast *West v Roberts,* 214 Mich App 252; 542 NW2d 352 (1995), rev'd without op'n, 454 Mich 877l 562 NW2d 199 (1996) (trial court imposed a $10,000 surety bond payable in twelve days; appeals court reversed for trial court for refusing to consider plaintiff's financial ability). Here, there was no abuse of discretion; the trial court properly dismissed Rite-Aid upon plaintiff's failure to post the required bond.

In light of this disposition, we do not address Rite Aid's contention that plaintiff's action against it is barred by plaintiff's failure to comply with the name-and-retain clause of the dram shop statute. (MCL 436.22(6); MSA 18.993(6)).

II

Plaintiff next contends that the trial court erred in granting summary disposition to defendant Tony M's (the first seller of alcohol), because: (1) plaintiff believes that she presented sufficient circumstantial evidence to create a question over whether Espinoza was visibly intoxicated at the time he was served at Tony M's, and (2) this evidence was sufficient to rebut the statutory presumption that only the last entity that sold alcohol should be liable. We disagree on both issues.

MCL 436.22; MSA 18.993 provides, in pertinent part:

> (3) A retail licensee shall not . . . sell, furnish, or give alcoholic liquor to a person who is visibly intoxicated.
>
> (4) [A]n individual who suffers damage or is personally injured by a . . . visibly intoxicated person by reason of the unlawful selling . . . of alcoholic liquor to the visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage . . . shall have a right of action . . . against the person who by selling . . . the alcoholic liquor has caused or contributed to the damage injury or death.
>
> * * *
>
> (9) There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (4).

A person is visibly intoxicated when the person's intoxication would be apparent to an ordinary observer. *Miller v Ochampaugh*, 191 Mich App 48, 57; 485 NW2d 493 (1991).

Here, there is no testimony that Espinoza was served alcohol at Tony M's while he was visibly intoxicated. The evidence indicated that Espinoza drank as many as six beers while there, and possibly purchased additional beer from a party store next door, as he left. However, no expert testimony has been proferred to indicate that six beers would produce any level of intoxication in Espinoza that would become visible – a fatal flaw where the dram shop statute creates a rebuttable presumption that a licensee other than the one who last sold alcohol to Espinoza, has not committed any act giving rise to a cause of action under the dram shop statute.[2] In the absence of evidence that Tony M's served Espinoza when he was visibly intoxicated, the trial court properly granted summary disposition to Tony M's.

Plaintiff also failed to rebut the presumption that only the last liquor establishment where Espinoza purchased alcohol can be liable under the dram shop act. It was undisputed that Espinoza bought alcohol at a third liquor establishment after the purchases at Tony M's and the adjoining party store. Further, there was circumstantial evidence (i.e. empty beer cans) suggesting that Espinoza may have bought and consumed even more alcohol after leaving his friend's home, but before the accident. Finally, in light of the fact that the accident occurred at 11:00 p.m. and that Espinoza had a blood alcohol content of .25% at the time of the accident, the connection between the alcohol served by Tony M's between 3:30 and 6:00 p.m. and 11:00 p.m. accident is tenuous. The trial court properly granted summary disposition to Tony M's.

Affirmed.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin
/s/ Henry William Saad

[1] Pursuant to mediation, the trial court entered a $30,000 judgment in favor of plaintiff and against the Estate of Espinoza.

[2] The necessity for such additional information as Espinoza's body weight, food consumption and other factors, including passage of time, which might have affected alcohol elimination rate and level of intoxication, was recognized in *People v Prelesniak,* 219 Mich App 173, 180; 555 NW2d 505 (1996).