Keus, et al. v. Catamount Restaurant & Bar, Inc., Docket No. 11-1-05 Bncv (Wesley, J., Dec. 19, 2006)

STATE OF VERMONT **BENNINGTON SUPERIOR COURT**
BENNINGTON COUNTY, SS. **DOCKET NO. 11-1-05 Bncv**

Vivian KEUS, Individually and as Guardian of James R. Keus, Dawn Keus, as Next Friend of James Keus, Jr., and Dana Keus, and Kimberly Wade as Next Friend of Casey Keus,
Plaintiffs

v.

CATAMOUNT RESTAURANT & BAR, INC., d/b/a Ryan's Cafe,
Defendant

ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFFS' CLAIMS UNDER THE DRAM SHOP ACT

James R. Keus suffered severe and permanent injuries in a one-vehicle accident in the early morning of April 19, 2002. His family's attempt to uncover the cause of the accident and receive compensation for potential negligence by other parties led to this lawsuit. Plaintiffs Vivian Keus, Dawn Keus and Kimberly Wade alleged in a complaint filed on January 6, 2005 that Defendant Catamount Restaurant and Bar, Inc., as proprietor of Ryan's Cafe, "continued to serve alcoholic beverages to [James] after he had become visibly intoxicated and/or after it was reasonable to expect him to be intoxicated as a result of the alcoholic beverages which it had already served

to him." Plaintiffs assert that Defendant's alleged actions were a proximate cause of the accident. In addition to claims for negligence, Plaintiffs also advanced claims under the Dram Shop Act ("DSA"), 7 V.S.A. §§ 501-507.

Currently pending is Defendant's Motion for Partial Summary Judgment, in which it asks the Court to rule that Plaintiffs' claims under the DSA are barred by its two-year statute of limitations. It argues that Plaintiffs had sufficient information "within days of the accident" to gain notice of potential DSA claims, which should preclude the January 6, 2005 filing as untimely. Plaintiffs dispute that they received all the information alleged by Defendant or that it was sufficient to put them on notice of potential DSA claims. Rather, they argue that the statute of limitations did not begin to run until a witness to Defendant's alleged actions presented himself to Plaintiffs between April and June of 2003. Due to the existence of disputes of material fact in this case, and recognizing that the date on which a statute of limitations begins to run is generally a matter best left to the trier of fact, Defendant's Motion for Partial Summary Judgment is **DENIED.**

I. Facts

The deposition and affidavit of Walter McDonald provide much of the factual background for reconstructing the events surrounding the accident. On the night of April 18th, 2002, Walter McDonald, driving James's truck, dropped James off near Ryan's Cafe at James's behest. McDonald did not see James enter the establishment, but he states in his affidavit and deposition that James told him he was going to the bar. However, McDonald also states that James told him he was "thinking about going up to this girl's house on Beech Street." James later came to McDonald's house to get his

truck sometime between midnight and 1:00 AM on the 19th. He did not tell McDonald where he had been after McDonald had dropped him off. McDonald assumed he had been at Ryan's and asked if he was sober enough to drive, but McDonald also states that James did not appear to be drunk. Sometime after leaving McDonald's, James suffered serious injury in an automobile accident in the early morning of April 19, 2002, as related in the State of Vermont Uniform Crash Report. The crash report discloses no indication that he was drunk at the time of the accident.

Vivian Keuss, James' mother, states in her affidavit that he was left with no memory of the accident or the events preceding it. According to the testimony of Walter McDonald, Vivian discussed the events of April 18-19 with him on the day after the collision involving James, at which time he told her of his belief that James was drinking at Ryans. Vivian cannot recall any such conversation, however, admitting only in her deposition that there were "rumors and stuff" but that she cannot recall who was the source of them.

Dawn Keus, as set forth in her deposition, also admits having heard "rumors" within several weeks after the accident that James had been drinking in an undetermined bar and left to retrieve the keys to his truck from "a friend," who gave him the keys reluctantly. Nonetheless, she denies that Walter McDonald ever had any conversation with her about the incident. Similarly, Kimberly Wade acknowledges in her deposition that , within a month after the accident, she had heard "a few rumors floating around the hospital" that James "had fallen asleep at the wheel before the accident, and that he may have had too much to drink." It was not until a year or more later, some time between April and June of 2003, when Shane Lurvey approached Dawn and

told her, as related in both her deposition and her affidavit, that he had seen James at Ryan's Cafe on the night of the accident, and that Ryan's had served James alcohol while James was already intoxicated. According to Plaintiffs, it was this first-hand knowledge that compelled them to file suit in this case on January 6, 2005.

II. Discussion

"To prevail on a motion for summary judgment, the moving party must show there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law." VRCP 56(c)(3); *Gordon v. Bd. of Civil Auth. for Town of Morristown*, 2006 VT 94, ¶ 5, 17 Vt.L. W. 300. The court does not weigh the evidence, but merely determines whether a triable issue of fact exists. *Berlin Dev. Assocs. v. Dept. of Social Welfare*, 142 Vt. 107, 111-112 (1982). This is a stringent test, as "the party opposing summary judgment is entitled to the benefit of all reasonable doubts and inferences." *Wesco, Inc. v. Hay-Now, Inc.*, 159 Vt. 23, 26 (1992); *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998).

DSA § 501(a) allows specified parties to sue for injuries to another person caused by a third party's "selling or furnishing intoxicating liquor . . . to a person apparently under the influence of intoxicating liquor." An action brought under this section must be "commenced within two years after the cause of action accrues, and not after." 7 V.S.A. § 501(d). The statute's use of the term "accrues" signifies that factual inferences are necessary in order to determine the date of accrual of the statute of limitations. *Pike v. Chuck's Willoughby Pub, Inc.*, 2006 VT 54, ¶ 16, 17 Vt.L.W. 161.

"The date of accrual under the statute of limitations seeks to identify the point at

which a plaintiff should have discovered the basic elements of a cause of action: an injury caused by the negligence or breach of duty of a particular defendant." *Earle v. State*, 170 Vt. 183, 193 (1999). A court may impute to a plaintiff knowledge obtainable through reasonably diligent inquiry. *Agency of Natural Res. v. Towns*, 168 Vt. 449, 452 (1998). The opportunity to investigate potential sources of information is also a relevant factor. See *Rodrigue v. VALCO Enters., Inc.*, 169 Vt. 539, 541 (1999) (citing *Burgett v. Flaherty*, 204 Mont. 169, 174 (1983)). Thus, if a reasonable person would have unearthed sufficient information to identify the existence of a cause of action under the DSA, the limitations period will begin to run despite a plaintiff's claim of an incomplete understanding of the relevant events. *Rodrigue*, 169 Vt. at 541. Yet, because determination of the date of accrual depends so heavily on the facts, it is generally a question for the jury. *Pike*, 2006 VT at ¶ 18.

While the above standard for judging compliance with the statute of limitations is well-settled, its fact-based nature makes its parameters unclear. *Rodrigue*, a DSA statute of limitations case, offers some guidance for ascertaining when a plaintiff should have discovered the elements of a cause of action. 169 Vt. 539. In that case, the plaintiff was injured in an accident with a drunk driver. *Id.* He received information that the driver had been charged with driving under the influence of alcohol and that the driver had, prior to the accident, been drinking alcohol at a specified establishment. *Id.* at 541. While he did not know whether the establishment had provided alcohol to the driver when he was already intoxicated, he knew that a forthcoming police report would provide additional details. *Id.* The *Rodrigue* Court held that this information was "more than sufficient" to begin the running of the statute of limitations, ruling that it "presented

far more than a 'remote possibility'" of a DSA violation. *Id.*

In this case, until Shane Lurvey related his eyewitness account approximately a year following the critical events, neither the state of James' sobriety, nor the probability of his having been served alcohol while drunk by a specified third-party, was made known to any of the Plaintiffs except by way of rumor. Even Walter McDonald could do no more than speculate that James actually entered Ryan's and was served alcohol there. Furthermore, whether or not McDonald furnished that information to Vivian is disputed by her, as she claims to have heard only vague rumors of it, unsupported by anyone's personal knowledge, and of the same nature as the rumors which Dawn and Kimberly also heard. Thus, the state of Plaintiffs' knowledge was far less developed than that of the *Rodrigue* plaintiff, and insufficient to trigger an obligation to investigate further as a matter of law, particularly since Plaintiffs are due the benefit of all reasonable doubts and inferences in their favor. While a jury might properly find that such a responsibility existed, applying the "reasonableness" standard to all the circumstances, the Court concludes that this case requires further fact-finding that is not within its powers on a motion for summary judgment.

Based on the foregoing, it is hereby **ORDERED**:

Defendant's Motion for Partial Summary Judgment is **DENIED**.

DATED , at Bennington, Vermont.

John P. Wesley

Presiding Judge