2012 IL App (5th) 120060-U

NO. 5-12-0060

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

BRITTANY CHILDRESS, Individually, and as Next Friend of CHANDLER YORK, a Minor, Plaintiff-Appellant, v. JORDAN WILSON, Defendant, and HI-BENDER'S INC., an Illinois Corporation d/b/a HI-BENDER'S TAVERN, Defendant-Appellee.	)	Appeal from the Circuit Court of Jasper County. No. 08-L-4 Honorable S. Gene Schwarm, Judge, presiding.

PRESIDING JUSTICE DONOVAN delivered the judgment of the court.
Justices Chapman and Welch concurred in the judgment.

ORDER

¶ *1* *Held*: In a dramshop action, the trial court did not err in denying the plaintiff's motions for a directed verdict and her motions for a judgment notwithstanding the verdict against the defendant tavern on the issue of liability and on the defense of complicity. Judgment affirmed.

¶ 2 The plaintiff, Brittany Childress, individually, and as next friend of Chandler York, a minor, filed an action in the circuit court of Jasper County, against Jordan Wilson, the alleged intoxicated person, and Hi-Bender's Inc., an Illinois corporation d/b/a Hi-Bender's Tavern. Brittany alleged that she sustained personal injuries when the vehicle which was being driven by Jordan and in which she was a passenger left the roadway and crashed in a

field. The complaint, as amended, alleged that Jordan drove his vehicle under the influence of alcohol and failed to drive within a single lane, and that he was liable for negligence (count I) or wilful and wanton conduct (count IV). The complaint further alleged that Hi-Bender's sold or provided alcoholic liquor to Jordan in violation of provisions of the Liquor Control Act of 1934 (Dramshop Act) (235 ILCS 5/6-21 (West 2004)), and that it was liable for Brittany's injuries (count II) and for the loss of support suffered by her minor child, Chandler York (count III). Following a trial, the jury found in favor of Hi-Bender's on the dramshop claims. The jury found that Jordan was guilty of negligence, but not wilful and wanton conduct. The jury assessed Brittany's total damages to be $2,597,388 but found that Brittany's percentage of contributory fault was 45%, and it reduced the damages award accordingly. Brittany has not challenged the judgment as to Jordan, and he is not a party to the appeal.

¶ 3 On appeal, Brittany contends that the trial court erred in denying her motion for a directed verdict and her motion for a judgment notwithstanding the verdict (judgment *n.o.v.*) on the issue of Hi-Bender's liability and its defense of complicity; that the trial court erred in overruling her objections to portions of Hi-Bender's closing argument in which it incorrectly identified its burden of proof on complicity; and that the trial court erred in refusing to submit her modified pattern instruction on complicity. For the reasons to be stated, we affirm the judgment of the circuit court.

¶ 4 The case against Hi-Bender's is commonly called a dramshop action. Count II and count III of the complaint allege that Hi-Bender's sold or gave alcoholic beverages to Jordan, that Jordan became intoxicated, that the alcoholic beverages sold by Hi-Bender's to Jordan were at least one cause of his intoxication, and that Jordan's intoxication was at least one cause of the accident. Hi-Bender's denied liability and asserted the affirmative defense of complicity. In the following paragraphs, we recount the testimony and evidence pertinent

to the issues raised in this appeal.

¶ 5 Sometime between midnight and 1:30 a.m., on November 16, 2007, Jordan Wilson, then 22 years old, was driving on Illinois Route 33, just west of Oblong, Illinois, when his vehicle left the roadway and crashed in an adjacent field. Jordan and his girlfriend, Brittany Childress, then 20 years old, had spent the evening together, and he was driving her home when the accident occurred. Constance Hanson and three family members were traveling on Route 33 when they noticed the headlights of a vehicle in the field well off the roadway. They stopped to offer assistance. Constance Hanson testified that when she approached the vehicle she saw a young man, later identified as Jordan Wilson, trying to open a door of the vehicle. Jordan said that he had to find his girlfriend. Constance and her family members joined in the search. They found Brittany. She was unconscious and lying in the field about 25 yards from the car. Jordan had been searching in another area of the field when he learned that Brittany had been found. Jordan went over to Brittany and tried to pull her up. Constance testified that her mother, Cindy Hanson, instructed Jordan not to move Brittany. Constance's brother pulled Jordan away to calm him down. When Jordan was calmer, he went back to Brittany and stayed with her, stroking her back. Constance noted that no one asked Jordan how the accident occurred, and that she did not hear Jordan explain how it had occurred. Constance testified that Jordan smelled of alcohol and that he appeared to be intoxicated. Cindy offered a similar opinion. Cindy testified that she suggested that Jordan call the police, and that Jordan said that he did not want to contact the police because he would go to jail. Cindy stated that she then called the police. Both women testified that before the police arrived, Jordan made a general request of everyone to look for beer around the vehicle.

¶ 6 Jordan's father, Lance Wilson, received a call from Jordan sometime after midnight on November 16, 2007. Lance Wilson testified that he could not remember the exact time

of the call. Phone records revealed that a call was made to Lance Wilson's phone at 12:14 a.m. on November 16, 2007. Lance Wilson said that Jordan sounded shaken and disoriented, and that Jordan could not provide his location. Lance Wilson testified that he spoke with a woman who had stopped to offer assistance at the accident scene, and that she was able to provide him with directions. When Lance Wilson arrived at the scene, he noted that Jordan was still shaken and very concerned about Brittany, and that Jordan was not concerned about his own injuries.

¶ 7 Deputies from the Jasper County sheriff's department were dispatched to the scene. Chief Deputy Eric Lamb testified that at approximately 1:37 a.m. on November 16, 2007, he received a call to respond to a motor vehicle accident, and that he arrived at the scene a few minutes later. He had no information regarding what time the accident had occurred. Deputy Lamb recalled seeing Jordan Wilson and Lance Wilson at the scene. Deputy Lamb recognized the men because he lived in the same community. He could not recall seeing anyone else at the scene. Deputy Lamb testified that he spoke briefly with Jordan. He recalled that Jordan was concerned about Brittany and did not want to leave her. He noted that Jordan smelled of alcohol, but he did not form an opinion as to whether Jordan was intoxicated. Deputy Dan Cheadle also responded to the scene. Deputy Cheadle testified that he helped to secure the scene and that he called for an ambulance. Deputy Cheadle testified that he spoke with Jordan that evening. He, too, noted that Jordan smelled of alcohol. He stated that it would be difficult to offer an opinion about whether Jordan was intoxicated because he did not conduct field sobriety tests on Jordan. Deputy Lamb and Deputy Cheadle secured the scene. They did not commence an investigation because the Illinois State Police worked motor vehicle accidents with personal injuries. When an Illinois state trooper arrived, the scene was turned over to him.

¶ 8 Trooper Kerry Sutton is the Illinois state police officer who investigated the accident.

Trooper Sutton readily conceded that he did not have a good recollection of the accident, and so he referred to his report throughout his testimony. Trooper Sutton testified that he was on patrol in Jasper County, Illinois, during the early morning hours of November 16, 2007, when he observed Crawford County sheriff's department vehicles, with their lights and sirens activated, traveling west on Route 33, and so he pulled in and followed them. As Trooper Sutton drove along, he observed the headlights of a vehicle in a field well off the roadway and he stopped to investigate. As Trooper Sutton approached the vehicle, he saw two Jasper County deputies. Trooper Sutton talked with the deputies and learned that the driver of the vehicle, Jordan Wilson, was being evaluated in an ambulance. Trooper Sutton went to the ambulance and briefly spoke with Jordan. Trooper Sutton testified that during the brief conversation, Jordan stated that he was driving the vehicle when it crashed. Jordan mentioned that he had swerved to avoid hitting a deer that had appeared in the roadway in front of him. When Trooper Sutton asked Jordan what he drank during the hours prior to the accident, Jordan said that he had four beers. Trooper Sutton conducted a more extensive interview with Jordan at the hospital. During that interview, Jordan stated that he drank three beers while painting the church, two beers during the drive home from the church, and one beer right before the accident. Jordan also stated that Brittany had obtained her beer from someone called the "street master." Jordan did not know the identity of the "street master."

¶ 9 Trooper Sutton conducted an investigation at the scene. Referring to his report, he noted that when he looked inside Jordan's vehicle, he observed a beer box, an empty can, and a can of beer on the floorboard. Trooper Sutton could not recall whether the box held 6, 12, or 24 cans. He could not recall whether the beer can on the floorboard had been opened. Trooper Sutton testified that he smelled the odor of alcoholic beverages coming from Jordan when he spoke with him in the ambulance and at the hospital, and that he formed an opinion that Jordan was intoxicated. Trooper Sutton requested that Jordan submit a blood sample for

a blood-alcohol analysis. The record shows that two blood samples were taken from Jordan. The sample that was provided to the Illinois State Police was drawn at 5:05 a.m. and revealed a blood-alcohol concentration of .165 grams per deciliter. The sample that was tested at the hospital was drawn at 5:13 a.m. and revealed a blood-alcohol concentration of .161 grams per deciliter. The results of the blood tests were consistent and revealed that Jordan's blood-alcohol level at 5 a.m. was more than twice the legal limit of .08 grams per deciliter. Trooper Sutton testified that the hospital had drawn blood for testing from Brittany at 3 a.m. on November 16, 2007, and the results showed that her blood-alcohol level at that time was .181 grams per deciliter. Trooper Sutton testified that he arrested Jordan for driving under the influence of alcohol.

¶ 10 Brittany was transported by ambulance from the accident scene to the local hospital. After an evaluation, she was airlifted to Carle Clinic in Champaign, Illinois. Brittany was diagnosed with a spinal injury. She was transferred to Northwestern Memorial Hospital in Chicago where she had surgery. Brittany was referred to the Rehabilitation Institute of Chicago for intensive rehabilitation. She was discharged from the Rehabilitation Institute in April 2008. Brittany returned to Oblong, Illinois, and stayed at the home of her mother and stepfather while modifications were made to her mobile home to accommodate a wheel chair. Brittany continued with therapy at the local hospital and periodically returned to the Rehabilitation Institute for additional treatment. At the time of trial, Brittany required the use of a wheel chair.

¶ 11 Angel Slane was the bartender on duty at Hi-Bender's on the evening of November 15, 2007. Slane testified that she had tended bar at Hi-Bender's for seven years, and that prior to that she had been employed part-time as a bartender at another establishment. Over the years, she had developed some ability to recognize a person who was intoxicated. Slane testified that Jordan and Brittany arrived at Hi-Bender's at approximately 9:30 p.m. on the

evening of November 15, 2007, and that they stayed at the tavern for about two hours. Slane knew Jordan because he and her brother were friends in high school. Slane testified that she observed Jordan when he arrived at the tavern that evening and she thought he was under the influence of alcohol, but not intoxicated. Slane noted that Jordan appeared happy, but he was not slurring his speech or walking unsteadily. He did not fumble for his money and he was not loud. Slane testified that she served Jordan two rum and Cokes that evening. Slane acknowledged that the two alcoholic drinks could have further affected Jordan's judgment and reflexes. Slane noted that Jordan paid for his drinks and that Brittany did not buy any drinks for Jordan. Slane did not observe Brittany do anything that caused or contributed to Jordan's intoxication that evening. Slane stated that Brittany had asked to write a check to the tavern for cash, but she could not recall if she cashed Brittany's check. Slane recalled that she closed the bar at 11:30 p.m. on November 15, 2007, and that no one was in the bar at closing. She explained that she remembered these facts because at that time she was engaged to a very controlling man and she would have had to answer to him if she got home late.

¶ 12 Jordan Wilson was called as a witness in the plaintiff's case. Jordan testified that he and Brittany had planned to paint at a church after work on November 15, 2007. Jordan worked at a hardware store in Oblong, Illinois, called the Rusty Nail. Jordan stated that Brittany met him in the parking lot at the Rusty Nail at 5 p.m. that day. She left her car in the parking lot and rode with Jordan. Jordan testified that they were going to stop at his house so that he could change his clothes and get his father's truck. On the drive home, Jordan stopped at a liquor store and purchased a six-pack of beer. He used his own money. Jordan could not recall if he had a beer as he drove home, but he had one on the way to the church. Jordan testified that he and Brittany worked at the church for two to three hours and then headed back to his house. He had one or two beers as he drove. When he and Brittany got back to his house, Brittany said that she wanted to go to Hi-Bender's. Jordan testified that

he wanted to stay home because he had to work the next morning and because neither he nor Brittany had money. Jordan testified that Brittany really wanted to go to Hi-Bender's and that he gave in. He borrowed $20 from his father and drove Brittany to Hi-Bender's. He said that he might have had another beer on the drive to Hi-Bender's. He admitted that he drank three or four beers before he entered Hi-Bender's.

¶ 13 Jordan testified that Angel Slane was the bartender that evening. Jordan stated that he placed $20 on the bar and that this money was used to purchase drinks for him and for Brittany during the evening. Jordan said that there was no money left by the time he and Brittany left Hi-Bender's. Jordan testified that Brittany did not buy any drinks for him at Hi-Bender's and that Brittany did not do anything to contribute to his intoxication that evening. Jordan stated that he drank beer and that Brittany had rum and Coke while they were at Hi-Bender's. Jordan could not remember how many beers he had at Hi-Bender's. He did not know how many mixed drinks Brittany had. He acknowledged that he had previously testified that he had three beers at that tavern.

¶ 14 Jordan testified that he did not purchase or consume any alcoholic beverages after he left Hi-Bender's. He stated that there was no establishment between Hi-Bender's and the accident scene where he could have purchased beer after 11:30 p.m. on a weeknight. Jordan acknowledged that he was intoxicated when he drove away from Hi-Bender's and when he drove off the road. He testified that his intoxication and the appearance of a deer in his lane of travel caused him to swerve and to lose control of his vehicle. Jordan said that he did not immediately tell the police or his father about the deer because he was in a state of shock. Jordan stated that he pled guilty to aggravated driving under the influence and that he was sentenced to six months in jail. Jordan acknowledged that he had at times given different accounts about the total number of beers he had consumed during the evening of November 15, 2007. Jordan did not challenge the police report which noted that at the accident scene

he stated that he had consumed four beers, and that while he was at the hospital, he stated that he had consumed six beers.

¶ 15 Brittany's stepfather, Brian Wilson, testified about a conversation he had with Jordan in December 2007. Brian testified that Jordan admitted that he had blacked out and lost control of the vehicle and that there was no deer. During cross-examination, Brian testified that he attended Jordan's sentencing hearing and that the deer's role in causing the accident was an issue during the hearing. Brian stated that he did not testify about Jordan's admission at the sentencing hearing because the prosecutor had advised against it. Brittany's sister, Bridget Childress, testified that Jordan made a similar admission to her a few weeks after the accident. She did not testify to the admission at Jordan's sentencing hearing.

¶ 16 Brittany Childress testified during the trial. She stated that she could recall only bits and pieces about the night of the accident. Brittany recalled that she went to work that day and that after work she picked up her 17-month-old son, Chandler York, from her mother's house. She remembered that she had a date with Jordan, that she took Chandler back to her mother's house later that afternoon, that she met Jordan at his work place, and that she got into Jordan's car. Brittany did not remember that Jordan stopped to purchase beer on the way to his house. She did not remember Jordan drinking beer as he drove to his house or as he drove from his house to the church. Brittany remembered painting a room at the church and driving back to Jordan's house to get his car. She did not remember the drive from Jordan's house to Hi-Bender's. She had some recollection of sitting at the bar at Hi-Bender's. She remembered writing a check for $20 and putting $5 in her pocket right before she and Jordan left Hi-Bender's. Brittany could not remember what she drank or how many drinks she had at Hi-Bender's. She had no memory of what Jordan drank at Hi-Bender's. Brittany testified that she knew that she consumed alcoholic beverages at Hi-Bender's because she wrote the check and because her blood-alcohol result showed that she had been drinking. Brittany

admitted that she broke some rules that evening when she went to a bar and drank alcoholic beverages while underage. Brittany testified that she had little recollection of her time in the hospitals. She remembered that Jordan visited her while she was hospitalized in Chicago. She also remembered that she asked Jordan not to visit anymore because he was the reason she had no use of her legs, and that he complied with her request.

¶ 17 During cross-examination, Brittany testified that she did not remember having a conversation with Jordan about going to Hi-Bender's, and she could not say whose idea it was to go there. She acknowledged that she had gone to Hi-Bender's in the past because she knew she would be served there. Brittany did not recall objecting to Jordan's drinking on the way to the church or to Hi-Bender's. Brittany said that her mother had warned her many times prior to the accident about the dangers of drinking and driving. Brittany accepted some responsibility for her injuries. She stated that she should not have gotten into the car with Jordan when they left Hi-Bender's.

¶ 18 Dr. Daniel Brown, a forensic toxicologist, appeared as an expert witness in the plaintiff's case. Dr. Brown reviewed the police report, Jordan's hospital record, the results of Jordan's blood-alcohol tests, and the depositions given by Jordan, Brittany, and Angel Slane. Dr. Brown noted that a blood sample was drawn from Jordan for testing by the Illinois State Police at 5:05 a.m. on November 16, 2007, and that the result revealed that Jordan's blood-alcohol level was .165 per deciliter at that time, and that a second blood sample was drawn from Jordan by the hospital at 5:13 a.m. that same day, and that the result revealed that Jordan's blood-alcohol level was .161 per deciliter at that time. Dr. Brown explained that the small difference in the results reflected the body's metabolism of alcohol during the eight-minute period between the two draws, and that the results were consistent.

¶ 19 Dr. Brown offered opinions as to what Jordan's blood-alcohol level was at the time of the accident using retrograde extrapolation. Dr. Brown noted that he considered Jordan's

body weight, his blood-alcohol level at 5:05 a.m., and the metabolic rates established in scientific literature in performing the calculation. Dr. Brown testified that in making his calculations, he also had to make certain assumptions about when Jordan started drinking, when he stopped drinking, and the time that the accident happened. Dr. Brown testified that based on the information he reviewed in this case, he assumed that Jordan started drinking around 5:30 p.m. on November 15, 2007; that Jordan stopped drinking around 11:30 p.m. on November 15, 2007; and that the accident occurred at 1:32 a.m. on November 16, 2007. Based on his assumptions, Dr. Brown opined that Jordan's blood-alcohol level at approximately 1:30 a.m. on November 16, 2007, was .216 grams per deciliter, or 2½ times the legal limit. Dr. Brown opined that if the accident had occurred at approximately 12:15 a.m. on November 16, 2007, then Jordan's blood-alcohol concentration would have been .23 instead of .216. He said that the blood-alcohol concentration would have been somewhat higher at 12:15 a.m. because the body would have had less time to metabolize the alcohol and because the blood-alcohol concentration reaches its peak within 20 minutes after the cessation of drinking. Dr. Brown opined that if Jordan began drinking at about 5:30 p.m., stopped drinking shortly before midnight, and drank no more than six beers, then he should have metabolized all of the alcohol that he had consumed and there would have been no alcohol in his system at 5 a.m. on November 16, 2007. Dr. Brown testified that if Jordan began drinking at about 5:30 p.m. and stopped shortly before midnight on November 15, 2007, and if Jordan had a blood-alcohol concentration of .161 at 5:13 a.m. on November 16, 2007, then Jordan would have consumed approximately 14.5 alcoholic beverages from 5:30 p.m. to just before midnight on November 15, 2007.

¶ 20 Dr. Brown concluded that the alcoholic beverages consumed by Jordan at Hi-Bender's constituted a material and substantial part of Jordan's impairment. Dr. Brown testified that there is a relationship between the increase in the blood-alcohol level and the degree of

impairment, and that this relationship is an exponential curve rather than a straight line. He explained that the consumption of four alcoholic beverages produces a blood-alcohol level of approximately .08, that the next alcoholic beverage would increase the blood-alcohol level to .10, and that once the blood-alcohol level reaches .10, the consumption of each additional alcoholic drink would double the effect of a person's impairment and the odds of having a motor vehicle accident. Applying retrograde extrapolation and the science regarding the relationship between blood-alcohol level and impairment, Dr. Brown concluded that Jordan consumed approximately 14.5 alcoholic drinks during the evening of November 15, 2007; that when Jordan walked into Hi-Bender's at 9:30 p.m. on November 15, 2007, his blood-alcohol level was above .20; and that Jordan's consumption of three additional beers or two additional rum and Cokes at Hi-Bender's between 9:30 p.m. and 11:30 p.m. on November 15, 2007, constituted a material and substantial part of his intoxication at the time of the accident, whether the accident occurred at 12:15 a.m. or 1:30 a.m. on November 16, 2007.

¶ 21 Dr. Brown opined that given a blood-alcohol concentration greater than .20, he expected that a person would exhibit slurred speech, difficulty walking, sleepiness, a change in demeanor, adverse effects on memory, slowed reaction times, and impaired hand-eye coordination. Dr. Brown noted that a person may not exhibit all of these effects, and that sometimes the effects are not readily observable. Dr. Brown acknowledged that he had no firsthand knowledge about where Jordan bought alcoholic beverages that evening or the exact time that he consumed each beverage.

¶ 22 During cross-examination, Dr. Brown conceded that though he calculated that Jordan had consumed approximately 14.5 alcoholic drinks during the evening of November 15, 2007, there were only 6 drinks accounted for by a witness or a source and he had no evidence to account for the other 8 drinks. Dr. Brown stated that if Jordan had consumed only six

drinks during the period from 5:30 to midnight, his measurable blood-alcohol content at the time of the accident would have been below .02, or one-quarter of the .08 legal limit. Dr. Brown opined that even if Jordan had consumed additional beer between midnight and 1:30 a.m., the drinks he consumed at Hi-Bender's would have been a material and substantial part of his intoxication because once the blood-alcohol level reaches .10, the level of impairment goes straight up with each additional alcoholic beverage.

¶ 23 Jordan Wilson was recalled in his defense. Jordan was asked about that portion of testimony of Brian Wilson and Bridget Childress, in which they stated that he had admitted there was no deer in his path on the night of the accident, and Jordan replied that this testimony was not true. Jordan testified that he and Brittany had only made plans to paint at the church that evening, and that they had no plans to go to Hi-Bender's afterward. Jordan testified that Brittany really wanted to go to Hi-Bender's and he finally gave in. Jordan stated that he was with Brittany the entire evening and she never objected or complained about his drinking. When Jordan was asked whether he felt Brittany bore any responsibility, he admitted that he felt she was partly to blame because she wanted to go to Hi-Bender's. Jordan noted that he did not force Brittany into his car and that Brittany never asked for his keys or suggested that they call someone for a ride. Jordan admitted that he made the decisions to accede to Brittany's wish to go to Hi-Bender's and to drive after drinking, and that he was responsible for his decisions.

¶ 24 At the close of the evidence, Brittany moved for a directed verdict in her favor on the issue of Hi-Bender's liability and on the issue of her complicity. The trial court denied the motions. After two hours of deliberations, the jury returned a verdict finding that Jordan was guilty of negligence, but not wilful and wanton conduct, and a verdict in favor of Hi-Bender's. Brittany filed a posttrial motion for a judgment *n.o.v.*, which was denied.

¶ 25 On appeal, Brittany contends that the trial court erred in denying her motion for a

directed verdict and subsequent motion for a judgment *n.o.v.* on the issue of Hi-Bender's liability, and her motion for a directed verdict and subsequent motion for a judgment *n.o.v.* on Hi-Bender's defense of complicity.

¶ 26 A directed verdict or a judgment *n.o.v.* is warranted when all of the evidence along with the reasonable inferences therefrom, viewed in a light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967). Because of this high standard, a directed verdict or a judgment *n.o.v.* is inappropriate if reasonable minds might differ as to the inferences or conclusions to be drawn from the facts presented. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178, 854 N.E.2d 635, 652 (2006). A reviewing court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way. *Maple v. Gustafson*, 151 Ill. 2d 445, 452-53, 603 N.E.2d 508, 512 (1992). The trial court's decision to deny a motion for a directed verdict or a motion notwithstanding the verdict is reviewed *de novo*. *Evans v. Shannon*, 201 Ill. 2d 424, 427, 776 N.E.2d 1184, 1186 (2002).

¶ 27 As we consider Brittany's claims, we remain mindful that the jury returned a general verdict in favor of Hi-Bender's and against Brittany. The jury was not asked to make special findings regarding the elements of the dramshop claim or the complicity defense. The general verdict could have been entered in favor of Hi-Bender's if the jury found that Brittany failed to establish a necessary element of her claim or if it found that Hi-Bender's proved complicity.

¶ 28 In order to recover under the Illinois Dramshop Act, Brittany had to establish that Jordan was intoxicated at the time of the collision, that Hi-Bender's sold or gave intoxicating liquor that was consumed by Jordan, that the liquor consumed caused the intoxication, that

the intoxication was at least one cause of the accident, and that she suffered personal injuries as a result of the occurrence. 235 ILCS 5/6-21 (West 2004). Of these, the element that appears to be in contention in this appeal is whether the alcoholic beverages sold by Hi-Bender's and consumed by Jordan caused the intoxication. In considering the element of causation, the focus is on whether the tavern's conduct was a material and substantial factor in producing or contributing to produce the intoxication relative to the person's level of intoxication prior to that service. *Henry v. Bloomington Third Ward Community Club*, 89 Ill. App. 3d 106, 109, 411 N.E.2d 540, 543 (1980).

¶ 29 In this case, Dr. Brown, the plaintiff's toxicology expert, opined that Jordan consumed approximately 14.5 alcoholic drinks during the evening, including the 2 or 3 he had at Hi-Bender's, that Jordan's blood-alcohol concentration at that time of the accident was either .216 or .23 depending on whether the accident occurred at 1:30 a.m. or 12:15 a.m., and that Jordan's blood-alcohol concentration was greater than .20 when he stepped foot into Hi-Bender's at 9:30 p.m. on November 15, 2007. Jordan testified that he consumed either two or three beers while he was at Hi-Bender's and that he had consumed four or five beers over a period of four hours prior to arriving at Hi-Bender's. Angel Slane testified that Jordan appeared to be under the influence of alcohol but that he was not intoxicated when he entered Hi-Bender's that evening. She noted that Jordan did not slur his speech, fumble for his money, exhibit loud or obnoxious behavior, or have difficulty walking. Slane testified that she served Jordan two drinks and that he and Brittany left the bar a little before 11:30 p.m. Trooper Sutton discovered a box of beer with one beer in it and one empty beer can on the floorboard of Jordan's vehicle at the scene of the accident. Constance Hanson and Cindy Hanson recalled that Jordan appeared to be intoxicated and that he appeared to be concerned about the police finding beer in or near his vehicle.

¶ 30 In this case, the jury may have accepted Dr. Brown's opinions that Jordan had

consumed at least 10 alcoholic beverages before he arrived at Hi-Bender's and that Jordan had a blood-alcohol concentration in excess of .20, or 2½ times the legal limit, when he first stepped into Hi-Bender's, and it may have reasonably concluded that the 2 or 3 alcoholic beverages Jordan consumed at Hi-Bender's over a two-hour period was not a substantial and material factor that contributed to or exacerbated his intoxication. In other words, the jury may have accepted Dr. Brown's calculations, but not his ultimate conclusion. The jurors may have considered the evidence, taking into account their common sense and ordinary experiences in life, and they may have found that Jordan was already intoxicated when he entered Hi-Bender's and that the two or three drinks which Jordan consumed at Hi-Bender's did not substantially contribute to or exacerbate his level of intoxication or impairment. Whether a dramshop is liable for serving a relatively small amount of liquor to a person who is allegedly already intoxicated presents a jury question as to whether the defendant's conduct was a material and substantial factor in producing, contributing to produce, or exacerbating that person's intoxication. *Henry*, 89 Ill. App. 3d at 109, 411 N.E.2d at 543. Given that reasonable minds might differ as to the inferences or conclusions to be drawn from the facts presented in this case, the element of causation was properly submitted to the jury. After considering all of the evidence and reasonable inferences of causation in a light most favorable to Hi-Bender's, we cannot find that the evidence so overwhelming favored Brittany that no contrary verdict based upon that evidence could ever stand. *Pedrick*, 37 Ill. 2d at 510, 229 N.E.2d at 513. The trial court did not err in denying Brittany's motion for a directed verdict and her subsequent motion for a judgment *n.o.v.* on the issue of liability.

¶ 31 Next, we consider whether the trial court erred in denying Brittany's motion for a directed verdict and her motion for a judgment *n.o.v.* on Hi-Bender's complicity defense. Complicity is a judicially created, affirmative defense to the statutory liability of those who own or operate establishments that sell liquor. *Walter v. Carriage House Hotels, Ltd.*, 164

Ill. 2d 80, 86, 646 N.E.2d 599, 602 (1995). In order to establish a complicity defense, the defendant must show that the plaintiff actively contributed to or procured the inebriate's intoxication. *Walter*, 164 Ill. 2d at 88, 646 N.E.2d at 603. The Illinois Supreme Court has cautioned against placing too much weight on any particular aspect of the plaintiff's conduct, such as a plaintiff's accompanying an inebriate to several locations or buying the inebriate one or more drinks. *Walter*, 164 Ill. 2d at 95-96, 646 N.E.2d at 606. In cases where the facts are disputed or reasonable minds can differ as to the active and material nature of the plaintiff's procurement of the inebriate's intoxication, the resolution of the complicity defense is for the jury to determine. *Walter*, 164 Ill. 2d at 96, 646 N.E.2d at 606-07; *Graham v. United National Investors, Inc.*, 319 Ill. App. 3d 593, 745 N.E.2d 1287 (2001).

¶ 32 In this case, the trial court did not err in submitting the issue of Brittany's complicity in Jordan's intoxication to the jury. There was evidence that Brittany was with Jordan throughout the evening and that she would have been aware of how many beers he drank before they arrived at Hi-Bender's. There was evidence that Jordan wanted to stay home after painting and that Brittany was starting a three-day weekend and was insistent that she and Jordan go to Hi-Bender's. There was evidence that Jordan placed $20 on the bar to pay for his own drinks and Brittany's drinks, and that Brittany cashed a check for $20 and left the bar with $5. There was evidence that Brittany's blood-alcohol level at 3 a.m. on November 16, 2007, was .181. Because the evidence was capable of more than one interpretation, the jury was the proper body to determine whether Brittany's sharing an evening of drinking with Jordan rose to the level of complicity. Given the evidence, the jury could have reasonably found that Brittany actively contributed to or procured Jordan's intoxication. Accordingly, the trial court properly denied the motion for directed verdict and the subsequent motion for a judgment *n.o.v.* on the defense of complicity. Given our resolution of the first two points, we need not discuss Brittany's claim for *additur*.

¶ 33 In the next point, Brittany contends that the trial court erred in denying her objections to a portion of the closing argument by Hi-Bender's counsel in which he stated that Hi-Bender's could satisfy its burden of proof on the issue of complicity by showing that Brittany was "just a little bit complicit." Brittany claims that Hi-Bender's had the burden to prove by a preponderance of the evidence that she had actively contributed to or procured Jordan's intoxication, and that she was unfairly prejudiced and denied a fair trial because the trial court failed to sustain her objections to the counsel's improper comments.

¶ 34 In presenting arguments to the jury, counsel may state what they believe the law to be as long as the remarks are not misleading. *Burns v. Michelotti*, 237 Ill. App. 3d 923, 939, 604 N.E.2d 1144, 1156 (1992). The propriety of closing comments made to the jury is a decision which rests within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of discretion. *Burns*, 237 Ill. App. 3d at 939, 604 N.E.2d at 1156. Error at trial warrants reversal only if the error unfairly prejudiced the appellant or duly affected the outcome of the trial. *Burns*, 237 Ill. App. 3d at 939, 604 N.E.2d at 1156.

¶ 35 The record shows that Hi-Bender's counsel acknowledged very early in his closing remarks that Hi-Bender's had the burden to prove that Brittany was complicit in bringing about her own injuries. Counsel then attempted to draw a distinction between its complicity defense and Jordan's comparative fault defense. Counsel noted that Brittany's lawyer and Jordan's lawyer had argued about what percentage of fault should be assigned to their respective clients, and that both noted that Brittany would be denied any recovery if she was found more than 50% responsible. Hi-Bender's counsel argued that complicity differs from comparative fault in that if the jury should find that Brittany was "even a little bit complicit," she would be barred from any recovery against Hi-Bender's. Counsel repeated that argument as he wound up his closing argument. We have reviewed the record and find that though Brittany objected to some of the remarks made by Hi-Bender's counsel, she did not object to

the particular comments she has challenged in this appeal. Failure to object to allegedly prejudicial remarks during closing argument generally waives the issue for review. *Simmons v. University of Chicago Hospitals & Clinics*, 162 Ill. 2d 1, 12, 642 N.E.2d 107, 113 (1994). We note that the Illinois Supreme Court has recognized an exception to waiver if the comments were so egregious as to deprive a litigant of a fair trial and to substantially impair the integrity of the judicial process. *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 375-77, 553 N.E.2d 291, 297 (1990). The exception has been applied in cases involving a blatant mischaracterization of facts, character assassination, or base appeals to emotion. *Gillespie*, 135 Ill. 2d at 375-77, 553 N.E.2d at 297. In this case, a fair reading of the argument in context shows that Hi-Bender's counsel was attempting to distinguish between the complicity defense and the comparative fault defense, and that he was not referring to or attempting to misstate or diminish the level of Hi-Bender's burden of proof. In addition, the record shows that the jury was properly instructed on the complicity issue. The comments complained of on appeal did not deprive Brittany of a fair trial, and they did not substantially impair the integrity of the judicial process. There is no plain error, and the claim of error is waived.

¶ 36 Next, Brittany contends that the trial court erred in giving Illinois Pattern Jury Instructions (IPI), Civil, No. 150.17 (2011) (hereinafter IPI Civil (2011) No. 150.17), regarding complicity and rejecting the plaintiff's modified version of the pattern instruction. Brittany concedes that Hi-Bender's proposed instruction follows verbatim the IPI, but she claims the pattern instruction is insufficient in that it fails to advise the jury that Hi-Bender's had the burden to prove that she was complicit in actively procuring the inebriation of Jordan. She contends that her instruction cured the alleged deficiency.

¶ 37 Whether to give a particular jury instruction is within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of discretion. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273, 775 N.E.2d 964, 972

(2002). Once a trial court determines that an instruction is to be given, Illinois Supreme Court Rule 239(a) creates a presumption that the Illinois Pattern Jury Instructions are to be used. Ill. S. Ct. R. 239(a) (eff. Jan. 1, 2011); *Luye v. Schopper*, 348 Ill. App. 3d 767, 773, 809 N.E.2d 156, 161 (2004). Rule 239(a) provides that where the IPI contains an instruction applicable to the facts and the prevailing law, and the trial court determines that the jury should be instructed on the subject, the pattern instruction shall be used unless the court determines that it does not accurately state the law. Ill. S. Ct. R. 239(a) (eff. Jan. 1, 2011). Whether the instruction is an accurate statement of the law in Illinois is a question of law that is reviewed *de novo*. *Luye*, 348 Ill. App. 3d at 773, 809 N.E.2d at 161.

¶ 38 In this case, the court instructed the jury in accordance with IPI Civil (2011) No. 150.17. The instruction states:

> "In Counts II and III of the Plaintiff's Complaint concerning the Defendant, Hi-Bender's Inc. the Defendant Hi-Bender's, claims the Plaintiffs should not recover because of Plaintiff's conduct in causing Jordan Wilson's intoxication. To establish this defense the Defendant Hi-Bender's must prove that Plaintiff Brittany Childress actively contributed to or procured the intoxication of Jordan Wilson.
>
> If you find Plaintiff Brittany Childress actively contributed to or procured the intoxication of Jordan Wilson, then your verdict should be for Defendant Hi-Bender's."

¶ 39 Brittany's modified instruction added the following sentence: "Hi-Bender's Inc. has the burden of proof as to this claim," and the sentence was placed between the first sentence and second sentence in paragraph one of the pattern instruction. The sentence proposed by Brittany does not amplify, clarify, or make more complete a statement of the law regarding who bears the burden of proof on the complicity defense. The IPI instruction is an accurate statement of the law. The trial court did not abuse its discretion in giving the pattern

instruction and in refusing Brittany's modified instruction.

¶ 40 Accordingly, the judgment of the circuit court of Jasper County is affirmed.

¶ 41 Affirmed.