No. 1-09-3535

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under rule 23(e)(1).

SIXTH DIVISION
March 31, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

URSULA RODRIGUEZ, Plaintiff-Appellant, v. VML, INC., AN ILLINOIS CORPORATION Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County 07 L 770 Honorable Eileen Brewer, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice R. E. Gordon concurred in the judgment.

ORDER

HELD: The judgment of the circuit court of Cook County granting summary judgment in favor of defendant was affirmed where the plaintiff presented no evidence that the defendant gave or sold alcohol to the person who allegedly attacked plaintiff, as required to sustain a cause of action under the Illinois Dram Shop Act.

Plaintiff, Ursula Rodriguez, filed a complaint against defendant asserting a cause of action under the Illinois Dram Shop Act (the Act) (235 ILCS 5/6-21 (West 2002)). The trial court granted summary judgment in favor of defendant, and plaintiff appeals that ruling. For the

reasons that follow, we affirm.

This case arises out of an incident that occurred on February 3, 2002, at the Buzz nightclub, which is operated by the defendant. On that date, plaintiff was assaulted while in the Buzz nightclub by an alleged intoxicated person who was never identified. As a result, plaintiff filed a complaint against defendant asserting a cause of action under the Act.[1] Plaintiff alleged that on February 3, 2002, at the Buzz nightclub, defendant sold alcoholic beverages to her assailant, and that the assailant consumed these beverages on defendant's premises and "was thereby caused to become intoxicated." Plaintiff further alleged that the alleged intoxicated person then assaulted and battered her and that she was injured as a result.

Defendant moved for summary judgment on the ground that the evidence of record established that plaintiff lacked evidence that defendant sold or gave alcohol to the alleged intoxicated person on the night of the incident. Plaintiff responded that there was sufficient circumstantial evidence on this issue.

Depositions were taken of plaintiff, Michelle McMeel, who accompanied plaintiff to the Buzz on the night of the incident, and Anthony Benash,, the assistant manager of the Buzz. These depositions, which both parties referenced in their motions for summary judgment, are not included in the record on appeal. However, neither party disputes the relevant facts as they are represented in the motions for summary judgment. Those motions establish the following facts.

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[1]Plaintiff also asserted a cause of action under a theory of negligence. However, plaintiff is only contesting the entry of summary judgment on her cause of action under the Act.

Plaintiff testified that she and McMeel arrived at the Buzz on February 3, 2002, at approximately 10 p.m. Plaintiff went to use the restroom and then returned and joined McMeel at the bar, at which point she first noticed the assailant. The assailant and several of her friends were standing to plaintiff's left and McMeel was standing to plaintiff's right. The assailant was swearing and slurring her speech, and she spit on plaintiff as she swore. The assailant then said that someone was a "bi***" while she was facing plaintiff and McMeel. Plaintiff said "what" in response and the assailant became irate and attacked plaintiff.

The assailant had a "rock glass" in her hand, which plaintiff described as half the size of a regular glass. The assailant moved aggressively and swung her hands and whole body at plaintiff. Plaintiff turned her face away as the assailant's body made contact with her and she was then struck in the head with the glass and "knocked out." When plaintiff regained consciousness, the assailant was on top of her and hitting her in the chest, face and stomach. After the attack, plaintiff was taken to a stairwell for medical attention. The assailant was brought to the stairwell and identified by plaintiff as the assailant. Plaintiff was taken to the hospital and she never again saw the assailant.

Plaintiff testified that she was in the Buzz for one half hour before she was assaulted. Also, only a few seconds elapsed between when plaintiff met McMeel at the bar and when she was attacked. Plaintiff had never seen her assailant prior to the incident.

McMeel testified to substantially the same version of event as did plaintiff. She added that the bar was crowded on the night in question and that she hung up her and plaintiff's coats and ordered two drinks at the bar while plaintiff was in the restroom. When plaintiff returned

from the restroom, the assailant, who was standing with three of her friends, was slurring as if she was intoxicated and could barely stand up. Plaintiff returned from the restroom approximately 15 minutes after she and McMeel entered the bar and the attack occurred less than five minutes after plaintiff returned from the restroom.

McMeel had seen the assailant before plaintiff returned from the restroom. The glass that the assailant was holding and that she used to hit plaintiff in the head contained an orange-yellow liquid. McMeel had no knowledge of what was inside the glass. She did see the assailant drink from the glass.

Anthony Benash was working as an assistant manager at the Buzz on the night of the incident. Benash saw two women arguing, one of whom was plaintiff. He approached the women from approximately 25 feet away but plaintiff was already on the floor when he arrived. He did not know how long the women were arguing and had no opinion as to whether the assailant was intoxicated.

The trial court granted summary judgment in favor of defendant. The court found that there was no evidence that defendant gave or sold alcohol to the alleged intoxicated person, as required under the Act. The court also granted summary judgment on plaintiff's claim of negligence. This appeal followed.

Plaintiff appeals only from the trial court's entry of summary judgment on her cause of action under the Act. She claims that the trial court improperly granted summary judgment because the evidence established that the assailant was intoxicated at the time of the incident. She also claims that there was sufficient circumstantial evidence to withstand summary

judgment and to permit the reasonable inference that defendant sold or gave alcohol to the assailant and thereby caused her to become intoxicated. According to plaintiff, this evidence consists of the fact that the assailant "was drinking an orange/yellowish liquid (presumably whiskey or scotch) from a rock glass" and that the assailant drank from that glass on defendant's premises immediately before she struck plaintiff.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2002); *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). In determining whether the moving party is entitled to summary judgment, the pleadings and evidentiary material in the record must be construed strictly against the movant. *Happel v. Wal-Mart Stores*, *Inc.*, 199 Ill. 2d 179, 186 (2002). If what is contained in the pleadings on file would constitute all of the evidence before a court and would be insufficient to go to a jury but would require a court to direct a verdict, summary judgment should be granted. *Payne v. Witmer*, 129 Ill. 2d 351, 358 (1989). The circuit court's decision to grant or deny a motion for summary judgment is reviewed *de novo*. *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill. 2d 466, 470-71 (2001).

A defendant may move for summary judgment by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action. *Willett v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 368 (2006). To prevent the entry of summary judgment, the nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law. *Caponi v. Larry's 66*, 236 Ill. App. 3d 660, 670 (1992). Therefore, while the party

opposing the motion is not required to prove her case at the summary judgment stage, she must provide some factual basis to support the elements of her cause of action. *Illinois State Bar Ass'n Mutual Insurance Co. v. Mondo*, 392 Ill. App. 3d 1032, 1036 (2009); *Ralston v. Casanova*, 129 Ill. App. 3d 1050, 1059 (1984). On a motion for summary judgment, the court cannot consider any evidence that would be inadmissible at trial. *Brown, Udell and Pomerantz v. Ryan*, 369 Ill. App. 3d 821, 824 (2006). Thus, the party opposing summary judgment must produce some competent, admissible evidence which, if proved, would warrant entry of judgment in her favor. *Brown, Udell and Pomerantz,* 369 Ill. App. 3d at 824. Summary judgment is appropriate if the nonmoving party cannot establish an element of her claim. *Willett*, 366 Ill. App. 3d at 368.

The Act provides that "[e]very person who is injured within this State *** by an intoxicated person has a right of action *** against any person, licensed under the laws of this State or of any other state to sell alcoholic liquor, who, by selling or giving alcoholic liquor, within or without the territorial limits of this State, causes the intoxication of such person. 235 ILCS 5/6-21 (West 2002). To sustain a cause of action under the Act, a plaintiff is required to prove, among other things, that defendant gave or sold intoxicating liquor to the person alleged to have injured the plaintiff. *Mohr v. Jilg*, 223 Ill. App. 3d 217 (1992); *Taylor v. Village Commons Plaza*, 164 Ill. App. 3d 460, 463 (1987).

In this case, plaintiff failed to present evidence that defendant sold or gave alcohol to the person who allegedly assaulted her. Neither plaintiff nor McMeel saw the assailant before the incident or saw anyone working at the Buzz give or sell alcohol to the assailant. Plaintiff relies

upon the fact that she and McMeel saw the assailant holding a "rock glass" before the attack and upon McMeel's testimony that the assailant drank from that glass, which contained an orange/yellow liquid, prior to the attack. However, the assailant was already holding the "rock glass" when she was observed by plaintiff and McMeel and therefore, even assuming the glass contained alcohol, neither witness could testify who purchased the glass or that an employee of the Buzz gave or sold this glass to the assailant.

Additionally, there is no evidence that the "rock glass" contained alcohol. Although plaintiff saw the assailant holding the rock glass, she did testify as to its contents. And while McMeel testified that the glass contained an orange/yellow liquid, she had no knowledge as to what the liquid was inside that glass. Plaintiff claims that the liquid was "presumably whiskey or scotch." However, this statement is not attributed to a witness but is instead taken from a portion of plaintiff's response to defendant's motion for summary judgment in which plaintiff's counsel speculates as to what the evidence will be at trial. The statement is a legal conclusion and it is not competent evidence that can defeat a motion for summary judgment. See *Brown, Udell and Pomerantz,* 369 Ill. App. 3d at 824; *Caponi*, 236 Ill. App. 3d 670. The record also does not reveal any other witness who could testify as to the contents of the "rock glass" or that defendant gave or sold the glass to the assailant. See, *e.g.*, *Anderson v. Dale*, 90 Ill. App. 2d 332, 336-37 (1967) (summary judgment was properly granted in favor of defendant where plaintiff presented no evidence that the defendant gave or sold alcohol to the person who injured the plaintiff).

Plaintiff claims that the circumstantial evidence of the assailant having drank from a

"rock glass" containing an orange/yellow liquid and engaging in "behavior of someone who is extremely intoxicated" is sufficient to permit the inference that defendant gave or sold alcohol to the assailant. However, circumstantial evidence can only support an inference which is reasonable and probable, not merely possible or speculative. *Monaghan v. DiPaulo Construction Co.*, 140 Ill. App. 3d 921, 924-25 (1986). In this case, given the insufficient nature of plaintiff and McMeel's testimony as well as the apparent lack of any other witness who could offer relevant testimony, the record is insufficient to permit the reasonable inference that defendant gave or sold alcohol to the assailant. Even if we could find that a reasonable inference could be drawn that the glass of the assailant contained liquor, we conclude that plaintiff cannot prove that defendant gave or sold intoxicating liquor to the person who injured plaintiff. If the assailant had momentarily entered defendant's premises in a drunken condition and had taken a glass of liquor from another patron without ever drinking it, defendant would not have been liable under the Act. We cannot speculate here. As a result, summary judgment was appropriate and we need not consider whether plaintiff offered a sufficient factual basis on the other elements of her claim to withstand summary judgment. See *Willett*, 366 Ill. App. 3d at 368.

Hartness v. Ruzich, 155 Ill. App. 3d 878 (1987), which plaintiff relies upon to assert that there was sufficient circumstantial evidence to withstand summary judgment, is distinguishable from the present case. In that case, there was direct evidence that the intoxicated person was not intoxicated when he arrived at the tavern and that he was intoxicated when he was later involved in a car accident. *Hartness*, 155 Ill. App. 3d at 883. There was also evidence that the

intoxicated person was at the tavern for a number of hours. *Hartness*, 155 Ill. App. 3d at 883. In this case, there is no evidence as to when the assailant arrived at the Buzz, whether she was intoxicated when she arrived, and how long she was at the Buzz before she attacked plaintiff. The momentary observation that the assailant drank from a glass that contained an orange/yellow liquid is not the same circumstantial evidence that was presented in *Hartness* and, as noted, is insufficient to withstand defendant's motion for summary judgment.

Although summary judgment is proper if plaintiff cannot establish one element of her claim, a cause of action under the Act also requires proof that the assailant was intoxicated at the time and that the defendant, by giving or selling intoxicating liquor, *caused the intoxication* of that person. *Kingston v. Turner*, 115 Ill. 2d 445, 457 (1987). "A defendant must have caused the intoxication and must not merely have furnished a negligible amount of liquor." *Kingston*, 115 Ill. 2d at 457. In this case, even assuming that defendant sold or gave the assailant the glass containing the orange/yellow liquid and that this liquid was alcohol, there is no evidence in the record to sustain the inference that defendant gave or sold the assailant anything more than a negligible amount of alcohol. Therefore, summary judgment would be proper for this reason as well.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

Affirmed.