IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SCOTTSDALE INSURANCE COMPANY, Plaintiff, v. VERONICA LANKFORD; BARRY LANKFORD, Individually and as Parent and Next Friend of CARSTON LANKFORD, a minor; LADAWN SAMPLE, Individually and Next Friend of CLARENCE SAMPLE, JR. and OLIVIA GIDDENS, minors; JON C. POULSON, Esquire and LADAWN SAMPLE, as Co-Administrators of the Estates of YUSTACY RENE JONES and JASMINE SAMPLE; MICHELLE SAMPLE, Individually and as Administratrix of the Estate of SHAKIRA SAMPLE; OTTO ALEXANDER JONES; CLARENCE GIDDENS; and S.B. SHOTS, INC., a Delaware corporation. Defendants.	)	C.A. No. 07C-06-254 RRC

Submitted: November 14, 2007
Decided: November 21, 2007

On Plaintiff Scottsdale Insurance Company's
Motion for Summary Judgment.
GRANTED.

On Defendant S.B. Shots, Inc.'s
Motion for Summary Judgment.
DENIED.

MEMORANDUM OPINION

Nicholas E. Skiles, Esquire and Michael B. Galbraith, Esquire, Swartz Cambell LLC, Wilmington, Delaware, Attorneys for Plaintiff Scottsdale Insurance Company.

Timothy E. Lengkeek, Esquire, Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware, Attorney for Defendants Veronica Lankford; Barry Lankford, individually and as parent and next friend of Carston Lankford, a minor; LaDawn Sample, individually and next friend of Clarence Sample, Jr. and Olivia Giddens, minors; Jon C. Poulson, Esquire and LaDawn Sample, as co-administrators of the estates of Yustacy Rene Jones and Jasmine Sample; and Michelle Sample, individually and as administratrix of the estate of Shakira Sample.

Martin J. Siegel, Esquire, Wilmington, Delaware, Attorney for Defendant Otto Alexander Jones.

Yvonne Takvorian Saville, Esquire, Weiss & Saville, P.A., Wilmington, Delaware, Attorney for Defendant Clarence Giddens.

Stephen P. Casarino, Esquire, and Colin P. Shalk, Esquire, Casarino, Christman & Shalk, P.A., Wilmington, Delaware, Attorneys for Defendant S.B. Shots, Inc.

COOCH, J.

I. INTRODUCTION

Before the Court are two cross motions for summary judgment stemming from an August 28, 2005 motor vehicle accident in which the driver of a motor vehicle, Albert P. Stevens, Jr., who had become intoxicated at his place of employment, a tavern owned by Defendant S.B. Shots, Inc.,

struck another car, resulting in physical injuries to the surviving plaintiffs and in death to four persons, including himself.

In its motion for summary judgment, Plaintiff Scottsdale Insurance Company seeks a declaratory judgment that Scottsdale has no duty under the applicable insurance policy to defend and/or indemnify S.B. Shots, Inc. in the pending underlying tort action brought by the survivors of the collision and the administrators of the decedents' estates that alleges negligence on S.B. Shots, Inc.'s part. Conversely, Defendant S.B. Shots, Inc. and the above named "Individual Defendants" jointly seek summary judgment declaring that Scottsdale must defend and/or indemnify S.B. Shots, Inc. pursuant to the terms of the policy.[1]

The Individual Defendants assert that the tavern's staff had served Stevens alcoholic beverages to the point of intoxication and then did not

[1] The Court collectively will refer to the individual defendants and S.B. Shots, Inc. as "Defendants" since their interests are essentially allied in these motions, unless the context requires particular identification.

prevent him from leaving the tavern in his automobile. They also assert numerous other allegations of negligence.[2]

The insurance policy's "Liquor Liability Exclusion" excludes insurance coverage for "Bodily Injury" and "Property Damage" for which Bank Shots might otherwise held be liable "by reason of … [c]ausing or contributing to the intoxication of any person; [or] the furnishing of alcohol to a person ... under the influence of alcohol." The issue presented is whether claims of negligent hiring and supervision of an employee (set out more fully in footnote 2, *supra*), which claims are alleged to have continued after the negligent causation of the employee's intoxication, are separate from claims based on causing or contributing to a person's intoxication, which latter claims, all parties agree, are excluded from coverage under the applicable insurance policy.

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[2] The Individual Defendants assert that S.B. Shots, Inc. was negligent in several ways. In their Second Amended Complaint they allege that Bank Shots was negligent in: hiring Stevens; retaining Stevens; failing to adequately train Stevens; failing to adequately supervise, monitor and control Stevens; serving Stevens alcoholic beverages to excess when it should have known Stevens was intoxicated and was going to operate a vehicle; failing to institute policies and procedures regarding service of alcoholic beverages to employees/agents and/or providing alternate transportation for intoxicated employees/agents; failing to competently train its employees regarding the responsible and appropriate service of alcoholic beverages to fellow employees; failing to train employees regarding the policies and procedures regarding providing alternate transportation for its employees who are intoxicated; failing to adequately supervise or monitor, or control its employees, including, but not limited to, Stevens, so as to prevent him from becoming intoxicated during his shift, so as to prevent him from becoming intoxicated during his shift. Pl. 2nd Am. Compl. ¶¶ 34-36.

The Court holds that the various claims of negligence asserted by the Individual Defendants against S.B. Shots, Inc. are "fundamentally premised" on Individual Defendants' position that S.B. Shots, Inc. was negligent in "causing" or "contributing" to Stevens's intoxication, a claim for which insurance coverage is precluded by the "Liquor Liability Exclusion." Recent cases interpreting Delaware law have held that a claim will be excluded from insurance coverage if that claim is "fundamentally premised" on a claim that is itself excluded. The Court finds that all of the various counts of negligence are, at their core, "fundamentally premised" on the actions of Bank Shots in having caused or contributed to Stevens's intoxication, resulting in the accident. Scottsdale has no contractual obligation to indemnify and/or defend S.B. Shots, Inc. for those claims. Scottsdale's motion for summary judgment is **GRANTED**; S.B. Shots, Inc.'s motion for summary judgment is **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

All parties agree that there are no genuine issues of material facts.

Albert P. Stevens, Jr. worked as a bouncer for S.B. Shots, Inc.'s tavern "Bank Shots" in Stanton on the night of August 27, 2005 and into the

early morning hours of August 28, 2005. Bank Shots's staff served Stevens alcoholic beverages while Stevens worked.

Stevens left Bank Shots in an intoxicated state sometime between 2:00 a.m. and 2:15 a.m on August 28, 2005, and ultimately drove his vehicle northbound without headlights in the southbound lanes of U.S. Route 13. At approximately 2:49 a.m., Stevens struck a vehicle traveling southbound in the southbound lane driven by Veronica Lankford. Yustacy Rene Jones, Jasmine Sample, Carston Lankford, and Shakira Sample were passengers in that car. Barry Lankford, Veronica Lankford's husband, was operating a vehicle immediately behind Veronica Lankford. Only Veronica Lankford and Carston Lankford, age eight, survived the collision. An autopsy later revealed that Stevens's blood alcohol concentration was .223, almost three times the legal limit under Delaware law.

The survivors of the collision and various administrators of the decedents' estates are the above named Individual Defendants, and who are the plaintiffs in the underlying action.[3] They brought suit against S.B. Shots, Inc., alleging various types of negligence on the part of S.B. Shots, Inc. and

[3] *Lankford, et. al. v. Stevens, et. al*, Del. Super. Ct., C.A. No. 06C-04-263 RRC. The plaintiffs and S.B. Shots, Inc. entered into a "Stipulation of Settlement and Entry of Judgment" on November 16, 2007. The parties agreed to the entry of judgment against S.B. Shots, Inc. of $1,000,000. S.B. Shots, Inc. assigned all of its rights under the policy to the plaintiffs in the underlying action.

its agents, servants, and employees.[4] The Individual Defendants and S.B. Shots, Inc. now seek defense and/or indemnification for the underlying action from Scottsdale, S.B. Shots, Inc.'s liability insurance carrier.

Scottsdale's general liability insurance policy then in force with S.B. Shots, Inc. contains a "Liquor Liability Exclusion." The insurance policy reads:

> 1. Insuring agreement
>
> a. … [Scottsdale] will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury'or 'property damage' to which this insurance does not apply. [ ]
>
> 2. Exclusions … this insurance does not apply to: [ ]
>
> c. Liquor Liability
>
> 'Bodily injury' or 'property damage' for which any insured may be held liable by reason of:
>
> (1) Causing or contributing to the intoxication of any person; [or]
>
> (2) The furnishing of alcoholic beverages to a person … under the influence of alcohol.

A separate but pertinent section of the insurance policy provides for exclusion of coverage for assault and battery actions. (The parties agree that no "assault and/or battery" occurred). That section excludes coverage for:

> 'Injury,' [or] 'Bodily Injury' arising from:
>
> (1) Assault and/or Battery committed by any insured, any employee of any insured, or any other person; [or]
>
> (2) The failure to suppress or prevent Assault and/or Battery by any person in (1) above;

[4] The Individual Defendants also brought suit against Marla Stevens as administatrix of the estate of Albert P. Stevens, Jr., individually and doing business as Chesapeake Security and Investigation Services, Inc., but the parties have settled that suit.

(3) The selling, serving or furnishing of alcoholic beverages which results in an Assault and/or Battery;
(4) The negligent:
a. Employment;
b. Investigation;
c. Supervision;
d. Reporting to the proper authorities, or failure to so report; or,
e. Retention …
by a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by paragraphs 1, 2 or 3 above.

III. THE PARTIES' CONTENTIONS

Scottsdale contends that the "Liquor Liability Exclusion" precludes coverage for any liability resulting from Stevens's intoxication because coverage was disclaimed for any acts "causing or contributing to the intoxication of any person" and for any acts of "furnishing alcoholic beverages … to any person." Scottsdale maintains that claimants' "primary allegation" in the underlying action is that "Bank Shots employees improperly caused Mr. Stevens to become intoxicated and then [caused] the motor vehicle collision."[5] Scottsdale asserts that any "secondary allegations," such as negligent hiring, retention, training, supervision, and control, "are based upon conduct that helped make Mr. Stevens['s] intoxication possible, and are thus 'fundamentally premised' on the

[5] Pl. Mot. for Summ. J. at 7.

intoxication itself."[6] Scottsdale contends that, as a matter of law, claims "fundamentally premised" on a claim that falls under an exclusion in an insurance policy are themselves excluded under Delaware law.

Defendants[7] concede that what Scottsdale characterizes as the claimants' "primary allegation" is excluded by the "Liquor Liability Exclusion."[8] However, Defendants contend that "Bank Shots's failure to supervise and control Stevens *after* he became intoxicated (including allowing him to depart in his vehicle once his shift was over) is a separate and addition occurrence from Bank Shots's causing or contributing to Stevens's intoxication while he was working."[9] Defendants maintain that the pre-accident negligent conduct (such as negligent hiring) continued to occur after the intoxication and after Stevens's departure from the bar, and that such actions constitute separate and additional claims which are not

[6] *Id*. at 7.

[7] Defendants Clarence Giddens and Otto Alexander Jones have joined with the Individual Defendants and with S.B. Shots Inc. in opposition to Scottsdale's motion for summary judgment, and in support of S.B. Shots Inc.'s cross motion for summary judgment.

[8] Individual Defs. Opp'n to Pl. Mot.for Summ. J., at n.1. (stating that "[a]lthough fully intending to pursue the remaining claims included under Count IV at trial in this matter, the Individual Defendants concede that the Policy does not provide coverage for the claims alleging that Bank Shots caused or contributed to Stevens['s] intoxication").

[9] *Id*. at 5.

excluded by the policy.[10] Furthermore, Defendants claim that Stevens's status as an "employee" tortfeasor distinguishes this case from other cases analyzing "liquor liability exclusions" involving "patron" tortfeasors.[11]

IV. STANDARD OF REVIEW

Upon cross motions for summary judgment, this Court will grant summary judgment to one of the moving parties. No genuine issues of material fact exist as a matter of law where opposing parties have sought summary judgment.[12] Superior Court Civil Rule 56(h) provides:

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

The sole question before the court is one of law, and the parties by filing cross motions for summary judgment have in effect stipulated that the case is ripe for a decision on the merits.

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[10] *Id*. at 5.

[11] *Id*. at 6.

[12] Super. Ct. Civ. R. 56(h); *Gallaher v. USAA Cas. Ins. Co.*, 2005 WL 3062014, * 1 (Del. Super.) (citing Super. Ct. Civ. R. 56(h) in granting plaintiff's cross motion for summary judgment where there were no genuine issues of material fact and where plaintiff was entitled to collect benefits under the plain language of the contract).

V. DISCUSSION

The relevant facts of the case are relatively straightforward. Staff of the insured, a tavern, served a tavern employee alcoholic beverages. The intoxicated employee then left the tavern in his automobile, and caused an accident while driving the wrong way on a highway. The tavern had a general liability insurance policy in place at the time of the incident. However, the insurance policy contained a "Liquor Liability Exclusion," which provides:

> 2. Exclusions … this insurance does not apply to: [ ]
>
> c. Liquor Liability
>
> 'Bodily injury' or 'property damage' for which any insured may be held liable by reason of:
>
> (1) Causing or contributing to the intoxication of any person; [or]
>
> (2) The furnishing of alcoholic beverages to a person … under the influence of alcohol.

The issue is whether claims of negligent hiring and supervision of an employee (and other like claims), which claims are alleged to have continued after the negligent causation of the employee's intoxication, are separate from claims based on causing or contributing to a person's intoxication, which latter claims are excluded from coverage under the

applicable insurance policy. This appears to be an issue of first impression in Delaware.[13]

This Court holds that insurance coverage for the Individual Defendants' various claims of negligence against Bank Shots, unavoidably based on injuries caused by an intoxicated employee, are precluded by the "Liquor Liability Exclusion" because such claims are "fundamentally premised" on a claim that is itself excluded by the terms of the policy; namely, the negligent furnishing of alcohol to an employee.

When considering whether an insurer has a duty to defend and/or indemnify, certain well established principles apply. It is an insurer's burden to prove that a policy exclusion has been triggered and that coverage is

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[13] Both parties cite cases from other jurisdictions in support of their respective positions on this issue.

Scottsdale cites, for example: *Property Owners Ins. Co. v. Ted's Tavern, Inc*., 853 N.E.2d 973 (Ind. Ct. App. 2006) (holding that a liquor liability exclusion precluded coverage for claims of negligent "supervision" and "hiring" where plaintiff, who was negligently injured by an intoxicated patron of the tavern, also claimed the tavern's employees were negligent in furnishing alcohol to the patron); *Cusenbary v. United States Fidelity and Gauranty Co*., 37 P.3d 67 (Mont. 2001) (finding no duty to defend under a liquor liability exclusion because claims of "improper employee supervision and training, and the mismanagement of the tavern, directly related to the service or sale of alcohol"); *The Paradigm Ins. Co. v. Texas Richmond Corp*., 942 S.W.2d 645 (Ct. App. Tx. 1997) (finding no duty to defend on claims of failure to properly train and supervise its employees under a liquor liability exclusion).

Defendants cite, for example: *Carroll Air Sys., Inc v. Fields*, 629 So.2d 914, 917 (Fla. 4th DCA 1993) (holding that "the 'fault' of the employer was not the furnishing of the drinks but in its knowledge, actual or constructive, that [the employee] was intoxicated and was not in a condition to drive"); *Otis Eng'r Corp. v. Clark*, 668 S.W.2d 307, 311 (Tex. 1983) (holding that "an employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others).

excluded.[14] An insurer's duty to defend and/or indemnify is limited to suits which assert claims for which the insurer has assumed liability under the policy.[15] In determining whether a third party's action against the insured states a claim covered by the policy, the court must look to the allegations of the complaint.[16] The test is whether the complaint alleges a risk within the coverage of the policy.[17] Policy exclusions are to be narrowly construed.[18] Any ambiguity in the policy will be construed against the insurer.[19] However, if the policy language is unambiguous, the parties are bound by its plain meaning.[20] No party asserts that the policy language is ambiguous.

Several Delaware courts have confronted the analogous (and the more frequently litigated) question of whether an "Assault and Battery Exclusion" to an insurance policy precludes claims of negligent hiring, training,

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[14] *State Farm Fire & Cas. Co. v. Hackendorn*, 605 A.2d 3, 7 (Del. Super. Ct. 1991).

[15] *Continental Casualty Co. v. Alexis I. du Pont School District*, 317 A.2d 101, 103 (Del. 1974).

[16] *Id*. at 103.

[17] *Id*.

[18] *Delaware Racing Assoc. v. Twin City Fire Ins. Co.*, 2003 WL 1605764 (Del. Super.).

[19] *Penn Mut Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149-1150 (Del. Super. Ct. 1997).

[20] *Emmons v. Hartford Underwriters Insur. Co.*, 697 A.2d 742, 745 (Del. 1997).

supervision, control, and the like, when an assault and battery has occurred. Those cases provide useful guidance here.

In *Terra Nova Insurance Company, Ltd. v. Nanticoke Pines, Ltd*.,[21] a bar patron had sustained injuries when he was shot outside a tavern by a security officer employed by the bar. The bar patron alleged, among other things, that the tavern had been negligent in hiring the security guard, in supervising him, in failing to prevent or stop the incident from occurring, and in serving alcohol to its security officer. The United States District Court for the District of Delaware, applying Delaware law, held that an assault and battery exclusion contained in the applicable insurance policy[22] barred the injured patron's claim because the various grounds of negligence asserted against the tavern were based on negligence which "helped make the assault possible," and were therefore "fundamentally premised" on the assault itself.[23] The court granted the insurance company's motion for summary

[21] *Terra Nova Insurance Company, Ltd. v. Nanticoke Pines, Ltd*., 743 F. Supp. 293 (D. Del. 1990).

[22] The exclusion in *Terra Nova* provided:

> It is agreed that no coverage shall apply under this policy for any claim, demand or suit based on Assault and Battery, and Assault and Battery shall not be deemed an accident, whether or not commited [sic] by or at the direction of the insured. *Id*. at 297.

[23] *Id*. at 297

judgment, holding that the insurance company did not have to provide coverage for the negligence claims.

In 2001, in *Regis Ins. Co. v. Cosenza*,[24] this Court considered a scenario similar to the one in *Terra Nova*. In *Cosenza,* a bar patron alleged that other patrons at a tavern had assaulted him on the property, and that the tavern had been negligent in failing to "properly control patrons who were known to harass, intimidate and assault other patrons" and in failing to "refrain from serving alcohol to visibly intoxicated persons."[25] The *Cosenza* court explicitly adopted the United States District Court's reasoning in *Terra Nova* in granting the insurance company's motion for summary judgment, declaring that the assault and battery exclusion in the relevant insurance policy[26] precluded coverage for the various grounds of negligence asserted by the bar patron against the tavern, because the claimed negligent actions

[24] *Regis Ins. Co. v. Cosenza,* 2001 WL 238150 (Del. Super.).

[25] *Id.* at *1.

[26] The exclusion in *Cosenza* provided:

> [Regis Insurance Company] has no duty to defend or to indemnify an insured in any action or proceeding alleging...[a]ssault and [b]attery or any act or omission in connection with the prevention, suppression or results of such acts; or...[h]armful or offensive contact between or among two or more persons; or... [a]pprehension of harmful or offensive contact between or among two or more persons; or... [t]hreats by word or deeds. *Id*. at *1.

were "based upon conduct 'that helped make the assault possible, and [were] thus fundamentally premised on the assault itself.'"[27]

Four years later, in *Regis Ins. Co. v. Graves*,[28] this Court again concluded that assorted claims of negligence against a tavern, including negligent "hiring," "training," and "supervision" of an employee, were precluded by an assault and battery exclusion in the tavern's insurance policy.[29] In *Graves*, a bar patron was in the area of a fight between two other individuals just outside of a tavern. The patron alleged that he was injured when a bouncer jumped on his back while the bouncer was trying to intervene in the fight. In granting the insurer's motion for summary judgment, the Court found *Consenza* controlling, and, applying the "fundamentally premised" approach of *Terra Nova* and *Cosenza*, held that

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[27] *Id.* at *3 (quoting *Terra Nova*, 743 F. Supp. 293, 297).

[28] *Regis Ins. Co. v. Graves*, 2005 WL 273239 (Del. Super.).

[29] The exclusion in *Graves* provided:

> [Regis Insurance Company has] no duty to defend or to indemnify an insured in any action or proceeding alleging ... Assault and Battery or any act or omission in connection with the prevention, suppression or results of such acts ... harmful or offensive contact between or among two or more persons ... apprehension of harmful or offensive contact between or among two or more persons; or ... threats by words or deeds.
> This exclusion applies regardless of the degree of culpability or intent and without regard to ... the alleged failure of the insured ... in the hiring, supervision, retention or control of any person, whether or not an officer, employee, agent or servant of the insured ... the alleged failure of the insured or his officers, employees, agents or servants to attempt to prevent, bar or halt such conduct.... *Id.* at *1.

"[a]ll of the allegations in the complaint, including allegations of negligence, arise from the assault or battery and are excluded from coverage by the inclusive language of the policy exclusion."[30]

On appeal, the Delaware Supreme Court affirmed the judgment of the Superior Court, but utilized a different analysis: that the unambiguous language of the insurance policy exclusion clearly barred coverage for a negligent "training" claim, despite the absence of the term negligent "training" in the policy's exclusion, which did exclude coverage for negligent "supervision" and "control."[31] The Supreme Court held that "[t]raining of an employee is one specific element of the 'supervision' and 'control' of an employee. Therefore, [the patron's] claim for negligent training fits squarely and unambiguously within the exclusion."[32]

Notably, however, in affirming the trial court's decision, the Supreme Court pointedly observed that "the trial judge's reasoning support[ed] his conclusion" that there was no insurance coverage for the negligence claims because they were "fundamentally premised" on the underlying assault and

[30] *Id*. at *3.

[31] *Graves v. CMC, Inc*., 2005 WL 2149394, *3 (Del. Supr.)

[32] *Id.* at *2.

battery.[33] Similarly, this Court, in the case at bar, has applied the reasoning of the trial court in *Graves*. (The Supreme Court's approach cannot be utilized in this case since there is no language in the insurance policy in the "Liquor Liability Exclusion" specifically precluding claims of negligent hiring, supervision, training, control, and the like.)

Defendants do not deny that the "fundamentally premised" analysis is the law of Delaware, but argue that the various negligence claims raised by the Individual Defendants are "separate" from and "additional" to the claim that Bank Shots caused or contributed to Stevens's intoxication. [34] Defendants in essence assert that what they call "separate and additional" claims are not "fundamentally premised" on the claim that Bank Shots negligently caused or contributed to Stevens's intoxication, or negligently furnished him with alcohol.

Defendants rely on this Court's 1998 decision in *St. Anthony's Club v. Scottsdale Ins. Co.*[35] In *St. Anthony's Club*, a patron of a club where liquor was sold sustained injuries when he was forcibly removed from the premises by the club's employees. He asserted numerous claims against the club as a

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[33] *Id.* at *2.

[34] Individual Defs. Mot. in Opp'n to Pl. Mot. for Summ. J., at 6.

[35] *St. Anthony's Club v. Scottsdale Ins. Co.,* 1998 WL 732947 (Del. Super.).

result of the incident.[36] The insurer asserted that all of the claims should be precluded by an assault and battery clause contained in the insurance policy. However, the Court found that the complaint was "ambiguous," because the claims were simultaneously couched in negligence and intentional tort language. Looking to *Terra Nova* for guidance, the *St. Anthony's Club* Court found a difference in the language of the assault and battery exclusions in the two cases. The *St. Anthony's Club* Court held that the absence of the phrase "[h]armful or offensive contact between two or among two or more persons" in the policy's assault and battery exclusion (language contained in the *Terra Nova* policy's assault and battery exclusion) distinguished *Terra Nova* from *St. Anthony's*, because this phrase covered claims of harm resulting from negligence.[37] The *St. Anthony's Club* court held that an ambiguity in a complaint is to be construed in favor of the insured.[38] Thus, the Court read the patron's complaint as negligence claims rather than

[36] The patron asserted that the club was negligent in: using excessive force to remove [him] from the club; using force to remove [him] from the club when no force was warranted; continuing to assail and assault [him] after [he] was incapacitated; not allowing [him] to leave the club peacefully on his own accord when [he] attempted to do so; not using reasonable care in removing [him] from the club; intentionally touching [him] knowing that his actions were likely to cause alarm. *Id*. at *1.

[37] *Id*. at *4.

[38] *Id.* at *2.

assault and battery claims, and allowed the patron to proceed under a negligence theory.

The *Graves* trial court distinguished *St. Anthony's Club* on the basis that the language of the assault and battery exclusion was "broader" in the applicable insurance policy before it than was the assault and battery exclusion language in *St. Anthony's Club.*[39] This Court similarly finds *St. Anthony's Club* inapposite. The exclusion at issue in this case is also broader in scope than was the exclusion language in *St. Anthony's Club*.

Defendants point out that the language in the "Assault and Battery Exclusion" in the insurance policy in this case specifically includes a provision excluding coverage for claims of negligent "employment," "investigation," "supervision," "reporting to the proper authorities, or failure to so report," or "retention." Defendants assert that, given the specific reference to negligent supervision, etc., in the "Assault and Battery Exclusion," the only way that Scottsdale could have validly excluded coverage for the various negligence claims brought in the underlying action would have been to include this provision in the "Liquor Liability Exclusion," thereby evincing an intent by the contracting parties to exclude coverage for such negligence based torts. The Court is not convinced by this

[39] *Regis Ins. Co. v. Graves*, 2005 WL 273239, at *3.

reasoning. The "Liquor Liability Exclusion" is broad and unambiguous. Just because the specific negligence exclusion language appears in the "Assault and Battery Exclusion" does not mean that the expansive language of the "Liquor Liability Exclusion" should not be afforded its plain meaning.

Scottsdale relies on a 2006 Indiana Court of Appeals case, *Property Owners Ins. Co. v. Ted's Tavern, Inc.*,[40] a case with very similar facts. In *Ted's Tavern,* employees of a tavern served a patron alcoholic beverages to the point of intoxication. Shortly after leaving the tavern, the intoxicated patron caused an automobile accident. The other driver died as a result of the accident. The decedent's estate brought several counts against the tavern, including negligent hiring, negligent training, and negligent supervising of employees. The tavern's general liability insurance contained a "Liquor Liability Exclusion" that excluded coverage for:

> 2. Exclusions … this insurance does not apply to: [ ]
> c. 'Bodily injury' or 'property damage' for which any insured may be held liable by reason of:
> (1) Causing or contributing to the intoxication of any person; [or]
> (2) The furnishing of alcoholic beverages to a person … under the influence of alcohol.

This is the exact language as in the instant case. The insurer in *Ted's Tavern* claimed that this provision precluded claims of negligence that were "based

[40] *Ted's Tavern,* 853 N.E.2d 973.

on the service or sale of alcohol to [the patron], which [was] the efficient and predominating cause of [the tavern's] liability" to the underlying plaintiff. However, the trial court ruled in favor of the tavern, finding that the negligence claims were not excluded by the provision.

The Indiana Court of Appeals disagreed, reversed the trial court, and held that

> … [r]egardless of the theories of liability a resourceful attorney may fashion from the circumstances of this case, the allegations [of negligently hiring, training, and supervising employees, and nuisance] are general "rephrasings" of the core negligence claim for causing/contributing to [the patron's] drunk driving. .... The events outlined in [the applicable counts] simply are not wholly independent of "carelessly and negligently" serving and continuing to serve alcoholic beverages to [the patron] when the defendants knew or should have known he was intoxicated and soon thereafter could be driving drunk. To the contrary, the nuisance and the negligent hiring, training, and supervision are so inextricably intertwined with the underlying negligence that there is no independent act that would avoid exclusion 2(c). Hence, while a valiant effort to procure coverage, the creative pleading of [negligently hiring, training, and supervising employees, and nuisance] cannot hide the reality that the immediate and efficient cause of the injuries was drunk driving precipitated by the negligent service of alcohol. As such, exclusion 2(c) precludes coverage.[41]

The *Ted's Tavern* court adopted an "efficient and predominate cause" analysis (which seems essentially the same as Delaware's "fundamentally premised" analysis) in holding that the negligence claims were precluded from coverage by the exclusion.

The Individual Defendants say that *Ted's Tavern* is distinguishable because it involved "allegations of negligent hiring, training, and supervision

[41] *Id.* at 983.

of an employee who served an intoxicated *patron* alcoholic beverages." Defendants maintain that the fact that a "patron" was the tortfeasor, rather than an "employee," distinguishes *Ted's Tavern*. However, that distinction is not of any moment in this Court's analysis of the "Liquor Liability Exclusion," which precludes coverage for Bank Shots's "[c]ausing or contributing to the intoxication of any person." The term "any person" makes no distinction between employee or patron.[42]

An apparent majority of other jurisdictions support the view that negligence claims should be excluded if those claims are founded upon on an assault and battery claim that is itself excluded by an insurance policy. An annotation examining cases construing assault and battery exclusions concludes that although "some courts" have found that a negligence claim stemming from an assault and battery did not fall within an assault and battery exclusion,

> most other courts have disagreed, finding that all claims, whether rooted in the actual assault or battery, or couched in

[42] Defendants also assert that the *Ted's Tavern* court did not look to the allegations of the complaint, as do Delaware courts, in determining whether the legal claims are covered by an insurance policy. However, this argument is contradicted by the language of the *Ted's Tavern* case, where the court stated: "we begin with a review of [the plaintiff's] complaint." *Ted's Tavern*, 853 N.E.2d 973, 981.

> negligence language, that arise from an assault and battery fall within the parameters of an assault and battery exclusion.[43]

Defendants concede that their claim of negligent furnishing of alcohol to Stevens is precluded by the "Liquor Liability Exclusion."[44] A plain reading of the exclusion precludes from insurance coverage the negligent furnishing of alcohol to Stevens by Bank Shots employees. All other related claims of negligence against S.B. Shots, Inc. are "fundamentally premised" upon this claim, and the facts giving rise to it, and, under Delaware law, are thus excluded from insurance coverage. Defendants are correct in asserting that Delaware recognizes the torts of negligent hiring, supervision, and control;[45] however, the issue is whether these other recognized torts are "fundamentally premised" on the claim that Bank Shots employees negligently furnished alcohol to Stevens, and thereby excluded from insurance coverage. The Court holds that they are. The parties are bound by the plain meaning of the language of the exclusion.[46] The very caption of the

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[43] Kimberly J. Winbush, Annotation, *Validity, Construction, and Effect of Assault and Battery Exclusion in Liability Insurance Policy at Issue*, 44 A.L.R.5th 91 (1996).

[44] See *supra* n. 8.

[45] *See, e.g., Simms v. Christina Sch. Dist.*, 2004 WL 344015, at *8 (setting out the standard for negligent hiring and supervision).

[46] *Emmons v. Hartford Underwriters Insur. Co.*, 697 A.2d 742, 745 (Del. 1997) (holding that if the language of an insurance policy is unambiguous, the parties are bound by its plain meaning).

exclusion provision, "Exclusions … This insurance does not apply to [ ] liquor liability," underscores the breadth of the liquor-based acts excluded.

The Court concludes that the "fundamentally premised" analysis used by *Terra Nova*, *Consenza*, and *Graves* is applicable here. The claimants' fundamental claim of negligence against Bank Shots is the alleged negligent furnishing of alcohol to Stevens by Bank Shots employees and then permitting him to drive away, because no other claim can be supported without evidence of Stevens's intoxication.

The Court cannot lose sight of the plain meaning of the language in the insurance policy by the Individual Defendants' resourcefulness in their artful pleadings. The purpose of Delaware's "fundamentally premised" analysis is to prevent an injured party from circumventing the clear terms of an insurance policy by allying with the insured and by fashioning expansive theories of liability.[47] While this Court recognizes, as did the *Ted's Tavern* court, "the horrible loss suffered here, [this Court is] not at liberty to extend

[47] An annotation examining cases construing assault and battery exclusions observes that cases arising from these exclusions often lead "to the anomalous legal posture of an insured and a victim, adversaries in one case, siding against an insurer seeking to apply an … exclusion to the litigated claims," which is exactly the situation in the instant case. 44 A.L.R.5th 91 (1996).

insurance coverage beyond that provided by the unambiguous language in the Policy."[48]

VI. CONCLUSION

For the foregoing reasons, Plaintiff's Motion Summary Judgment is **GRANTED** and Defendants' Motion for Summary Judgment is **DENIED.**

IT IS SO ORDERED.

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oc: Prothonotary

[48] *Ted's Tavern*, 853 N.E.2d 973, 983.