UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-10862-GAO

PHUONG LUC, THAI MINH CHINH, Individually and
as Administrators of the Estate of LINDSAY PHUONG CHINH,
Plaintiffs,

v.

ROBERTO M. MADRUGA; HELIO S. DEMELO, BOSTON BALLROOM CORP. d/b/a THE ROXY, WYNDHAM INTERNATIONAL, INC. f/k/a PATRIOT AMERICAN HOSPITALITY OPERATING PARTNERSHIP d/b/a WYNDHAM HOTELS & RESORTS d/b/a THE TREMONT BOSTON; WYNDHAM MANAGEMENT CORP.; CHC LEASE PARTNERS c/o GENCOM AMERICAN HOSPITALITY; WYNDHAM INTERNATIONAL OPERATING PARTNERSHIP, L.P.; and PATRIOT AMERICAN HOSPITALITY PARTNERSHIP, L.P.,
Defendants.

MEMORANDUM AND ORDER
August 3, 2005

O'TOOLE, D.J.

The plaintiffs, Phuong Luc and Thai Minh Chinh, bring this personal injury and wrongful death action on behalf of themselves and their deceased unborn child, Lindsay Phuong Chinh, against Roberto M. Madruga ("Madruga"), Helio S. Demelo ("Demelo"), Boston Ballroom Corp. d/b/a The Roxy ("Boston Ballroom"), Wyndham International, Inc. f/k/a Patriot American Hospitality Operating Partnership d/b/a Wyndham Hotels & Resorts d/b/a The Tremont Boston, Wyndham Management Corp., CHC Lease Partners c/o Gencom American Hospitality, Wyndham International Operating Partnership, L.P., and Patriot American Hospitality Partnership, L.P. (collectively "the Wyndham Defendants"). Pending before the Court are three motions for summary judgment filed by Madruga and Demelo (Dkt. No. 92), Boston Ballroom (Dkt. No. 89), and the Wyndham Defendants (Dkt. No. 94).

I. Summary of Pertinent Facts

The following facts are either undisputed or are stated favorably to the plaintiffs:

On the evening of July 21, 2002, Madruga, Demelo, and Demelo's girlfriend Malinda Silva, drove in Demelo's pickup truck from Lawrence, Massachusetts, to The Roxy, a nightclub operated by Boston Ballroom and located inside the Tremont Boston Hotel, a Wyndham hotel. Soon after they arrived at The Roxy around 11:15 p.m., Madruga ordered a "kamikaze" – a mixed drink containing vodka – which he consumed in fifteen to twenty minutes. Approximately fifteen to twenty minutes after finishing this drink, Madruga ordered another kamikaze from a different bar in the club. Sometime later, after finishing his second drink, Madruga ordered a third kamikaze and a bottle of water at the same bar at which he purchased the second drink but from a different bartender.[1]

Madruga testified that it does not take much alcohol for him to become intoxicated and that he was under the influence of intoxicating liquor "probably from the first drink [he] had" at The Roxy and when he left the club. Other than the bartenders and the employees working at the door of the club, Madruga did not speak with any other employees of The Roxy that evening. Madruga testified at his deposition that he did not have any difficulty talking, walking, dancing, using his hands, or speaking to the bartenders at The Roxy, and there is no other direct evidence indicating that he did have any such observable difficulty.

Madruga, Demelo, and Silva left The Roxy together around 1:45 a.m. on July 22, 2002. Madruga drove Demelo's pickup truck, with Demelo and Silva as passengers, north on Interstate Route 93 from Boston towards Lawrence. The plaintiff Thai Minh Chinh and his wife

[1] In July 2002, The Roxy had nine bars, approximately sixteen bartenders, a wait staff of five or six, and could entertain a maximum of 1,300 people.

Phuong Luc were also traveling north on Interstate Route 93. Luc was approximately twenty-one weeks pregnant with the couple's first child, already named Lindsay by the couple. Chinh pulled over and stopped his vehicle in the breakdown lane of the interstate and Luc started to get out of the car. As she did so, the truck being driven by Madruga crashed into the rear of the plaintiffs' vehicle. The impact severely injured Luc and Chinh and killed the couple's unborn fetus.

The accident happened approximately thirty-five to forty-five minutes after Madruga and the others left The Roxy. Madruga thinks he may have fallen asleep at the wheel before the collision. Responding officers from the Massachusetts State Police reported that Madruga had difficulty performing several field sobriety tests at the scene of the accident and was given a breathalyzer test which yielded a blood alcohol level reading of 0.109. Madruga was placed under arrest for operating a motor vehicle while under the influence of intoxicating liquor and taken to the hospital where blood tests indicated that he had a blood alcohol level of 0.097 as of 4:30 a.m. Madruga also tested positive for amphetamines, cocaine and cannabinoids.

The only place Madruga consumed alcohol on the night of the accident was The Roxy. Boston Ballroom's liability expert, Brian E. Pape, Ph.D., estimated that Madruga's blood alcohol content at the time that he last consumed alcohol at The Roxy on July 22, 2002 was "[p]erhaps at about .10, but I would think a little bit below .10." The plaintiffs submitted expert evidence from Richard D. Blomberg, who calculated Madruga's blood alcohol content to be at or above 0.120 when he left The Roxy. Given Madruga's blood alcohol level at The Roxy, Blomberg concluded that he was "likely evidencing signs of the excessive use of alcohol before he was served his final drink and certainly evidencing such symptoms after completion of three raspberry kamikazes." Blomberg also expressed the opinion that "the manner in which The Roxy served alcohol to its customers could not

provide a reasonable degree of control against the serving of an excessive amount of alcohol to an individual patron."

Madruga testified at his deposition that he did not consume alcohol very often. Demelo testified that on at least two occasions before the night of the accident he had seen Madruga when he appeared to be intoxicated. On those occasions, Madruga appeared to Demelo to be slurring his words and stumbling. Demelo also testified that on the night of the accident, Madruga was not slurring his words or stumbling and did not appear to him to be intoxicated. Silva testified at her deposition in this action that Madruga did not appear to be drunk at The Roxy. Previously, testifying before a grand jury, she had stated that she had not formed any opinion about whether Madruga was under the influence of alcohol or drugs before he left The Roxy.

Madruga was charged with operating a motor vehicle while under the influence of intoxicating liquor recklessly or negligently so that the lives or safety of the public might be endangered, and causing serious bodily injury to Phuong Luc. He pled guilty and was sentenced to two and a half years in a house of correction.

In July 2002, Wyndham International, Inc. or its subsidiaries or affiliates operated the Tremont Boston Hotel, but did not directly operate or manage The Roxy. Boston Ballroom operated The Roxy under a lease agreement with Wyndham which permitted the serving of alcoholic beverages. The Tremont Boston Hotel advertised The Roxy as one of its five night clubs, offering hotel guests priority admission and access from within the hotel.

Fred Kleisner II, the general manager of the Tremont Boston Hotel had previously notified The Roxy of noise complaints the hotel had received from its guests regarding the volume of the music at The Roxy. Mr. Kleisner considered the noise level to be a nuisance and a violation of the

lease agreement. Wyndham also conducted inspections of The Roxy and outlined deficiencies that it wanted remedied, such as damaged bathroom tiles and heavy accumulations of dust on the bars.

II. Madruga's and Demelo's Motion for Summary Judgment

Madruga and Demelo move for partial summary judgment on the wrongful death claims (Counts 1 and 10) and the loss of consortium claims (Counts 4, 5, 13, and 14) asserted against them in the Amended Complaint[2] relating to the death of Lindsay Phuong Chinh.

A. Counts 1 and 10 – Wrongful Death

Under Massachusetts law (controlling in this case based upon the parties' diversity of citizenship), a parent may bring an action for wrongful death of an unborn child if the fetus is viable at the time of injury, even if not born alive. Remy v. MacDonald, 801 N.E.2d 260, 265 (Mass. 2004) ("[A] viable fetus, whether or not born alive, is considered a 'person' for purposes of our wrongful death statute, G.L. c. 229, § 2."); Thibert v. Milka, 646 N.E.2d 1025, 1026 (Mass. 1995). A fetus is "viable" if it is "so far formed and developed that if then born it would be capable of living." Thibert, 646 N.E.2d at 1025 n.3 (quoting Torigian v. Watertown News Co., 225 N.E.2d 926, 927 (Mass. 1967)). Viability cannot be determined solely by reference to a specific point in the gestation period. Colautti v. Franklin, 439 U.S. 379, 388-89 (1979). Rather, determining viability is a matter of judgment by an attending physician based on the particular facts of the case. Id. at 387-89.

Both sides have submitted expert reports concerning the viability of the plaintiffs' unborn child at the time of the accident. The plaintiffs' expert, Dr. Wayne L. Goldner, reviewed Luc's medical records and concluded that Luc was 21–22 weeks pregnant at the time of the accident and "would

[2] I refer to the plaintiffs' First and Second Amended Complaints together as the Amended Complaint.

have been quickened or have felt quickening." The defendants are correct that the concept of "quickening" – that is, the ability of a child to move inside its mother's womb – does not equate to "viability." While some states recognize a wrongful death cause of action for a fetus who is "quick" at the time of its death, Massachusetts is not one of them. Cf. Citron v. Ghaffari, 542 S.E.2d 555, 556 n.1 (Ga. Ct. App. 2000) ("Georgia appears to be unique in its adherence to the concept of quickening. The majority of jurisdictions that recognize a cause of action for wrongful death of a fetus limit such actions to claims arising after the fetus is viable.").

Dr. Goldner also stated that Luc "would now be considered to be parous having carried a pregnancy beyond twenty weeks." "Parous" is generally defined as having given birth to one or more children, alive or dead. See Stedman's Medical Dictionary 1317-18 (27th ed. 2000). A conclusion that Luc was parous does not tend to prove that her fetus was viable at the time of the accident.

Madruga and Demelo rely on the report of Boston Ballroom's expert, Dr. Curtis Cetrulo, who also reviewed Luc's medical records and concluded, "At 21 weeks and 3 days and 320 grams there was essentially no chance that this child would survive." Dr. Cetrulo also stated, correctly, that parity does not equate with viability, as those terms define different conditions.

On the evidence offered in the summary judgment record, the plaintiffs are not able to satisfy their burden of proving that their child was viable for purposes of the Massachusetts wrongful death statute. Though a fetus might be viable at twenty-one weeks gestation if there is a reasonable likelihood that it would be capable of living outside the womb, the plaintiffs have not presented sufficient evidence from which a jury could conclude that this particular fetus was so capable. Dr. Goldner's opinions evade the question of viability and are plainly an inadequate basis for any such conclusion. Consequently, the defendants Madruga and Demelo are entitled to summary judgment

on Counts 1 and 10.

B. Counts 4, 5, 13, and 14 – Loss of Consortium of Child (M.G.L. c. 231, § 85X)

Consistent with my November 23, 2004 Memorandum and Order dismissing these same causes of action against the Wyndham Defendants, Madruga and Demelo are entitled to summary judgment on Counts 4, 5, 13, and 14 because the plaintiffs cannot bring a separate cause of action under M.G.L. c. 231, § 85X for the death (not serious injury) of their alleged "viable, yet unborn" fetus (not minor child). See Mass. Gen. Laws ch. 231, § 85X ("The parents of a minor child or an adult child who is dependent on his parents for support shall have a cause of action for loss of consortium of the child who has been seriously injured against any person who is legally responsible for causing such injury.") (emphasis added).

III. Boston Ballroom's Motion for Summary Judgment

Boston Ballroom moves for summary judgment on all remaining counts asserted against it in the Amended Complaint (Counts 19, and 21 through 28). Boston Ballroom's primary argument is that the plaintiffs have failed to present sufficient evidence to permit a jury to conclude that The Roxy knew or reasonably should have known that Madruga was intoxicated at the time he was served his last alcoholic drink in the early morning hours of July 22, 2002.

Under well-established Massachusetts law, "a tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have

known that the patron is intoxicated." Vickowski v. Polish American Citizens Club of Deerfield, 664 N.E.2d 429, 431 (Mass. 1996) (quoting Cimino v. Milford Keg, Inc., 431 N.E.2d 920, 924 (Mass. 1982)). "The negligence [if any] lies in serving alcohol to a person who already is showing discernible signs of intoxication. A plaintiff's evidence must be sufficient to establish that, more probably than not, the patron in question was exhibiting signs of intoxication before he or she was served a last alcoholic drink (or drinks)." Vickowski, 664 N.E.2d at 432 (citation omitted). In order to survive a motion for summary judgment, a plaintiff must proffer some evidence – direct, circumstantial, or a combination of the two – that the patron's intoxication was apparent at the time he was served by the defendant. Douillard v. LMR, Inc., 740 N.E.2d 618, 621 (Mass. 2001).

In Douillard, the plaintiff overcame a motion for summary judgment by submitting expert testimony calculating the patron's blood alcohol level at the time he was served his last drink, coupled with direct evidence from the patron's friends regarding his customary reaction to alcohol consumption. The Massachusetts Supreme Judicial Court held that this evidence would permit a jury to infer that the patron probably appeared intoxicated at the time he was served his last drink. 740 N.E.2d at 621-23. A similar result is warranted here.

Blomberg, the plaintiffs' expert, would testify that given Madruga's likely blood alcohol level as he would calculate it (0.12), "Madruga would inevitably have evidenced unmistakable signs or cues of alcohol impairment and intoxication while he was being served . . . e.g., change in conversation or animation level, slight to gross slurring of speech, alteration of eye movements or appearance, [or] slight to significant unsteadiness." (Blomberg Aff. ¶ 29.) Assuming that Blomberg's expert evidence is admissible (and no challenge has been made to its admissibility), it suffices in combination with other evidence in the record about Madruga's consumption of alcohol to create a genuine issue of

material fact as to whether Madruga was exhibiting signs of intoxication at the time he was served his last drink at The Roxy. See Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co., 161 F.3d 77, 83-86 (1st Cir 1998); see also Douillard, 740 N.E.2d at 621.

Boston Ballroom's summary judgment motion is denied as to Counts 21, 22, 25, 26, 27, and 28. Boston Ballroom is, however, entitled to summary judgment on Counts 19, 23 and 24 for the reasons stated in Part II, supra.

IV. Wyndham Defendants' Motion for Summary Judgment

Summary judgment in favor of the Wyndham Defendants is appropriate because the plaintiffs have failed to establish a triable issue of fact regarding an agency relationship between Boston Ballroom and the Wyndham Defendants or "apparent intermingling" of their business activities. The facts viewed in the light most favorable to the plaintiffs do not demonstrate the kind of "substantial disregard of the separate nature of the corporate entities," or "serious ambiguity about the manner and capacity in which the [two] corporations and their respective representatives [were] acting" which would warrant taking the rare step of disregarding the corporate structure in order to prevent gross inequity. Birbara v. Locke, 99 F.3d 1233, 1239 (1st Cir. 1996) (quoting My Bread Baking Co. v. Cumberland Farms, 233 N.E.2d 748, 752 (Mass. 1968)). Furthermore, the summary judgment record is devoid of any evidence that the plaintiffs relied on anything the Wyndham Defendants or Boston Ballroom said or did on the night of the accident. See Theos & Sons v. Mack Trucks, Inc., 729 N.E.2d 1113, 1121 (Mass. 2000) ("Apparent authority exists only if the plaintiff reasonably relied on the principal's words or conduct at the time he entered the transaction that the agent is authorized to act on the principal's behalf."); Hudson v. Massachusetts Prop. Ins. Underwriting Ass'n, 436 N.E.2d 155, 159 (Mass. 1982) ("Apparent or ostensible authority results

from conduct by the principal which causes a third person reasonably to believe that a particular person has authority to enter into negotiations or to make representations as his agent. If a third person goes on to change his position in reliance on this reasonable belief, the principal is estopped from denying that the agency is authorized.") (internal quotations and citations omitted). This is not like those cases relied upon by the plaintiffs where the primary tortfeasor appeared to the plaintiff to be working for the defendant as an ostensible agent at the time the plaintiff was injured. See Wyndham Hotel Co. v. Self, 893 S.W.2d 630, 637-38 (Tex. App. 1994); Barron v. McLellan Stores Co., 39 N.E.2d 953, 954 (Mass. 1942).

V. Conclusion

For the reasons stated above, Madruga and Demelo's motion for summary judgment (Dkt. No. 92) is GRANTED as to Counts 1, 4, 5, 10, 13, and 14; Boston Ballroom's motion (Dkt. No. 89) is DENIED as to Counts 21, 22, 25, 26, 27, and 28, but GRANTED as to Counts 19, 23 and 24; and the Wyndham Defendants' motion (Dkt. No. 94) is GRANTED as to all counts directed at them.

It is SO ORDERED.

August 3, 2005
DATE

\s\ George A. O'Toole, Jr.
DISTRICT JUDGE