

# Lawrence Law Journal

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VOL. 31

June 14, 2021

No. 233

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Nikoden  
v.  
Oasis Bar, Inc.

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Owned and Published By  
**THE LAWRENCE COUNTY BAR ASSOCIATION**

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Phone 724-656-2136

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# Lawrence Law Journal

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# **Lawrence Law Journal**

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## **LAWRENCE COUNTY BAR ASSOCIATION QUARTERLY MEETING ON ZOOM**

**WEDNESDAY, JUNE 16, 2021, 12:00 NOON**

Zoom link has been sent to everyone's email.

If you need the link sent to you, please email [jthomas@lawrencecountypa.gov](mailto:jthomas@lawrencecountypa.gov).

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## ESTATE NOTICES

Notice is hereby given that in the estates of the decedents set forth below, the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims against the estate of the decedent shall make known the same to the person(s) named or to his/her/their attorney and all persons indebted to the decedent shall make payment to the person(s) named without delay.

### FIRST PUBLICATION

#### **Clark, Agnes L.**

Late of New Castle, Lawrence County, Pennsylvania

Executrix: Janet L. Busin, New Castle, PA  
Attorney: Phillip L. Clark, Jr., Leymarie Clark Long, P.C., 423 Sixth St., Ellwood City, PA 16117

#### **Graziani, Italo A.**

Late of Union Township, Lawrence County, Pennsylvania

Executor: Marcia J. Macri and Andrew J. Graziani

Attorney: Clark & Clark Law, P.C., Robert D. Clark, Jr., 201 N. Market St., New Wilmington, PA 16142

#### **Haggerty, Janet C.**

Late of Mahoning Township, Lawrence County, Pennsylvania

Executrix: Susan A. Smith, 178 Milton Lane, Pulaski, PA 16143

Attorney: Anthony Piatek, 414 N. Jefferson St., New Castle, PA 16101

#### **Masters, Dennis J.**

Late of Lawrence County, Pennsylvania

Administrator: Brian F. Levine

Attorney: Brian F. Levine, Levine Law, LLC, 22 East Grant St., New Castle, PA 16101

#### **Micco, John C., Jr.**

Late of the City of New Castle, Lawrence County, Pennsylvania

Executor: John C. Micco, III, 137 E. Euclid Ave., New Castle, PA 16105

Attorney: Anthony Piatek, 414 N. Jefferson St., New Castle, PA 16101

#### **Murphy, Frances Fayette**

##### **a/k/a Bracken, Fayette**

Late of Little Beaver Township, Lawrence County, Pennsylvania

Administrator: Gary M. Murphy, 2054 Clark Rd., Enon Valley, PA 16120

Attorney: Shawn A. Sensky, 809 Wilmington Ave., New Castle, PA 16101

#### **Regan, Patrick H.**

Late of Lawrence County, Pennsylvania

Administrator: Brian F. Levine

Attorney: Brian F. Levine, Levine Law, LLC, 22 East Grant St., New Castle, PA 16101

## SECOND PUBLICATION

#### **Dewberry, Paul E.**

Late of New Castle, Lawrence County, Pennsylvania

Executrix: Cheryl Ann Metrick, 106 Shelton Place Dr., Evans City, PA 16033

Attorney: Gregory D. Metrick, Stranahan, Stranahan & Cline, 101 South Pitt St., P.O. Box 206, Mercer, PA 16137-0206

#### **Graham, Richard C.**

Late of Shenango Township, Lawrence County, Pennsylvania

Executrix: Susan L. Lawrence, c/o 183 Scharberry Lane, Mars, PA 16046

Attorney: Timothy B. Sechler, 183 Scharberry Lane, Mars, PA 16046

#### **Reed, Ronald F.**

##### **a/k/a Reed, Ronald**

Late of New Castle, Lawrence County, Pennsylvania

Executrix: Cassandra Marie Reed VanSickles, 270 N. Myers Ave., Sharon, PA 16146

Attorney: Roger R. Shaffer, Jr., Barr and Shaffer, 701 North Hermitage Rd., Suite 20, Hermitage, PA 16148

#### **Semple, Kathryn A.**

##### **a/k/a Semple, Kathryn Alice Semple**

Late of New Wilmington Borough, Lawrence County, Pennsylvania

Executor: Jane Wetzal

Attorney: Clark & Clark Law, P.C., Robert D. Clark, Jr., 201 N. Market St., New Wilmington, PA 16142

#### **Villani, Betty Ann**

Late of New Castle, Lawrence County, Pennsylvania

Executor: Thomas Villani, 1026 Lorraine Ave., New Castle, PA 16101

Attorney: Charles P. Sapienza, 713 Wilmington Ave., New Castle, PA 16101

#### **Volkman, Donna L.**

Late of Taylor Township, Lawrence County, Pennsylvania

Administrator: Donald H. Volkman, 3109 New Butler Rd., New Castle, PA 16101

Attorney: Richard E. Flannery, Flannery & Flannery, 214 McCarty Lane, New Castle, PA 16105

THIRD PUBLICATION

**Annarella, Harry Phillip**

Late of Union Township, Lawrence County, Pennsylvania

Executor: Nicole C. Fuchs

Attorney: John J. DeCaro, Jr., Cusick DeCaro & Langer, P.C., 100 Decker Dr., P.O. Box 5137, New Castle, PA 16105, 724-658-2525

**Duda, Walter J.**

**a/k/a Duda, Walter James**

**a/k/a Duda, Walter**

Late of Pulaski Township, Lawrence County, Pennsylvania

Executor: Gary Uzarski, 1046 Sikora Dr., Pulaski, PA 16143

Attorney: Douglas M. Watson, 259 Main St., Greenville, PA 16125

**Lupo, Marlene**

Late of Neshannock Township, Lawrence County, Pennsylvania

Executrix: Robin Prossen, 3108 Whitney Dr., New Castle, PA 16105

Attorney: Jason A. Medure, 713 Wilmington Ave., New Castle, PA 16101

**McCullough, Allen D.**

Late of New Wilmington Borough, Lawrence County, Pennsylvania

Executor: Jennifer L. McCullough, 13800 West Catharpin Rd., Spotsylvania, VA 22551

Attorney: Alan M. Acker, Acker and Larsen, P.C., 217 North Main St., Coudersport, PA 16915, (814) 274-7913

**Rochow, Ronald R.**

**a/k/a Rochow, Ronald Robert**

Late of Pulaski Township, Lawrence County, Pennsylvania

Executor: Ronda L. Rochow-Miller

Attorney: Clark & Clark Law, P.C., Robert D. Clark, Jr., 201 N. Market St., New Wilmington, PA 16142

**Rugh, Bettie T.**

Late of Wilmington Township, Lawrence County, Pennsylvania

Executor: James A. Rugh, Jr.

Attorney: Clark & Clark Law, P.C., Robert D. Clark, Jr., 201 N. Market St., New Wilmington, PA 16142

**Soukovich, Gloria L.**

Late of New Castle, Lawrence County, Pennsylvania

Executor: David A. Soukovich, 308 E. Hazelcroft Ave., New Castle, PA 16105

Attorney: Carmen F. Lamancusa, 414 N.

Jefferson St., New Castle, PA 16101

**Stunkard, Ruth**

Late of Hickory Township, Lawrence County, Pennsylvania

Executrix: Audi Steele, 2412 Gough St., San Francisco, CA 94123

Attorney: Anthony Piatek, 414 N. Jefferson St., New Castle, PA 16101

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**LEGAL NOTICE**

Notice is hereby given, that a Certificate of Organization-Domestic Limited Liability Company has been filed with the Department of State in the Commonwealth of Pennsylvania, with respect to a Limited Liability Company, which is organized under the provisions of The Pennsylvania Uniform Limited Liability Company Act of 2016, 15 Pa.C.S. § 8811 et seq., and any successor statute, as amended from time to time. The name of the Limited Liability Company is **Byers Farm LLC** and it is to be organized effective May 12, 2021.

S.R. Law, LLC

Amy E. Molloy, Esquire  
631 Kelly Blvd., P.O. Box 67  
Slippery Rock, PA 16057

L.C.L.J. - June 14, 2021

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**NOTICE OF DISSOLUTION**

Notice is hereby given, that **SAWTECH USA, LLC**, with its registered address at 705 Moravia Street, New Castle, PA 16101, a Pennsylvania Limited Liability Company has been authorized by its Members to dissolve voluntarily and is now engaged in winding up and settling the affairs of the Company so that its corporate existence will end pursuant to the Pennsylvania Uniform Limited Liability Company Act of 2016, as amended. Any persons having claims against the Company shall forward any claim, in writing to the Company at the above referenced address. Any claim against the Company is barred unless an action to enforce the claim is commenced within two (2) years after the publication of this Notice.

Ronald W. Coyer, Esquire  
S.R. Law, LLC  
631 Kelly Blvd., P.O. Box 67  
Slippery Rock, PA 16057

L.C.L.J. - June 14, 2021

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# Lawrence Law Journal

**IN THE COURT OF COMMON PLEAS OF  
LAWRENCE COUNTY, PENNSYLVANIA**

**IN RE: PETITION FOR NAME CHANGE OF  
ZACHARY ROBERT MCCANN,  
Petition for Name Change.**

**Civil Division  
#70053-21**

## **NOTICE**

Notice is hereby given that on April 26, 2021, the Petition For Name Change regarding Zachary Robert McCann, was filed in the above named Court requesting a Decree to change the name of the person from **Zachary Robert McCann to Mallory Autumn McCann**. The Court has fixed the 23rd day of July, 2021 at 8:30 o'clock a.m. in Court Room No. 4 of the Lawrence County, PA Courthouse, as the time and place for hearing on said Petition, when and where all persons interested may appear and show cause, if any, why the prayer of the said Petitioner should not be granted.

Eric D. Levin, Esquire  
Rishor Simone  
101 East Diamond St., Suite 208  
Butler, PA 16001  
724-283-7215  
PA I.D. #58307

L.C.L.J. - June 14, 2021

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## **SHERIFF SALES**

**Wednesday, July 14, 2021 at 10:00 AM**

By virtue of various Writs of Execution issued out of the Court of Common Pleas of Lawrence County, Pennsylvania, there will be exposed to sale by public auction at the Lawrence County Government Center, Commissioners Meeting Room, First Floor, 430 Court St., New Castle, PA 16101 at the above date and time, the following described real estate, subject to the following TERMS OF SALE:

The following terms shall be complied with for each sale or continuation thereof:

1. All bidders must identify themselves prior to submitting a bid. Attorneys of record shall be presumed to be bidding for their client(s). No bid may be withdrawn.
2. If the defendant intends to bid, prior to the bidding they must submit to the Sheriff satisfactory proof that they will be able to comply with the bid. No bids will be accepted in excess of the submitted proof.

3. At the request of the plaintiff, any sale may be continued, postponed or cancelled.

4. All bids must be paid in full. The successful bidder shall pay unto the Sheriff, by cash, certified or cashiers' check, 10% within one hour after the sale and the balance within 7 days thereafter. If terms of sale are not met within the required time period, the property will be resold at 12:00 noon on the Third business day following the payment deadline at the Lawrence County Sheriff's Office, Government Center, 430 Court Street, New Castle, PA at the expense and risk of the person to whom it was struck off, who in case of deficiency on such sale shall make good the same.

5. Prior to the delivery of the Sheriff's deed, a successful bidder may assign their bid to a third party, in which case the realty transfer taxes shall be paid as if the assignee were the original successful bidder.

6. If a Third Party is the successful bidder, a Schedule of Distribution will be filed by the Sheriff in the Prothonotary's Office on the Wednesday following the date of sale and that distribution will be made in accordance with the Schedule unless exceptions are filed within TEN days thereafter.

7. Anyone placing a bid should check with an attorney for legal advice. The property you are bidding upon may be subject to unpaid taxes, liens or mortgages.

8. Any current & delinquent real estate taxes will be paid as part of the costs and before distribution to the plaintiff or any other party.

### **Sale No. 1**

No. 10214-2007; Wells Fargo Bank, N.A. as Trustee for Option One Mortgage Loan Trust 1999-C, Asset-Backed Certificates, Series 1999-C, Plaintiff vs. Charlotte Weber; John Edward Weber, Defendants. Property address: 143 Rich Avenue a/k/a Box 219 Rich Avenue, Hillsville, PA 16132. Parcel ID: #24-159000 (Mahoning Township); Improvements thereon: Residential Dwelling. Judgment amount: \$117,155.65 plus interest, costs and attorney fees. Attorney: Brock & Scott, PLLC

### **Sale No. 2**

No. 10832-2020; U.S. Bank, National Association, as Trustee for Residential Asset Securities Corporation, Home Equity Mortgage Asset-Backed Pass-Through Certificates, Series 2005-KS3, Plaintiff vs. Christopher D. Vignolini and Lesley R. Vignolini, Defendants. The land referred to

in this commitment is described as follows: All that certain Lots Nos. 19 and 20 of the Plan of West Wort, Perry Township, Lawrence County, Pennsylvania, as laid out by the New York and Pennsylvania Mining and Manufacturing Company, LTD., and recorded in Deed Book Volume 40, Pages 14 and 15, May 8, 1883, and being more particularly bounded and described as follows, to wit: Lot No. 19 – Beginning at a point where the dividing line between Lots Nos. 19 and 21 intersect Grace Street; thence along Grace Street, a distance of 50 feet to the dividing line between Lots Nos. 17 and 19; thence along said dividing line to the intersection of said dividing line with property now owned by The Pittsburgh Company; thence along the boundary Lot No. 19 to the intersection of the dividing line between Lots Nos. 19 and 21 with the said property of The Pittsburgh Company; thence along the last mentioned dividing line to the place of beginning. Lot No. 19 having a depth of 140 feet. Lot 20 – Beginning at a point where the dividing line between Lots Nos. 20 and 21 intersect Railroad Avenue; thence along Railroad Avenue, a distance of 50 feet to the dividing line between Lots Nos. 18 and 20; thence along the above mentioned dividing line, a distance of 130 feet to a point where the dividing line of Lots Nos. 18 and 20 intersect Grace Street; thence along Grace Street to the intersection of the dividing line between Lots Nos. 20 and 22 with said Grace Street; thence along the last above mentioned dividing line to the point of beginning. Being the same premises which Anthony James Kincade and Michele Florie Kincade, husband and wife by Deed dated September 29, 2003 and recorded in the Office of Recorder of Deeds of Lawrence County on October 15, 2003 at Book 1887, Page 738 granted and conveyed unto Christopher D. Vignolini and Lesley R. Vignolini, husband and wife. Property address: 111 River Road, Ellwood City, PA 16117. Parcel ID: #27-106600 & 27-106500 (Perry Township); Judgment amount: \$49,806.07 plus interest, costs and attorney fees. Attorney: Stern & Eisenberg, PC

### **Sale No. 3**

No. 10129-2021; Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust not individually but as Trustee for Pretium Mortgage Acquisition Trust, Plaintiff vs. Tammy Casalandra and Robert T. Casalandra, Defendants. Property address: 911 Richview Drive, New Castle, PA 16101. Parcel ID: #34-255900, Map No. 34-4240-110. (Union Township) Improvements consist of

a residential dwelling. Judgment amount: \$144,742.23 plus interest, costs and attorney fees. Attorney: KML Law Group, P.C.

### **Sale No. 4**

No. 10025-2021; First Commonwealth Bank, Plaintiff vs. Stephen DeSantis, Wilfred M. DeSantis and David DeSantis, solely as the known heirs of Paul C. DeSantis, deceased, and all the Unknown Heirs of Paul C. DeSantis, Defendants. All that certain piece, parcel or lot of land situate, lying and being in Mahoning Township, Lawrence County, Pennsylvania, having erected thereon a dwelling, described in Deed Book Volume 653, Page 659. Property address: 154 Gasperoni Drive, Hillsville, PA 16132. Parcel ID: #24-043300. (Mahoning Township) Judgment amount: \$17,822.95 plus interest, costs and attorney fees. Attorney: Gary Darr, Esquire.

### **Sale No. 5**

No. 10072-2021; Pennsylvania Housing Finance Agency, Plaintiff vs. Randall B. Zieber, Defendant. Designated as Lot No. 30 in the addition to the Plot of Lots called "Carriage Hill" Plan of Lots, Plot Book 13, page 40. Addition to the Plot of Lots, Plot Book 14, page 23. See Instrument: 2015-006896. Improvement thereon: a residential dwelling house. Property address: 132 Landau Drive, Pulaski, PA 16143. Parcel ID: #29-024400 (29-3720-130). (Pulaski Township) Judgment amount: \$201,401.92 plus interest, costs and attorney fees. Attorney: Leon P. Haller, Esq.

### **Sale No. 6**

No. 10112-2020; PNC Bank, National Association, Plaintiff vs. Cathy Marie Reid, Defendant. All that certain piece or parcel of land situate in the Borough of Ellwood City, County of Lawrence, Commonwealth of Pennsylvania, bounded and described as follows to wit: Being the same property conveyed to Cathy Marie Reid who acquired title by virtue of a deed from Robert James Reid and Cathy Marie Reid, individually and in her own right, in fee dated December 30, 1995, recorded January 5, 1996, at Deed Book 1252, Page 583, Lawrence County, Pennsylvania records. Improvement thereon: a residential dwelling house as identified above. Property address: 300 First Street, Ellwood City, PA 16117. Parcel ID: #13-036100. (Ellwood City Borough 3rd Ward) Judgment amount: \$53,028.27 plus interest, costs and attorney fees. Attorney: Manley

Deas Kochalski LLC

## Sale No. 7

No. 10334-2019; The Huntington National Bank, Plaintiff vs. Matilda Pepe, as Administrator to the Estate of Susy A. Shaffer and Brett E. Shaffer, Administrator for the Estate of Howard D. Shaffer, Sr., Defendants. All that certain piece or parcel of land situate in the Township of Pulaski, County of Lawrence, Commonwealth of Pennsylvania, bounded and described as follows to wit: Being the same property conveyed to Susy A. Shaffer who acquired title by virtue of a deed from Susy A. Shaffer, Executrix of Estate of Howard D. Shaffer, Sr., deceased, dated February 28, 2013, recorded April 23, 2013, at Document ID 2013-004446, Office of the Recorder of Deeds, Lawrence County, Pennsylvania.. Property address: 435 Cherriwood Road, AKA 435 Cherriwood Road, Pulaski, PA 16143. Parcel ID: #29-116600. (Township of Pulaski) Judgment amount: \$39,520.07 plus interest, costs and attorney fees. Attorney: Manley Deas Kochalski LLC

## Sale No. 8

No. 11267-2019; Specialized Loan Servicing LLC, Plaintiff vs. David R. Boyles, Defendant. All that certain piece, parcel and lot of land situate, lying and being in the Seventh Ward of the City of New Castle, Lawrence County, Pennsylvania, being known and designated as all of Lot No. 100 and the West 20 feet of Lot No. 101 on Section 72 of the Official Survey of the City of New Castle, and said City lot No. 100 is marked 295 and said City Lot No. 101 is marked No. 296 on the Recorded Plan of the Mahoningtown Realty Company's Plan of Lots, Plan "B", as recorded in the office of the Recorder of Deeds of Lawrence county, Pennsylvania, in Plot Book Vol. 4, p. 40, and being more particularly bound and described as follows: Commencing on the north line of Seventh Street where it is intersected by the dividing line between Lot No. 99 and 100 on Section 72 of the City Survey; thence Northwardly, a distance of 117.8 feet to an alley; thence by said alley North 63 degrees 30 minutes East, a distance of 60.16 feet to a point in the middle line of Lot No. 101 on Section 72 of the City Survey; thence by the middle line of said Lot No. 101, Southwardly a distance of 122.25 feet to the North line of Seventh Street; thence westwardly, by the north line of Seventh Street, a distance of 60 feet to a point, being the place of beginning. Property address: 519 7th Street, New Castle, PA 16102. Parcel ID: #07-071200

(New Castle 7th Ward); Judgment amount: \$29,547.03 plus interest, costs and attorney fees. Attorney: LOGS Legal Group LLP

Sworn to and subscribed before me this 13th day of May, 2021  
Perry L. Quahliero, Sheriff

L.C.L.J.: June 7, 14, and 21 of 2021

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**Nikoden v. Oasis Bar, Inc.**

**Preliminary Objections - Legal Insufficiency - Pa. R.C.P. No. 1028(a)(4) - Insufficient Specificity - Pa.R.C.P. No. 1028(a)(3) - Failure to Conform to Law or Rule of Court - Scandalous or Impertinent Matter - Pa.R.C.P. No. 1028(a)(2) - Liquor Liability - Dram Shop Act, 47 P.S. § 4-101, et seq. - Common Law Negligence - Causes of Action - Separate Counts - Duty to Provide Transportation**

Dram Shop liability is sufficiently plead where it is alleged that a liquor licensee served a visibly intoxicated patron alcohol which was a substantial factor in causing injuries.

A Plaintiff may not recover under two theories of liability asserted under one count.

Injured patrons and third parties can pursue liability claims against liquor licensees based upon a negligence per se theory under the Dram Shop Act in addition to, or in lieu of, common law negligence theory which are parallel remedies.

Vicarious liability is a variation of common law negligence and may be asserted alongside a Dram Shop based liability claim.

A licensee's duties do not include always ensuring an intoxicated patron has transportation home.

An allegation that a licensee engaged in negligent conduct "motivated solely by [its] own financial gain" will be stricken from a complaint as spurious and irrelevant.

Preliminary Objections - Court of Common Pleas of Lawrence County, Pennsylvania, No. 10143 of 2018, C.A.

*George R. Farneth II*, attorney for Plaintiff

*Louis M. Perrotta*, attorney for Defendant, Oasis Bar, Inc.

### OPINION

Hodge, J.

December 3, 2019

Before the Court are the Preliminary Objections of Defendant Oasis Bar, Inc. (Defendant Oasis) to the First Amended Complaint of Plaintiff Edward Nikoden (Plaintiff). For the reasons that follow, the objections are SUS-TAINED in part and OVERRULED in part.

#### I. Procedural Background

The instant litigation began when Plaintiff filed his original complaint on August 9, 2018, naming Oasis Bar, Inc. (Defendant Oasis), Gerald Bene-

dict (Defendant Benedict), Victoria Bober (Defendant Bober), and Harry Annarella (Defendant Annarella) as defendants. All four defendants responded with preliminary objections, and argument was then scheduled for December 17, 2018. Three days before argument, on December 14, 2018, Plaintiff filed the First Amended Complaint. Defendants Benedict, Bober, and Oasis all filed preliminary objections to the First Amended Complaint on or before January 9, 2019, while Defendant Annarella elected to file an Answer and New Matter also asserting cross-claims against Defendants Benedict and Bober.

On January 8, 2019, this Court ordered that argument on the preliminary objections filed only by Defendants Benedict and Bober, and not Defendant Oasis, would take place on February 25, 2019. On February 25, 2019, counsel for Plaintiff and Defendants Benedict and Bober appeared as scheduled for argument. The Court, mistakenly forgetting that its earlier order issued nearly seven weeks prior did not encompass Defendant Oasis' preliminary objections, initially expressed confusion and consternation over the absence of Defendant Oasis' counsel. After contacting counsel for Defendant Oasis and reviewing the earlier order, the Court recognized its mistake and proceeded with argument as to Defendants Benedict and Bober. Counsel for Plaintiff and Defendant Bober reached an agreement to dismiss Defendant Bober as a party to the lawsuit without prejudice, and the Court then overruled the preliminary objections from Defendant Benedict. These developments were all memorialized in an Order of Court dated February 25, 2019.

In that same order, this Court ordered Defendant Oasis to file a supporting brief for the Preliminary Objections *sub judice* and directed that these objections would be decided on briefs alone. Plaintiff's brief had already been filed on February 19, 2019, as an omnibus brief opposing the preliminary objections of all defendants, while Defendant Oasis filed its brief on March 15, 2019. Accordingly, the matter is ripe for decision.

## II. Factual Background

Instantly, we summarize the factual averments of Plaintiff's First Amended Complaint, focusing especially on the allegations pertaining to Defendant Oasis, and in so doing recognize that when a court is presented with preliminary objections to a complaint, all material facts averred in the complaint, as well as all reasonable inferences deducible therefrom, must be accepted as true. O'Toole v. Pennsylvania Department of Corrections, 196 A.3d 260, 264 (Pa. Cmwlth. 2018).

Plaintiff is an adult individual currently residing in Youngstown, Ohio, and Defendant Oasis is a Pennsylvania corporation founded in 1998 with its current place of business at 303 S. Jefferson Street, New Castle, Lawrence County, Pennsylvania. A drinking establishment, Defendant Oa-

sis is the holder of a liquor license from the Pennsylvania Liquor Control Board and is thereby authorized to sell and serve alcoholic beverages. At the time of the events giving rise to this lawsuit, Defendant Oasis was under the ownership of Defendant Annarella and employed bar and wait staff to operate its business and tend to any customers.

On the afternoon of February 18, 2016, Plaintiff patronized Defendant Oasis and remained on the premises for several hours consuming alcoholic beverages served to him by the establishment's staff. Defendant Oasis served Plaintiff alcohol early and often after his arrival, such that Plaintiff quickly became visibly intoxicated. Plaintiff's visible intoxication on the bar's premises manifested itself through glassy and bloodshot eyes, loud and slurred speech, a lack of coordination and concentration, swaying and staggered walking, impairment of decision-making, and a strong alcoholic odor. Despite these ongoing signs of visible intoxication, Defendant Oasis and its staff ignored the risks to Plaintiff's health and safety by continuing to serve him alcohol. At or around 6:20 p.m., while severely intoxicated, Plaintiff left Defendant Oasis and began to walk home. Plaintiff's walking route took him along a nearby side street, S. Croton Avenue, where in the 300 block at approximately 6:38 p.m. he was suddenly struck from behind by a motor vehicle driven by an inattentive Defendant Benedict.

Plaintiff, due to his alcohol-induced lack of situational awareness, had no warning or opportunity to take evasive action or protect himself. After Defendant Benedict's vehicle hit him, Plaintiff was thrown onto the vehicle's hood, launched into the air, and flung into a post and the passenger side of the vehicle before making a hard landing on the roadway surface. Suffering severe injuries, Plaintiff required an ambulance to take him to Jameson Memorial Hospital before being transferred to St. Elizabeth Health Center. Plaintiff's injuries were extensive, including syncope, concussions, back, neck and shoulder trauma, whiplash, neurological issues, bruises and contusions, arthritis, anxiety and emotional distress, and brain hemorrhaging. Because of these injuries, which may plague him for life, Plaintiff has endured and will continue to endure ongoing and future medical treatments, permanent scars and disfigurements to his body, loss of earning capacity and work ability, mental and emotional tolls taken by such injuries, and general impairment to his quality of life. Financially, Plaintiff has incurred over \$329,500.00 in medical bills and will continue to incur similarly high expenditures due to the chronic nature of his injuries.

### III. Legal Discussion

Plaintiff's First Amended Complaint is divided into seven counts, the first four of which pertain exclusively to Defendants Benedict, Bober, and Annarella. The latter three counts of the First Amended Complaint are asserted against Defendant Oasis and/or Annarella: Count V is for Dram

Shop Act liability and negligence in supervision, Count VI is for general negligence, and Count VII is for vicarious liability. Defendant Oasis has responded with seven preliminary objections:

- I. Demurrer to Count V under Pa. R.C.P. No. 1028(a)(4) for failure to state a claim under the Dram Shop Act;
- II. Demurrer to Count V for failure to state a claim for negligence;
- III. Demurrer to Count VI for legal insufficiency;
- IV. Demurrer to Count VII for legal insufficiency;
- V. Objection under Pa. R.C.P. No. 1028(a)(3) for insufficient specificity to Counts V through VII;
- VI. Motion to Strike under Pa. R.C.P. No. 1028(a)(2) for failure of pleading to conform to law or rule of court; and
- VII. Motion to Strike for inclusion of scandalous or impertinent matter.

The Court will address each of these objections *ad seriatim*.

#### A. Demurrers

Preliminary objections in the nature of a demurrer are “properly granted where the contested pleading is legally insufficient.” Cooper v. Frankford Health Care System, Inc., 960 A.2d 134, 143 (Pa. Super. 2008). In other words, “the question presented by the demurrer is whether, *on the facts averred*, the law says with certainty that no recovery is possible.” Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270, 274 (Pa. 2005) (emphasis added). When a court is presented with a preliminary objection in the nature of a demurrer, all material facts averred in the complaint, as well as all reasonable inferences deducible therefrom, must be accepted as true. Smolsky v. Governor’s Office of Administration, 990 A.2d 173, 174 (Pa. Cmwlth. 2010). From these well-pleaded facts, the Court must determine, as a matter of law, whether the plaintiff may be entitled to recovery. Wiernik v. PHH U.S. Mortgage Corp., 736 A.2d 616, 619 (Pa. Super. 1999). Preliminary objections in the nature of a demurrer should be overruled unless the court *determines with certainty* that, upon the facts averred, the law will not permit the recovery sought by the plaintiff. R.W. v. Manzek, 888 A.2d 740, 749 (Pa. 2005). Conversely, a preliminary objection in the nature of a demurrer is properly sustained when the court finds, based on the facts pleaded, that there are no legal grounds upon which the claim can stand. Weiley v. Albert Einstein Med. Ctr., 51 A.3d 202, 208 (Pa. Super. 2012).

#### 1. Demurrer to Count V, Dram Shop Act

In its first demurrer, Defendant Oasis argues that Plaintiff has failed to set forth a valid claim at Count V of the First Amended Complaint for liability under the Pennsylvania Dram Shop Act.

The Pennsylvania Dram Shop Act, 47 P.S. §4-101 *et seq.*, first enacted by the General Assembly in 1951 and also known as the Liquor Code, is a piece of sweeping legislation designed to stringently govern the manufacture, distribution, transportation, sale, and provision of alcohol within the Commonwealth's borders, as well as "to prohibit forever the open saloon." 47 P.S. §4-104. Included in the Dram Shop Act's broad mandate, of course, is the regulation of bars, nightclubs, taverns, inns, hotels, and all drinking establishments open to the public as licensees of the Pennsylvania Liquor Control Board (liquor licensees or licensees). Section 4-493 is among the extensive provisions liquor licensees must follow, and it states the following in pertinent part, with emphasis added:

It shall be unlawful –

(1) For any licensee...or any employee, servant or agent of such licensee...to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person *visibly intoxicated*...  
47 P.S. §4-493(1)

Patrons of licensees who were served alcohol while visibly intoxicated and then suffered injuries allegedly caused by that overserving have frequently used Section 4-493(1) to file suit against the licensee in a cause of action informally known as Dram Shop liability.

Technically speaking, our appellate courts have stressed that Section 4-493 of the Dram Shop Act does not in and of itself create a private cause of action against a licensee, but rather is a vehicle for the injured party to bring forth a standard negligence *per se* action.<sup>1</sup> Majors v. Brodhead Hotel, 205 A.2d 873, 875 (Pa. 1965); Juszczyszyn v. Taiwo, 113 A.3d 853, 858 (Pa. Super. 2015); Schuenemann v. Dreemz, LLC, 34 A.3d 94, 98 n.1 (Pa. Super. 2011). What is clear, however, is what a plaintiff must successfully establish to prevail in this cause of action: 1. The licensee served alcoholic beverages to a visibly intoxicated plaintiff; and 2. This violation of the Liquor Code was the proximate cause of the plaintiff's injuries. McDonald v. Marriott Corp., 564 A.2d 1296, 1298 (Pa. Super. 1989).

Visible intoxication is not a medical standard requiring an exact measurement of alcohol in the body, but rather is a subjective determination turning on the physical appearance of the plaintiff at the time the alcohol was served. Hiles v. Brandywine Club, 662 A.2d 16, 19 (Pa. Super. 1995). Eyewitness or direct evidence, although it may be highly probative, is not needed to establish this element; circumstantial evidence may be sufficient, such as the length of time the plaintiff was in the bar, police reports,

blood test results, or in rare cases “relation back” testimony from an expert witness. Fandozzi v. Kelly Hotel, Inc., 711 A.2d 524, 527 (Pa. Super. 1998); Johnson v. Harris, 615 A.2d 771, 776 (Pa. Super. 1992). Proximate cause, in a Dram Shop action, “exists where a defendant’s wrongful conduct is a substantial factor in bringing about plaintiff’s harm.” Miller v. Brass Rail Tavern, Inc., 702 A.2d 1072, 1078 (Pa. Super. 1997). Courts will not find proximate cause, however, “when the causal chain of events resulting in plaintiff’s injury is so remote that it seems highly extraordinary that defendant’s conduct caused the harm.” Id.

In light of the foregoing, Plaintiff has sufficiently pleaded a case for Dram Shop liability. First, Plaintiff has averred that Defendant Oasis is the holder of a liquor license from the Pennsylvania Liquor Control Board and is governed by 47 P.S. §4-493(1). Second, Plaintiff has averred that when he patronized Defendant Oasis on February 18, 2016, he was served alcoholic beverages after he became visibly intoxicated through exhibiting slurred speech, glassy bloodshot eyes, loss of coordination, and other drastic changes to his physical appearance in full view of the bar’s staff. Third, Plaintiff has averred that Defendant Oasis’ overserving of alcohol was a substantial factor in causing the severe injuries he sustained from the collision with Defendant Benedict. The causal relationship Plaintiff asserts is that the excessive alcohol in his body caused him to be unable to process his surroundings and left him defenseless against Defendant Benedict’s oncoming car. Even though it was Defendant Benedict whose vehicle collided with Plaintiff, Plaintiff’s reflexes and ability to react to oncoming dangers were rendered useless by Defendant Oasis.

Reading these averments, as we must, in a light most favorable to Plaintiff, he has sufficiently pleaded both elements needed to assert a Dram Shop liability cause of action: visible intoxication and proximate cause. Therefore, Defendant Oasis’ first preliminary objection is OVERRULED.

## 2. Demurrer to Count V, Negligence

For its second preliminary objection, Defendant Oasis argues that this Court should sustain the demurrer because Plaintiff’s common law negligence claims under Count V have been subsumed and superseded by the Dram Shop Act. In other words, Defendant Oasis argues that a plaintiff cannot assert any general negligence claims against a liquor licensee because the only permissible cause of action is Dram Shop liability. We address this argument, hotly debated in courthouses across the Commonwealth, in greater detail below. Here, we will sustain Defendant Oasis’ preliminary objection, but on alternate grounds.

Pa. R.C.P. No. 1020(a) permits a plaintiff to state multiple cognizable causes of action against a defendant in a single pleading. However, the rule specifically prescribes “[e]ach cause of action and any special damage

related thereto shall be stated in a *separate count* containing a demand for relief.” Id. (emphasis added). Further, each claim in a complaint “must be presented in a self-sufficient separate count, which includes averments of facts pertaining to the particular claim and relief sought.” Commonwealth v. Parisi, 873 A.2d 3, 9 (Pa. Cmwlth. 2005).

In Count V of the First Amended Complaint, Plaintiff appears to state a cause of action for both Dram Shop liability and general negligence in supervision. As explained before, Dram Shop liability is a type of negligence per se. Juszczyszyn, supra, at 858. While negligence per se is closely related to general negligence, it is nonetheless a separate legal theory having different elements and underlying rationales from other theories. McCloud v. McLaughlin, 837 A.2d 541, 544 (Pa. Super. 2003). Count V of Plaintiff’s First Amended Complaint, therefore, has improperly merged and commingled negligence per se and general negligence claims, both of which are distinct causes of action. Simply put, Plaintiff cannot recover under both of these theories at Count V, and may only recover under this count for Dram Shop liability, the cause of action he set forth first. For these reasons, Defendant’s preliminary objection is SUSTAINED, and all averments in Count V relating to common law negligence are hereby stricken.

### 3. Demurrer to Count VI, Negligence

Defendant Oasis next raises a demurrer to Plaintiff’s claim for negligence at Count VI of the First Amended Complaint on grounds of legal insufficiency, contending that personal injury claims against liquor licensees can only be pursued via Dram Shop liability. Plaintiff suggests instead that the Dram Shop Act does not exclude common law negligence claims against licensees.

At the outset, we must note, as have so many other courts of common pleas, that no appellate decision in this Commonwealth squarely addresses this question. As a result, our sister courts have reached wildly divergent conclusions on this issue, cases which both parties have cited and examined in their briefs to this Court. Essentially, we discern two lines of common pleas cases. The first group has held that Dram Shop liability and common law negligence claims can coexist and be separately asserted in a single lawsuit, with the leading cases being Rivero v. Timblin, 12 Pa. D.&C. 5th 233 (Pa. Com. Pl. Lancaster, March 16, 2010), Joyce et al. v. Starters Riverport, Inc., et al., 57 Northampton Co. Rep. 962 (Pa. Com. Pl. Northampton, December 21, 2012), and Sims v. Frank B. Fuhrer Holdings, Inc., et al., No. GD-11-024389 (Pa. Com. Pl. Allegheny, December 13, 2012). In opposition is the second collection of cases, which has firmly held that only Dram Shop liability claims can be brought against a licensee, to the exclusion and preemption of any common law claims:



Clark v. Thompson, No. 2002-0260 (Pa. Com. Pl. Armstrong, March 12, 2003), Kortum v. 1K Second Street Assoc. et al., 123 Dauphin Co. Rep. 465 (Pa. Com. Pl. Dauphin, January 3, 2008), and Liberty Mutual Fire Ins. Co. v. Tilden, 2011 WL 7758348 (Pa. Com. Pl. Cumberland, February 1, 2011). The Court has extensively reviewed all of these cases from across the Commonwealth.

We now summarize the arguments supporting each line of cases, and begin with the decisions permitting both Dram Shop liability and common law claims. Central to this position is Rivero, an exquisitely crafted and thoroughly researched opinion by the Honorable David L. Ashworth of the Lancaster County Court of Common Pleas. In Rivero, Judge Ashworth began by providing helpful historical background on the controversy's roots, which date back to the General Assembly's adoption of the current liquor law in 1951. The Liquor Code enacted that year was an update and replacement of the previous 1854 statute, and many sections that had been included in the old statute, including the immediate predecessor of Section 4-493(1), were carried over, with slight modifications, to the new one. Rivero, 12 Pa. D.&C. 5th at 241-42. For reasons unknown, the legislature omitted a corresponding update to a provision in the 1854 law permitting third parties to file suit against establishments unlawfully serving alcohol. Id. Accordingly, no civil liability provision was explicitly included in the 1951 statute; however, Judge Ashworth noted, this "elimination of a civil liability statute did not...eliminate civil liability for licensees who furnished alcoholic beverages in violation of the law." Id.

To the contrary, Judge Ashworth pointed to Schelin v. Goldberg, 146 A.2d 648 (Pa. Super. 1958) and Jardine v. Upper Darby Lodge No. 1973, Inc., 198 A.2d 550 (Pa. 1964)<sup>2</sup> for the proposition that the structure of the 1951 Dram Shop Act made common law tort actions against licensees all the more necessary, concluding "the Supreme Court has recognized a common law cause of action in negligence against a licensee for injuries resulting from the furnishing of alcohol to a visibly intoxicated customer in violation of the Commonwealth's Liquor Code." Id. at 251. Next, Judge Ashworth rebutted arguments that Sections 4-493(1) and 4-497 of the Liquor Code, 47 P.S. §§4-493(1) and 4-497, immunized licensees from all tort claims except Dram Shop liability. Id. In his view, these sections of the Liquor Code merely established a prerequisite level of negligence that must be shown before "other common law claims of negligence can be asserted" against the licensee, who would otherwise be "immune from suit." Id. at 253-54 (citing, *inter alia*, Hiles, *supra*, at 20; Mathews v. Konieczny, 527 A.2d 508, 512 (Pa. 1987); and Detwiler v. Brumbaugh, 656 A.2d 944, 946-57 (Pa. Super. 1995)). Lastly, Judge Ashworth observed that the Dram Shop Act contained no exclusivity provision reserving unto itself the sole remedy for parties injured by a licensee's negligence, and in turn sug-



gested that the General Assembly had not met its obligation to repeal or specifically preempt common law causes of action in this area. Id. at 258 (citing Metro. Prop. & Liability Ins. Co. v. Ins. Comm'r of Pennsylvania, 580 A.2d 300, 302 (Pa. 1990)).

Based on his exploration of the statutory history and case law, Judge Ashworth's decision in Rivero held that common law negligence and Dram Shop liability are not mutually exclusive causes of action, but rather are complementary theories of liability meant to be applied in tandem when holding licensees accountable for tortious conduct. Rivero's holding and rationale was later fully embraced by Joyce and Sims.

Turning to those cases holding that Dram Shop liability is a plaintiff's only recourse against a licensee, we find that Clark, authored by the Honorable Joseph A. Nickleach of the Armstrong County Court of Common Pleas, provides the most in-depth analysis. In Clark, President Judge Nickleach first examined the exact wording of Section 4-497, 47 P.S. §4-497, which states that:

No licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of the licensee unless the customer who inflicts the damages was sold, furnished or given liquor or malt or brewed beverages by the said licensee or his agent, servant or employee when the said customer was visibly intoxicated.

Stating that this section's language was "plain" and "clear," President Judge Nickleach concluded that "the Legislature intended section 4-497 to be the sole means of tort liability for tavern owners in serving competent adult patrons alcohol." Clark, unpublished slip op. at 9 (citing, *inter alia*, 1 Pa. C.S. §1903).<sup>3</sup>

Intriguingly, also cited in Clark were some of the same cases in Rivero, such as Hiles, supra at 18, and Detwiler, supra, at 946, wherein the Superior Court stated that Section 4-497 is a "limiting provision designed to specifically shield licensees from liability to third parties except in those instances where the patron served was visibly intoxicated." These appellate interpretations of the Liquor Code, President Judge Nickleach continued, "would be illogical if they stood for the proposition that [the Dram Shop Act] shields taverns from civil liability if they follow it, yet permits them to be held liable on common law grounds of negligence with respect to the furnishing of alcohol to patrons." Clark, slip op. at 10-11. Lastly, President Judge Nickleach compared Dram Shop liability to workers' compensation, opining that the Liquor Code preempted common law claims against licensees just as the Workers' Compensation Act specifically replaced any common law negligence claims by workers against their employer. Id.

In Kortum, a much more succinct opinion, the late Honorable Joseph H. Kleinfelter of the Dauphin County Court of Common Pleas also invoked Hiles in holding that Sections 4-493(1) and 4-497 “provide[d] not only a basis for liability [against licensees for service to visibly intoxicated persons], but [also restricted] liability *to those exact circumstances*.” Kortum, supra, 123 Dauphin Co. Rep. at 465 (emphasis added). Lastly, the Honorable Kevin A. Hess of the Cumberland County Court of Common Pleas also relied upon the exact wording of Section 4-497, as well as Hiles and Detwiler, supra, to find that the Dram Shop Act “has the preemptive effect of precluding all other claims asserted against a licensee by injured third parties and thereby limits liability...” Tilden, supra, at \*5. In Judge Hess’ view, “the text chosen by the legislature in drafting Section 4-497 was clear in both its limiting of the *method* of recovery for third parties... as well as the limiting of the *liability* that could otherwise be imposed.” Id. (emphasis in original).

After thoroughly reviewing these competing cases and conducting our own independent research, this Court respectfully sides with Rivero and its progeny. First, we agree with Rivero that the Dram Shop Act is not the exclusive civil remedy against liquor licensees because, notably, there is no provision in the Dram Shop Act reserving unto itself that sole remedy. By contrast, as Judge Ashworth cogently noted, the Workers’ Compensation Act *explicitly* preempts any common law tort actions by employees against their employers. Rivero, supra, at 258 (citing 77 P.S. §481(a)). Judge Ashworth also astutely observed that dram shop laws in other states, such as New Jersey and Texas, clearly preempt common law causes of action against liquor licensees. Id. at n.12. Our General Assembly instead appears to have made a conscious and deliberate decision to omit the civil liability provision already in the 1854 law when it enacted the current Liquor Code in 1951, suggesting its intention to resurrect common law causes of action against licensees. See Schelin, supra, 146 A.2d at 651 (“When an act embodying in expressed terms a principle of law is repealed by the legislature, then the principle as it existed at common law is still in force.”) and Jardine, supra, 198 A.2d at 553 (“The repeal of the [1854 dram shop law] did not wipe out the remedy which that [act] afforded victims of intoxicated persons.”). Indeed, the General Assembly has had 68 years to amend the Liquor Code and make it the exclusive avenue of civil liability; this still has yet to occur.

Of course, it is unassailable in Pennsylvania, and has been for centuries, that when the legislature provides a statutory remedy, this is to be pursued in favor of any parallel remedy otherwise available at common law. 1 Pa. C.S. §1504; White v. Conestoga Title Ins. Co., 53 A.3d 720 (Pa. 2012). This principle appears to turn on questions of exclusivity, however: “If the legislative method for disposing of the dispute is not exclusive, some ap-

propriate form of common law action in the Court of Common Pleas may be available.” School Dist. of Borough of West Homestead v. Allegheny County Bd. Of School Directors, 269 A.2d 904, 907 (Pa. 1970). Such is the case here as we parse ambiguous legislation and case law. Clearly, injured patrons and/or third parties can pursue Dram Shop liability, i.e. negligence per se, against licensees. McDonald, supra. On the other hand, because it is far from certain whether the General Assembly intended for the Liquor Code to be the exclusive means of handling these disputes, the common law actions remain available as parallel remedies under West Homestead.

Our review of the case law suggests a tacit approval by the appellate courts of this approach. In Juszczyszyn, for example, a Philadelphia police officer injured responding to a disturbance at a bar filed suit against the licensee under theories of both Dram Shop liability and common law negligence. Juszczyszyn, supra, at 855. The precise question before the Superior Court in that case was whether police officers injured on duty when quelling disturbances at licensees were part of the class of persons protected by the Dram Shop Act, and therefore entitled to sue thereunder. Id. Because police officers are employed precisely to respond to potentially violent incidents like this, the Superior Court held that Dram Shop liability actions were unavailable to police officers injured in such a manner. Id. at 860. The Juszczyszyn Court did not make any negative note or comment on the fact that the plaintiff had sued under both theories, implying there was nothing procedurally improper about asserting both Dram Shop liability and common law negligence in the same complaint.

In Schuenemann, another case originating in Philadelphia, a 23-year-old woman patronized a nightclub for several hours on the night of November 4, 2006, and later died while driving herself home. Schuenemann, supra, at 97. The decedent’s estate filed suit using Dram Shop liability, arguing that the nightclub had served the decedent while she was visibly intoxicated and this high level of inebriation caused her to fatally crash her vehicle on the way home. Id. at 98. The case was tried before a jury, which found the nightclub 51% responsible for the decedent’s death and the decedent 49% at fault. Id. Eventually, the nightclub appealed to the Superior Court, arguing that the trial court had erred by allowing the decedent’s estate to introduce what it felt was irrelevant and highly prejudicial evidence of the nightclub’s policies and procedures for handling visibly intoxicated patrons, because this evidence would only have been relevant in a general negligence claim. Id. On appeal, the Superior Court affirmed the trial court’s evidentiary decisions. Id. at 102. While the Schuenemann Court, like Juszczyszyn, did not touch on the precise question we face, we again find implied approval that Dram Shop liability and general negligence claims are designed to coexist and complement each other.

Lastly, we agree with Rivero that the Liquor Code does not reserve civil liability unto itself but rather limits the instances in which *any* type of liability, i.e. Dram Shop liability or common law negligence, can be asserted against a licensee. It does so by imposing a threshold requirement of “visible intoxication” that refines and narrows the range of situations in which an injured party can file suit against a licensee. In other words, so long as a person was served while visibly intoxicated and injuries followed, suit can be filed against the licensee under Dram Shop liability and/or common law negligence. Without visible intoxication, no suit can be filed, no matter what the alleged negligence and resulting injuries may have been. We read the Superior Court’s statement in Detwiler with this idea in mind: “Section 4-497 acts as a shield restricting liability instead of a provision defining where it is to apply...[this section] does not create a cause of action against a licensee but in fact limits the extent of a licensee’s liability.” Detwiler, supra, 656 A.2d at 946 (internal citations and punctuation omitted). Hiles, likewise, referred to the visible intoxication standard under Section 4-497 as a “prerequisite to imposing *any* liability upon a licensee.” Hiles, supra, 662 A.2d at 20 (emphasis added). After careful consideration, we wholeheartedly agree with our learned colleague, Judge Ashworth, that the Liquor Code serves to enhance and moderate, not eliminate, possible ways of holding negligent liquor licensees accountable.

Our review of the law compels us to reach one conclusion: a party, whether a licensee’s customer or a third party injured because of serving alcohol to a visibly intoxicated person, can pursue civil claims against the licensee under a negligence per se theory via the Liquor Code *in addition to, or in lieu of*, a common law negligence theory. Whatever arguments can be made about Dram Shop liability preempting common law negligence, we simply cannot ignore the unequivocal statement our Supreme Court made 55 years ago in Jardine: that it would be negligent for any member of society, whether or not a liquor licensee, to pour alcohol into a visibly intoxicated person. Jardine, supra, 198 A.2d at 553.<sup>4</sup> Even if the General Assembly tomorrow repealed the Liquor Code in its entirety, and with it the basis for Dram Shop liability, there would still exist an unwavering duty to refrain from serving alcohol to a visibly intoxicated person. Dram Shop liability and common law negligence are not mutually exclusive, either/or propositions, but rather complementary causes of action ultimately meant to work together in prodding licensees toward safe, responsible service of alcohol to patrons. In our view, both causes of action may be asserted in a given lawsuit. Plaintiff has justifiably done so here, and therefore, Defendant Oasis’ preliminary objection is OVERRULED.

#### 4. Demurrer to Count VII, Vicarious Liability

Defendant Oasis next raises another preliminary objection in the nature of a demurrer, this time to Count VII of Plaintiff’s First Amended Complaint

on the same grounds as to Count VI, in that Plaintiff's claim for vicarious liability is superseded and preempted by Dram Shop liability. Additionally, Defendant Oasis contends that Plaintiff has failed to allege sufficient facts to support a vicarious liability claim.

Preliminarily, as to Defendant Oasis' argument that vicarious liability has been preempted by Dram Shop liability, we refer to the discussion at III. A. 3, supra, and reaffirm our conclusion that Dram Shop liability and common law negligence may each be asserted in a lawsuit against a liquor licensee. As vicarious liability is a variation on common law negligence, it may be asserted alongside Plaintiff's Dram Shop liability claim. Next, we must ensure that Plaintiff has pleaded sufficient facts to support recovery on a theory of vicarious liability.

Vicarious liability, as distinguished from direct liability in a negligence context, "is a policy based allocation of risk...[and] means in its simplest form that, by reason of some relation existing between A and B, the negligence of A is to be charged against B..." Scampone v. Highland Park Care Center, LLC, 57 A.3d 582, 597 (Pa. 2012). "Once the requisite relationship (i.e. employment, agency) is demonstrated, the innocent victim has recourse against the principal, even if the ultimately responsible agent is unavailable or lacks the availability to pay." Id. To hold an employer responsible for negligence committed by employees, the tortious acts must have been committed within the course and scope of employment. Sutherland v. Monongahela Valley Hospital, 856 A.2d 55, 62 (Pa. Super. 2004). Conduct is considered within the course and scope of employment if: 1. It is of a kind and nature that the employee is expected to perform; 2. It occurs substantially within the authorized time and space limits; 3. It is actuated, at least in part, by a purpose to serve the employer; and 4. If force is intentionally used by the employee, the use of force is not unexpected by the employer. Sokolsky v. Eidelman, 93 A.3d 858, 864 (Pa. Super. 2014).

While Plaintiff does not specify in the First Amended Complaint which agency relationship was at play on February 18, 2016, the reasonable inference is that it was one of employment, i.e. Defendant Oasis was the employer and its bar and wait staff were employees. Accordingly, we will evaluate Plaintiff's averments against the Sokolsky test, including the following. Defendant Oasis operated as a liquor licensee and its business model relied on selling alcoholic beverages to patrons. Defendant Oasis employed bar and wait staff to further these ends, who would have been expected while on duty to attend to patrons' needs and serve multiple rounds of alcoholic beverages within the bar's confines. It was with these goals in mind – to further the bar's mission of making a profit – that Defendant Oasis' employees served Plaintiff during his visit, even after he became visibly intoxicated. In other words, Defendant Oasis' employees

served a visibly intoxicated Plaintiff alcohol while in the scope and course of their employment. Giving Plaintiff the benefit of all reasonable inferences, it appears the first three factors of the Sokolsky test have been sufficiently pleaded.

Defendant Oasis lastly argues that the demurrer should be sustained because Plaintiff fails to name the individual employees who worked and served him on February 18, 2016. Not only is naming individual employees unnecessary when asserting vicarious liability, imposing such a requirement would rebuff “both the intent and purpose underlying this theory of recovery.” Sokolsky, supra, at 865-66. Thus, Plaintiff’s failure to list any specific names of Defendant Oasis’ bar and wait staff is of no consequence.

For these reasons, Defendant Oasis’ preliminary objection in the nature of a demurrer to Count VII of Plaintiff’s First Amended Complaint is hereby OVERRULED.

## B. Miscellaneous Objections

### 1. Objection under Pa. R.C.P. No. 1028(a)(3) for Insufficient Specificity

Defendant Oasis next makes an objection to Counts V through VII of Plaintiff’s First Amended Complaint under Pa. R.C.P. No. 1028(a)(3) for insufficient specificity in the pleading. Defendant Oasis asserts, *inter alia*, that the First Amended Complaint lacks specificity because it fails to demonstrate any connection between Defendant Oasis’ actions and Plaintiff’s injuries, fails to name the employees who served Plaintiff on February 18, 2016, fails to state how Plaintiff was visibly intoxicated at any point, and fails to plead that Plaintiff was a customer that day.

We have thoroughly examined Plaintiff’s First Amended Complaint, and we disagree with Defendant Oasis’ characterizations. Plaintiff has sufficiently pleaded what is needed at this point under Pa. R.C.P. No. 1019, which is simply “all the facts that he must prove in order to achieve recovery on the alleged cause of action” such that “the defending party will know how to prepare his defense.” Commonwealth ex rel. Pappert v. TAP Pharmaceutical Products, Inc., 868 A.2d 624, 635 (Pa. Cmwlth. 2005). Moreover, we again stress that Plaintiff is not required to name individual employees as doing so belies the entire purpose of a vicarious liability claim. Sokolsky, supra, at 865-66. Plaintiff has put Defendant Oasis on notice of what his claims are against it – Dram Shop liability, general negligence, and vicarious liability related to his patronizing the bar on February 18, 2016 – and Defendant Oasis has sufficient knowledge of the substance of these claims to begin preparing a defense. No additional facts must be pleaded at this point, and therefore this preliminary objection is OVERRULED.

## 2. Motion to Strike for Failure to Conform to Law or Rule of Court

Defendant Oasis next contends that various paragraphs of the First Amended Complaint should be stricken because they allude to or cite duties that liquor licensees do not have under the Liquor Code or common law. In particular, Defendant Oasis takes issue with Plaintiff's repeated mentioning of a failure by Defendant Oasis to ensure Plaintiff had safe and adequate transportation home before letting him walk home on February 18, 2016, because no such duty is imposed on liquor licensees.

After extensively searching the case law of this Commonwealth, the Court agrees. We uncovered no appellate decision, published or unpublished, holding that a licensee's duties include always ensuring an intoxicated patron has transportation home. One common pleas court, albeit in a case concerning premises liability and not Dram Shop and related liability, has held that a bar's duty to ensure its patrons' safety ends at the bar's property line. Newell v. Colorado Café, Inc., 2014 WL 7001422 (Pa. Com. Pl. Philadelphia, April 17, 2014). Such a position seems reasonable here as well. While it may be good business practice to arrange rides for patrons as a courtesy, as many bars do, it would simply be impossible and unfeasible in many bars and nightclubs to monitor and supervise intoxicated patrons until they are home safe. To hold otherwise would be to begin a descent down a slippery slope of increasingly onerous burdens for licensees. We therefore SUSTAIN Defendant Oasis' preliminary objection as to the averments mentioning a duty to arrange transportation. As to all averments concerning the conduct of Defendant Oasis on its premises, that portion of the preliminary objection is OVERRULED.

## 3. Motion to Strike Scandalous or Impertinent Matter

Defendant Oasis' last preliminary objection is a Motion to Strike under Pa. R.C.P. No. 1028(a)(2) for the inclusion of scandalous or impertinent matter in the First Amended Complaint. Specifically, Defendant Oasis objects to Paragraph 71 of that pleading, in which Plaintiff alleges Defendant Oasis engaged in negligent conduct "motivated solely by [its] own financial gain."<sup>5</sup>

When a preliminary objection under Pa. R.C.P. No. 1028(a)(2) is made for inclusion of scandalous or impertinent matter, the objecting party must meet a high burden before the court may grant the requested relief. We observe that the appellate case law on this point has been consistent. For averments in a complaint to be stricken as "scandalous and impertinent," they must be "immaterial and inappropriate to the proof of the cause of action." Common Cause/Pennsylvania v. Commonwealth, 710 A.2d 108, 115 (Pa. Cmwlth. 1998). The Commonwealth Court has also advised that a trial court's right to strike scandalous or impertinent matter from a complaint should be "sparingly exercised and only when a party can affirma-



tively show prejudice.” Breslin v. Mountain View Nursing Home, Inc., 171 A.3d 818, 829 (Pa. Cmwlth. 2017) (quoting Commonwealth Dep’t of Envtl. Res. v. Hartford Accident and Indem. Co., 396 A.2d 885, 888 (Pa. Cmwlth. 1979)).

Defendant Oasis has shown it would be prejudiced by Paragraphs 71 and 83 of the First Amended Complaint. Plaintiff’s chosen phrasing has a connotation of avarice and malice, that Defendant Oasis knowingly ignored the condition of Plaintiff and all customers in the gratuitous and unabashed pursuit of profit. Such motivations, besides being spurious and irrelevant in actions based on negligence, prejudice Defendant Oasis by portraying it in an exceedingly negative light. Accordingly, we SUSTAIN this preliminary objection.

#### IV. Conclusion

For the foregoing reasons, Defendant Oasis’ preliminary objections to the First Amended Complaint are SUSTAINED in part and OVERRULED in part. In accordance herewith, the Court enters the following order.

#### **ORDER OF COURT**

AND NOW, this 3rd day of December, 2019, the case being before the Court for a decision on the Preliminary Objections of Defendant Oasis Bar, Inc., to the First Amended Complaint of Plaintiff Edward Nikoden, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. Defendant Oasis’ Preliminary Objection in the nature of a demurrer pursuant to Pa. R.C.P. No. 1028(a)(4) to Count V of Plaintiff’s First Amended Complaint as to Dram Shop liability is OVERRULED.

2. Defendant Oasis’ Preliminary Objection in the nature of a demurrer pursuant to Pa. R.C.P. No. 1028(a)(4) to Count V of Plaintiff’s First Amended Complaint as to general negligence is SUSTAINED for the reasons set forth in the attached opinion. Paragraphs 60(b), (c), (e), (f), (g), (h), (m), (n), (p), 63, 64, and 65 are hereby STRICKEN from the First Amended Complaint.

3. Defendant Oasis’ Preliminary Objection in the nature of a demurrer pursuant to Pa. R.C.P. No. 1028(a)(4) to Count VI of the First Amended Complaint is OVERRULED.

4. Defendant Oasis’ Preliminary Objection in the nature of a demurrer pursuant to Pa. R.C.P. No. 1028(a)(4) to Count VII of the First Amended Complaint is OVERRULED.

5. Defendant Oasis’ Preliminary Objection pursuant to Pa. R.C.P. No. 1028(a)(3) for insufficient specificity in the pleading is OVERRULED.



6. Defendant Oasis' Preliminary Objection pursuant to Pa. R.C.P. No. 1028(a)(2) for failure of a pleading to conform to law or rule of court is SUSTAINED as to the averments in the First Amended Complaint at Paragraphs 60(b), (c), (e), (f), (g), (h), (l), (m), (n), (p), 63, 64, 75 at "and failed to take any steps to ensure Plaintiff made it home safely", 78(e), (h), (i), and 81. These paragraphs and/or parts thereof are hereby STRICKEN from the First Amended Complaint. Otherwise, this objection is OVER- RULED.

7. Defendant Oasis' Preliminary Objection pursuant to Pa. R.C.P. No. 1028(a)(2) for inclusion of scandalous or impertinent matter at Paragraphs 71 and 83 of the First Amended Complaint is SUSTAINED. Paragraphs 71 and 83 are hereby STRICKEN from the First Amended Complaint.

8. Defendant Oasis shall have 21 days from the date of this order to file an Answer and New Matter to the First Amended Complaint as modified by this Order.

9. The Prothonotary of Lawrence County shall serve notice of this Order and attached opinion upon all counsel of record.

BY THE COURT:

John W. Hodge, Judge

Footnotes:

<sup>1</sup> Nevertheless, we will use the terms "negligence per se" and "Dram Shop liability" interchangeably throughout this opinion because both terms appear repeatedly in case law.

<sup>2</sup> In Jardine, the Supreme Court used stark and vivid language to describe the danger posed by overserving alcohol and our corresponding collective obligation to prevent it:

Since an intoxicated person is and can be an instrument of danger to others...the legislature of Pennsylvania declared in the Liquor Code that it shall be unlawful for one to sell liquor to one already intoxicated. The first prime requisite to de-intoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him. *This is a duty which everyone owes to society and to law entirely apart from any statute.* The person who would put into the hands of an obviously demented individual a firearm with which he shot an innocent third person would be amenable in damages to that third person for unlawful negligence. An intoxicated person behind the wheel of an automobile can be as dangerous as an insane person with a firearm. He is as much a hazard to the safety of the community as a stick of dynamite that must be de-fused in order to be rendered harmless. To serve an intoxicated person more liquor is to light the fuse.

198 A.2d at 553 (emphasis added).

<sup>3</sup> By clear wording of Section 4-497, it is obvious Plaintiff cannot rely on this section for Dram Shop liability because he was not a third person injured by a customer of the licensee, but rather was *the customer* of the licensee. Suits against licensees by injured third parties almost universally cite to both Sections 4-493(1) and 4-497. By contrast, lawsuits by injured customers are properly brought solely under Section 4-493(1). See, e.g., McDonald, *supra*. Nevertheless, because many of the cases we reviewed involved injuries to these statutorily

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envisioned third parties, and because we are to interpret all portions of the Liquor Code *in pari materia*, see 1 Pa. C.S. §1932, we find the discussion on Section 4-497 applicable and instructive in our disposition of the preliminary objections *sub judice*.

<sup>4</sup> Four years before deciding Jardine, the Supreme Court made a similar pronouncement in Corcoran v. McNeal, 161 A.2d 367, 370 (Pa. 1960), with emphasis added:

An intoxicated person amid a group of people is a constant source of danger and hurt to those around him. He is the proverbial bull in the china shop and, of course, it is clear that when the owner of a bull is sued for damages done by his animal he cannot expect to escape liability by demanding proof as to how the bull smashed the china. He is liable for allowing the bull to be abroad unrestrained, unfettered and uncontrolled. The proprietor of an establishment whose employees pour inflammable liquid into a vessel already too full cannot plead ignorance of results when the vessel explodes from contact with the slightest spark. The liability of a tavern proprietor for damage done a patron under the circumstances herein discussed does *not depend on the [Liquor Code of 1951] or any statute*.

<sup>5</sup> Paragraph 83 contains a nearly identical averment to Paragraph 71 and we therefore analyze it under this objection. While Defendant Oasis did not specifically mention Paragraph 83 under this objection, it did object to this paragraph under the previous Motion to Strike for Failure to Conform to Law or Rule of Court.

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