

## The Interesting Back Door Negligent Security Case

**Negligent Security - An intoxicated woman was sexually assaulted after exiting a Bardstown Road area bar – she blamed the bar staff and its landlord for failing to protect her – while prevailing at trial, the jury found her 70% at fault for the assault**

*Sancomb v. The Back Door et al,*

11-5359

Plaintiff: Udell B. Levy, Louisville and Patricia Morris, *Winton & Hiestand*, Louisville

Defense: Robert J. Rosing, *Rosing & Brownfield*, Louisville for The Back Door

Mark A. Osbourn and Adam E. Levy, *Schiller Osbourn Barnes & Maloney*, Louisville for Mid-City Mall

Verdict: \$42,259 for plaintiff

assessed 20% to The Back Door and 10% to Mid-City Mall

Court: **Jefferson**, J. Cowan,

3-27-14

Nicole Sancomb, then age 36, went to The Back Door (it is a bar within the Mid-City Mall on Bardstown Road) one evening to meet a friend. She arrived at 11:00 p.m. after having dinner with a friend. There was evidence Sancomb drank at dinner and continued drinking at The Back Door. She had visited the bar many times and was a good friend of the bartender on duty.

Sancomb's friend didn't show at the bar and she remained visiting with the bartender. That visit involved consuming several drinks including a concoction called a Lemon Drop. While Sancomb wasn't clear what happened, she suspected that at some point in the evening another patron may have surreptitiously drugged her drink.

Sancomb made a decision to leave the bar at 3:00 in the morning. She walked outside and strangely sat on the steps. Her odd behavior was noticed by the bar staff. They looked at her through a window and wondered what she was doing. Despite her obvious intoxication and confusion, the bar did not intervene to protect her.

A few moments later a man led Sancomb away from the steps and to an alley just 100 feet away from the bar's entrance. There she was raped and sodomized by three men. A rape kit taken that day would confirm physical injuries consistent with a sexual assault.

In this lawsuit Sancomb blamed her assault on The Back Door and the Mid-City Mall on a negligent security theory. She focused that despite her obviously unsteady presence, bar staff did nothing to protect her. Had the bar done virtually anything at all for Sancomb, the assault could have been averted – that included calling her a cab or assisting her as she sat on the bar steps.

The Mid-City Mall was also implicated in several ways. Those included the poor lighting of the parking lot, it being very dark as lights were not replaced. There was also a suggestion that parking lot should have had security to protect patrons. An identified security expert for Sancomb was Ralph Witherspoon.

If Sancomb prevailed at trial she sought her incurred medicals of \$16,129. She claimed \$52,000 for ongoing emotional care. Sancomb, who had worked as a rape crisis counselor among other positions, has since claimed a disabling emotional injury. The injury was confirmed by Richard Edelson, Neuropsychology.

The jury could award her \$1,000,000 for pain and suffering. Beyond an award of compensatory damages, Sancomb also sought to impose punitives against The Back Door. She argued its conduct rose to the level of recklessness. The punitive damages were capped in the instructions at \$1,000,000.

The defendants denied fault for the sexual assault and argued that (1) Sancomb's sexual assailants (never identified) were the tortfeasors, and (2) regardless of anything the defendants did or didn't do, the attack itself was not foreseeable. Significant focus was also placed on the plaintiff's own comparative

fault.

A defense security expert was Lance Foster summarized these themes: (1) The bar and surrounding area were not dangerous, (2) the attack was not foreseeable, and (3) the defendants tried to help Sancomb, the bartender recalling he attempted to call her a cab at his own expense.

The defendants also noted her intoxication level as measured by Dr. George Nichols, Pathology, Louisville at .291. Particularly, Sancomb, a rape crisis counselor, should have appreciated this risk. In its pre-trial brief, the Mid-City Mall even questioned as a prefatory matter if there was a sexual assault at all – it conceded there was sexual activity, but it believed the proof was consistent with consensual rough sex.

This jury had questions for the court as it deliberated: Does the percentage of fault determine the split of money? If we put a percentage, does that reduce the amount the plaintiff will get? Judge Cowan told the jury to read the instructions.

The deliberations lasted five hours. A mixed verdict was returned, the jury finding all three parties at fault. That fault was assessed 20% to The Back Door, 10% to Mid-City Mall and the remaining 70% to the plaintiff. The jury also rejected the imposition of punitive damages against The Back Door.

The jury turned to damages and Sancomb took her medicals as claimed. She took \$16,129 for future care. Her pain and suffering was \$10,000. The raw verdict totaled \$42,259. The court's judgment against the defendants reflected comparative fault was entered in the sum of \$8,451 against The Back Door. The verdict was \$4,225 against Mid-City Mall.

The plaintiff has moved for a new trial and alleged error by the court in submitting her comparative fault to the danger – she argued there was no way she could foresee the danger of being assaulted. She also asserted the \$10,000 suffering award was inadequate.

The defendants replied (separately) that Sancomb had not exercised ordinary care for her own safety – Mid-City Mall noted that a rape counselor should know the risk of getting drunk at a bar and leaving alone in the middle of the night.

Sancomb filed a reply and raised new issues. She cited an affidavit from a juror, Ellen Brickley – Brickley had first written a letter to Judge Cowan (that letter is not in the record) expressing her outrage at the deliberations and the verdict itself.

Brickley explained (in an affidavit attached to the reply) that male jurors on the panel were not much interested in the case at all – they simply wanted to talk about the NCAA basketball tournament. Another juror worried about an award to the plaintiff as it would put the bar out of business.

The juror continued that this panel remained confused about the effect of comparative fault. Brickley tried to tell them that the award would be reduced by comparative fault – the jurors, in spite of their question to the judge, still thought Sancomb would take the full award. Brickley finished her affidavit with exasperation writing "JUSTICE NOT SERVED". All the motions are pending.