

January 30, 2012

An ALM Publication

TEXAS**HARRIS COUNTY****DRAM SHOP**

Motor Vehicle — Alcohol Involvement-Plaintiff — Wrongful Death

Two passengers were killed, one injured, in DWI incident

TYPE: Verdict Defendant
STATE: Texas
VENUE: Harris County
COURT: Harris County District Court, 11th
INJURY TYPE(S): eye leg-fracture(fracture, femur); leg(fracture, femur) head chest-fracture; rib other-death other-laceration other-strains and sprains hand/finger-fracture; finger
CASE TYPE: Dram Shop - Wrongful Death - Motor Vehicle - Passenger, Single Vehicle, Alcohol Involvement-Plaintiff
CASE NAME: Mikhail Kim and Adil Mukanov, as personal representative of the estate of Madina Kaipova and as personal representative of the estate of Ainur Nuftieva v. Cafe Europe Inc. and Sabahudin Lujinovic, d/b/a Cafe Europe, No. 2009-19541
DATE: December 2, 2011
PARTIES
PLAINTIFF(S): Mikhail Kim (Male, 27 Years), Adil Mukanov, Estate of Ainur Nuftieva (Female, 18 Years), Estate of Madina Kaipova (Female, 18 Years)
PLAINTIFF ATTORNEY(S): Dominique Bartholet; Blum Law Firm, P.C; Houston, TX, for Mikhail Kim, Adil Mukanov, Estate of Ainur Nuftieva, Estate of Madina Kaipova James E. Rensimer; Rensimer & Robin; Houston, TX, for Mikhail Kim, Adil Mukanov, Estate of Ainur Nuftieva, Estate of Madina Kaipova
PLAINTIFF EXPERT(S): Gary Wimbish ; Ph.D. ; Alcohol Toxicology; Milford, TX called by: Dominique Bartholet, James E. Rensimer
DEFENDANT(S): Cafe Europe Inc., Sabahudin Lujinovic
DEFENSE ATTORNEY(S): Spencer G. Markle; Markle DeLaCruz LLP; Houston, TX, for Cafe Europe Inc. Obed DeLaCruz; Markle DeLaCruz LLP; Houston, TX, for Cafe Europe Inc.

FACTS: On the night of Nov. 16, 2009, plaintiff Mikhail Kim, 24; plaintiffs' decedent Madina Kaipova, 18; and plaintiffs' decedent Ainur Nuftieva, 18; and Zhassulan Sarsenbayev, 20, were drinking at Caf Europe, in Houston. Afterward, around 2:30 a.m., they were in traveling in a mid-size sedan on Westheimer Road, near Stoney Brook Drive. The driver, Sarsenbayev, lost control, hit a hydrant and utility pole and rolled over; witnesses said vehicle was going 100 mph to 115 mph. Kaipova and Nuftieva were killed.

The estates and Kim sued Caf Europe for dram shop liability. Sarsenbayev's blood alcohol concentration was .172 at 4 a.m. The plaintiffs'

expert extrapolated it to a higher level at 2 a.m., but that level was unavailable for this report.

In Sarsenbayev's last 90 minutes at Caf Europe, the plaintiffs claimed, he was served at least five vodka shots, despite exhibiting obvious signs of intoxication and being underage. According to Kim, Sarsenbayev looked drunk while drinking shots and staggered his way out the door. According to plaintiffs' counsel, police and EMTs testified that Sarsenbayev was belligerent and smelled of alcohol at the accident scene, and the plaintiffs' expert opined that Sarsenbayev would have shown obvious signs of intoxication at Cafe Europe.

Their table's server was 18 and had received her Texas Alcoholic Beverage Commission certification after completing an online course that same day. The server knew the four occupants of the vehicle from school. They and the server were all from the same country, Kazakhstan; and the server was good friends with one of the woman who died.

Plaintiffs' counsel also alleged that Cafe Europe's management was aware that some underage people washed the Xs off their hands and drank there.

The plaintiffs also sued Cafe Europe's individual owner, Sabahudin Lujinovic, but he obtained a summary judgment before trial.

Caf Europe denied negligence, saying that the driver did his drinking before going to Cafe Europe; that he drank nothing there; and that he did not exhibit signs of intoxication there.

The defense did not assert the "safe harbor."

INJURY: Kim sustained multiple fractures (including the femur, three ribs, and two fingers), as well as head lacerations, an eye injury, and sprains and strains.

His paid or incurred medical was \$122,000. He also claimed past and future pain and suffering, physical impairment, and disfigurement. He sought a total of \$230,000.

Kaipova was in the back seat and was ejected from the vehicle. She and Nuftieva died in the accident. Their estates claimed the decedents' conscious pain and suffering and funeral and burial expenses.

RESULT: For Kim's injuries, the jury found 85 percent negligence on Sarsenbayev and 15 percent on Kim. For Nuftieva's death, the jury found 85 percent negligence on Sarsenbayev and 15 percent on Nuftieva. For Kaipova's death, the jury found 85 percent negligence on Sarsenbayev and 15 percent on Kaipova. The plaintiffs took nothing.

TRIAL INFORMATION:

JUDGE: Mike Miller
TRIAL LENGTH: 4 days
TRIAL DELIBERATIONS: 1.5 hours
JURY VOTE: 10-2

EDITOR'S COMMENT: This report is based on information that was provided by plaintiffs' counsel and defense counsel.

—John Schneider