

**IN THE
INDIANA COURT OF APPEALS**

22A-CT-1869

WEOC, Inc. d/b/a WINGS,
Etc., et al.

Appellants-Defendants,

v.

CHRISTOPHER ADAIR, et al.,
Appellees-Plaintiffs.

) Appeal from the LaPorte Superior Court 2
)
) Trial Court Cause No.:
) 46D02-2107-CT-001342
)
) The Honorable Richard R. Stalbrink, Jr.,
) Judge
)

**BRIEF OF THE APPELLEE, LEAH NIEBAUER, AS SPECIAL REPRESENTATIVE OF
THE ESTATE OF NATHAN BLOUNT**

Jon F. Schmoll, #192-45
Steven L. Langer, #9853-64
Sara A. Langer, #34675-53
LANGER AND LANGER
4 Indiana Avenue
Valparaiso, IN 46383
Telephone: 219-464-3246
Facsimile: 219-462-4198
jschmoll@langerlaw.com
slanger@langerlaw.com
salanger@langerlaw.com

Attorneys for Appellee, Leah
Niebauer, as Special Representative
of the Estate of Nathan Blount

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
I. STATEMENT OF ISSUES	6
II. STATEMENT OF CASE	6
III. STATEMENT OF FACTS.....	6
IV. SUMMARY OF ARGUMENT	7
V. ARGUMENT	8
A. UNDER COMMON LAW, PERSONS SELLING ALCOHOLIC BEVERGES HAVE A DUTY TO EXERCISE DUE CARE.....	8
1. The Indiana Supreme Court’s Holding in <i>Picadilly</i> Recognized that Common Law Liability Exists Despite Indiana’s Dram Shop Act.....	9
2. The <i>Picadilly</i> Holding Applies to This Case.....	10
B. THE PASSAGE OF THE DRAM SHOP ACT DID NOT ABROGATE THE COMMON LAW DUTY OF PERSONS SELLING ALCOHOLIC BEVERAGES.....	12
1. §15.5 Did Not Abrogate the Common Law.....	12
2. The Cases Holding Any Common Law Liability Claim Must be Linked to a Statutory Breach are Distinguishable from <i>Picadilly</i> and the Present Case.....	13
3. Even if §15.5 is in Abrogation of the Common Law, the <i>Picadilly</i> Holding Should Still Apply in Cases Involving Injured Third Parties.....	15
C. PUBLIC POLICY SUPPORTS RECOGNIZING THE EXISTENCE OF THE COMMON LAW DUTY OF PERSONS SELLING ALCOHOLIC BEVERAGES TO EXERCISE DUE CARE.....	16

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

D. THE COMMON LAW DUTIES STATED IN APPELLEE’S THIRD AMENDED COMPLAINT EXIST	18
VI. CONCLUSION	20
WORD COUNT CERTIFICATE	21
CERTIFICATE OF FILING AND SERVICE	22

TABLE OF AUTHORITIES

Indiana Cases

<i>Baxter v. Galligher</i> , 604 N.E.2d 1245 (Ind. Ct. App. 1992).....	13
<i>Buffington v. Metcalf</i> , 883 F.Supp. 1190, 1193 (S.D. Ind. 1994).....	12
<i>Burrell v. Meads</i> , 569 N.E.2d 637 (Ind. 1991).....	16, 17
<i>Caesars Riverboat Casino, LLC v. Kephart</i> , 934 N.E.2d 1120, 1127 (Ind. 2010).....	11, 12
<i>Elder v. Fisher</i> , 217 N.E.2d 847 (Ind. 1966).....	7, 8
<i>Elder v. Rutledge</i> , 27 N.E.2d 358, 361 (Ind. 1940).....	18, 19
<i>Estate of Cummings by Heck v. PPG Industries, Inc.</i> , 651 N.E.2d 305 (Ind. Ct. App. 1995).....	10, 14, 15
<i>Gariup Const. Co., Inc. v. Foster</i> , 519 N.E.2d 1224 (Ind. 1988).....	9, 10, 13, 17
<i>Hillebrand v. Supervised Estate of Large</i> , 914 N.E.2d 846, 850 (Ind. Ct. App. 2009).....	12
<i>Kitchell v. Franklin</i> , 997 N.E.2d 1020 (Ind. 2013).....	19

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

<i>Kosarko v. Padula</i> , 979 N.E.2d 144, 148 (Ind. 2012).....	15
<i>Livingston v. Fast Cash USA, Inc.</i> , 753 N.E.2d 572 (Ind. 2001).....	16
<i>Miami County Board of Commissioners v. US Specialty Insurance Company</i> , 158 N.E.3d 415, 420 (Ind. Ct. App. 2020).....	12
<i>Midwest Motor Coach Co. v. Elliott</i> , 182 N.E. 541, 542 (Ind. Ct. App. 1932).....	19
<i>Morrison v. Vasquez</i> , 124 N.E.3d 1217, 1222 (Ind. 2019).....	11
<i>Murray v. Indianapolis Public Schools</i> , 128 N.E.3d 450 (Ind. 2019).....	18
<i>Picadilly, Inc. v. Colvin</i> , 519 N.E.2d 1217 (Ind. 1988).....	7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18
<i>Rauck v. Hawn</i> , 564 N.E.2d 334 (Ind. Ct. App. 1990).....	13
<i>Rhodes v. Wright</i> , 805 N.E.2d 382, 385 (Ind. 2004).....	18
<i>Scott County Sch. Dist. One v. Asher</i> , 324 N.E.2d 496 (Ind. 1975).....	17
<i>Stachowski v. Estate of Radman</i> , 95 N.E.3d 542 (Ind. Ct. App. 2018).....	10
<i>Thompson v. Ferdinand Sesquicentennial Committee, Inc.</i> , 637 N.E.2d 178 (Ind. Ct. App. 1994).....	13, 14
<i>Weida v. Dowden</i> , 664 N.E.2d 742 (Ind Ct. App. 1996).....	13, 14, 15
<i>Whisman v. Fawcett</i> , 470 N.E.2d 73 (Ind. 1984).....	9

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

Statutes and Rules

Indiana Code § 7.1-5-10-15.....	7, 9, 10, 11
Indiana Code § 7.1-5-10-15.5.....	7, 10, 11, 12, 13, 15
Indiana Code § 34-30-2.1. <i>et al.</i>	12, 13

Other Sources

Centers for Disease Control and Prevention, National Center for Injury Prevention and Control. Sobering Facts: Drunk Driving in Indiana (December 2014), https://www.cdc.gov/motorvehiclesafety/pdf/impaired_driving/drunk_driving_in_in.pdf	16
Indiana State Police Automated Reporting Information Exchange System (ARIES), as of March 17, 2020 and June 15, 2020 (2018 and 2019 impaired driving data).....	16
Indiana University Public Policy Institute, Impaired Driving 2019 (September 2020), https://www.in.gov/cji/research/files/TS-Impaired-Driving-2019.pdf	16
Restatement (Second) of Torts §283.....	19
Restatement (Second) of Torts §302.....	19
Restatement (Second) of Torts §302A.....	19
Restatement (Second) of Torts §308.....	19

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

**I.
STATEMENT OF ISSUES**

1. Whether Indiana's Dram Shop Act §15.5 abrogated the common law duty of persons selling alcoholic beverages to exercise due care.
2. Whether assuming the common law duty of persons selling alcoholic beverages to exercise due care survived the passage of Indiana's Dram Shop Act §15.5, do the following duties exist: a. the duty to stop Adair from leaving the premises intoxicated; b. the duty to notify law enforcement that Adair left their premises intoxicated; and c. the duty to arrange alternative transportation for the intoxicated Adair.

**II.
STATEMENT OF CASE**

Pursuant to Indiana Appellate Rule 46(B)(1), Appellee has omitted this section and adopts Appellants' Statements of the Case as it relates to the procedural history of this case.

**III.
STATEMENT OF FACTS**

This case stems from the wrongful death of Nathan Blount. The relevant facts of this case are: On March 12, 2021, Eric A. Adair consumed alcohol at the Appellants' establishments. (Appellant, Wings, Etc., App. Vol. II pp. 56-57.) Mr. Adair was visibly intoxicated at both locations. (Appellant, Wings, Etc., App. Vol. II pp. 56-57.) Appellants furnished alcohol to Mr. Adair when they knew or should have known he was visibly intoxicated. (Appellant, Wings, Etc., App. Vol. II pp. 56-57.) After leaving the Appellants' establishments, Mr. Adair drove his vehicle across the center line of the highway and crashed into Nathan Blount. (Appellant, Wings, Etc., App. Vol. II p. 55.) On March 13, 2021, Nathan Blount died as a result of the injuries he sustained in the March 12, 2021 crash. (Appellant, Wings, Etc., App. Vol. II p. 55.)

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

IV. SUMMARY OF ARGUMENT

The Indiana Supreme Court has recognized the common law duty of persons selling alcoholic beverages to exercise due care. *Elder v. Fisher*, 217 N.E.2d 847 (Ind. 1966). In 1988, the Indiana Supreme Court took its holding in *Elder* one step further and held that I.C. § 7.1-5-10-15 “does not represent a legislative attempt to modify the common law with respect to liability of persons negligently furnishing alcoholic beverages. The statute merely designates certain specific conduct, the violation of which is punishable by criminal conduct.” *Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217, 1220 (Ind. 1988).

While the *Picadilly* Court dealt with §15 of Indiana’s Dram Shop Act, not §15.5, *Picadilly’s* holding and the Court’s intention are clear. Indiana’s Dram Shop Act is not a complete immunity statute. It merely designates specific conduct that represents a violation of the Act. There is nothing in §15.5 that would lead to the conclusion that the *Picadilly* holding should not apply to §15.5.

Further, although two court of appeals cases held that any common law liability for negligence in serving alcoholic beverages is restricted to cases involving a breach in the Indiana Dram Shop Act, these cases are not binding on this Court when there is an Indiana Supreme Court case on point. Also, these cases are notably different from the case at hand. Those cases involve injuries to the consumer driver or his or her passenger who also consumed alcohol from the defendant, furnisher. *Picadilly*, on the other hand, involved injuries to an innocent third party. The present case is like *Picadilly* because it also involves injuries to an innocent third party. At the very least, when it comes to injured third parties, the case law leads to the conclusion that common liability and Dram Shop Act liability exist independently of one another.

Public policy also supports recognizing the independent common law duty of those businesses

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

selling alcoholic beverages. Drunk driving presents a significant danger to the citizens of Indiana, and it is imperative that the laws reflect that danger. This is especially true for protecting innocent third parties.

Finally, because businesses selling alcoholic beverages have a common law duty to exercise due care, Appellee may bring forth their common law allegations in Count III of Appellee's Third Amended Complaint. Although there is no case law recognizing the exact duties at issue, there is also no case law stating those duties do not exist. Whether Appellants acted reasonable under the facts and circumstances of this case is a question for the jury to decide.

For these reasons, Appellee respectfully requests this Court affirm the trial court's denial of Appellants' Motion to Dismiss Count III of Appellee's Third Amended Complaint.

V. ARGUMENT

A. UNDER COMMON LAW, PERSONS SELLING ALCOHOLIC BEVERGES HAVE A DUTY TO EXERCISE DUE CARE.

The Indiana Supreme Court has recognized the existence of the common law duty of persons selling alcoholic beverages to exercise due care. *Elder v. Fisher*, 217 N.E.2d 847 (Ind. 1966). In *Elder*, one question before the Court was whether even if there was not a statute in existence, is there a common law cause of action for negligence based upon the sale of alcohol. *Id.* at 850. The Court answered in the affirmative, holding that common law liability applies when a negligent act or omission is a proximate cause of the injury. *Id.* at 853.

Although the Court decided *Elder* before the passage of Indiana's Dram Shop Act, since its passage, the Court has continued to recognize the independent common law duty of those businesses selling alcoholic beverages. *See, e.g., Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217, 1219 (Ind. 1988).

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

1. The Indiana Supreme Court's Holding in *Picadilly* Recognized that Common Law Liability Exists Despite Indiana's Dram Shop Act.

In *Picadilly*, the Indiana Supreme Court reviewed whether the trial court was correct in refusing to issue a jury instruction limiting dram shop liability to a statutory violation of I.C. § 7.1-5-10-15. *Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217, 1219 (Ind. 1988). The *Picadilly* Court held that I.C. § 7.1-5-10-15 “does not represent a legislative attempt to modify the common law with respect to liability of persons negligently furnishing alcoholic beverages. The statute merely designates certain specific conduct, the violation of which is punishable by criminal conduct.” *Id.* at 1220.

The Court specifically addressed the mistake the Court made in its 1984 holding in *Whisman v. Fawcett*, 470 N.E.2d 73 (Ind. 1984). *Id.* In *Whisman*, the Court misinterpreted *Elder's* opinion to limit common law dram shop liability to the absence of a statute. *Id.* This is the same mistake Appellants make. As clarified by the *Picadilly* Court, the *Elder* Court's intention was to recognize common law dram shop liability “**notwithstanding the existence of such statute.**” *Id.* (emphasis added).

On the same day that the Indiana Supreme Court issued the *Picadilly* opinion, it also issued an opinion in *Gariup Construction Co. v. Foster*, 519 N.E.2d 1224 (Ind. 1988). Because the Court issued the *Gariup* and *Picadilly* opinions on the same day, it reasons that the Court intended these cases to be consistent with one another. *Gariup* involved a social host and held that common law liquor liability does not extend to the **purely social host**, except in cases involving a breach of a statutory duty. *Gariup*, 519 N.E.2d at 1228 (emphasis added). However, the *Gariup* opinion did not state that common law liability for negligence in the provision of alcoholic beverages is restricted to cases involving the breach of a statutory duty. *Gariup* specifically restated and approved of the *Picadilly* holding, stating:

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

In *Picadilly*, we **expressly recognized** that the statute does not preempt the common law, but rather designates certain minimal duties which do not thereby relieve persons from otherwise exercising reasonable care.

Gariup Construction Co. v. Foster, 519 N.E.2d 1224, 1227 (Ind. 1988) (emphasis added).

Recent common law also supports that idea that to have negligence per se, there must be an underlying common law duty. See *Stachowski v. Estate of Radman*, 95 N.E.3d 542, 544 (Ind. Ct. App. 2018) (recognizing that in any negligence per se case, the defendant already owes a duty to use reasonable care without reliance on the statute).

2. The *Picadilly* Holding Applies to this Case.

Like in *Picadilly*, here, Appellants argue that the sole basis for liability should derive from Indiana’s Dram Shop Act. Appellants claim that *Picadilly* is inapplicable because it involved conduct that occurred before the Legislature’s 1986 enactment of §15.5. Appellants argue that §15.5 offers complete immunity to dram shops unless § 15.5 allows liability. Appellants are wrong.

The only real difference between *Picadilly* and this case is that *Picadilly* dealt with §15 and its criminal application and this case deals with §15.5 and its civil application. Nothing in *Picadilly*’s holding distinguishes between §15 and §15.5 or limits its holding to §15. Both §15 and §15.5 have the same actual knowledge requirement. There is no reason to believe the Court’s analysis in *Picadilly* would be different were it interpreting §15.5. See I.C. § 7.1-5-10-15 and I.C. § 7.1-5-10-15.5. See also, *Estate of Cummings by Heck v. PPG Industries, Inc.*, 651 N.E.2d 305, 309 (Ind. Ct. App. 1995) (stating that statutes relating to the same general subject matter are in *pari materia* and should be construed consistently and harmoniously, not conflicting).¹

¹ While *Estate of Cummings* was referring to the use of the word “furnish” in statutes I.C. § 7.1-5-10-15.5(a) and § 7.1-5-7-8, the same applies to § 15 and §15.5 of the Dram Shop Act.

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

In *Picadilly*, the Indiana Supreme Court stated:

We conclude that *Elder* did not intend to limit common law dram shop liability to the absence of statute, but rather to recognize the common law liability notwithstanding the existence of such statute.

Under the common law of this State, persons engaged in the business of furnishing alcoholic beverages are not granted special exemption or privilege. **They are under the same duty to exercise ordinary and reasonable care in the conduct of their operations as are those involved in businesses not alcohol related.**

Id. at 1220 (emphasis added). This language is clear. Common law liability exists separately and apart from any statutory liability.

Further, the Court used the wording “such statute.” *Id.* Not “this statute.” Using the phrase “such statute” leads to the conclusion that nothing in *Picadilly*’s holding meant to limit it to cases involving §15.

In 2010, Justice Dickson, who authored the *Picadilly* opinion, authored another opinion where he cited the *Picadilly* holding as: “...common law duty to exercise reasonable care shall exist for alcoholic providers **despite** the enactment of dram shop **statutes.**” *Caesars Riverboat Casino, LLC v. Kephart*, 934 N.E.2d 1120, 1127 (Ind. 2010) (emphasis added). By Justice Dickson’s citation to *Picadilly* and his use of the word “statutes”, it seems clear that the Indiana Supreme Court intended the *Picadilly* holding to stand for the overall proposition that Indiana’s Dram Shop Act, in its entirety, does not abrogate the common law.

Appellant, Wings, Etc., claims support for its argument with the fact that §15.5 does not apply to actions accruing before April 1, 1986. That has nothing to do with *Picadilly*’s application. Whether a statute applies retroactively depends on if the statute is procedural or substantive. *See, e.g., Morrison v. Vasquez*, 124 N.E.3d 1217, 1222 (Ind. 2019).

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

Appellant, Wings, Etc., further points to a footnote in a *Picadilly* and claims that the Court did not intend for its holding to apply to §15.5. This footnote is merely dicta and is not binding. *See, e.g., Hillebrand v. Supervised Estate of Large*, 914 N.E.2d 846, 850 (Ind. Ct. App. 2009) (stating that a footnote's legal value is dicta at best).

B. THE PASSAGE OF THE DRAM SHOP ACT DID NOT ABROGATE THE COMMON LAW DUTY OF PERSONS SELLING ALCOHOLIC BEVERAGES.

1. §15.5 Did Not Abrogate the Common Law.

Appellants also claim that §15.5 is an overall immunity statute, abrogating the common law. However, §15.5 of Indiana's Dram Shop Act is not an overall immunity statute, and common law dram shop liability exists notwithstanding Indiana's Dram Shop Act.

First, nothing in §15.5 states it is an overall immunity statute and abrogates the common law. If that was the Legislature's intention, it would have stated as such. The statute merely sets forth basic elements necessary to establish liability on the part of an alcohol provider. *See, e.g., Picadilly*, 519 N.E.2d at 1220.

Second, when the legislature enacts a statute, courts presume that the legislature does not intend to make any changes in the common law beyond what it declares, either in express terms or by unmistakable implication. *See, e.g., Caesars Riverboat Casino, LLC v. Kephart*, 934 N.E.2d 1120, 1123 (Ind. 2010); *Miami County Board of Commissioners v. US Specialty Insurance Company*, 158 N.E.3d 415, 420 (Ind. Ct. App. 2020); *Buffington v. Metcalf*, 883 F.Supp. 1190, 1193 (S.D. Ind. 1994). As stated by Chief Judge Barker, there is nothing, either in the express terms of §15.5 or by unmistakable implication that indicates that §15.5 intended to preclude common law liability for those furnishing alcohol. *Buffington*, 883 F.Supp. at 1194.

And third, although §15.5 is listed in I.C. §34-30-2.1. *et al.* as a statute outside I.C. 34 that

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

confers immunity, that does not mean §15.5 offers immunity in every situation. In fact, I.C. § 34-30-2.1-1(b) states in part, “Listing in this chapter does not equate to the creation of an immunity from civil liability...”

2. The Cases Holding Any Common Law Liability Claim Must be Linked to a Statutory Breach are Distinguishable from *Picadilly* and the Present Case.

Appellants incorrectly rely on a line of Indiana Court of Appeals cases to argue that §15.5 abrogated the common law for sellers of alcohol. This is wrong. The main cases Appellants rely on are *Weida v. Dowden*, 664 N.E.2d 742 (Ind. Ct. App. 1996); *Thompson v. Ferdinand Sesuicentennial Committee, Inc.*, 637 N.E.2d 178 (Ind. Ct. App. 1994), *Baxter v. Galligher*, 604 N.E.2d 1245 (Ind. Ct. App. 1992), and *Rauck v. Hawn*, 564 N.E.2d 334 (Ind. Ct. App. 1990).

These cases say that common law liability for negligence in the provision of alcoholic beverages is restricted to cases involving the breach of a statutory duty. *Weida*, 664 N.E.2d at 747-48; *Thompson*, 637 N.E.2d at 180; *Baxter*, 604 N.E.2d at 1246, and *Rauck*, 564 N.E.2d at 337. However, *Picadilly*, an Indiana Supreme Court case, is directly on point and no Indiana Supreme Court case has overturned it. And further, these cases are distinguishable from *Picadilly* and the present case.

Baxter and *Rauck* both involved social hosts. The law is different for purely social hosts. As the *Gariup* court held, common law liquor liability does not extend to the **purely social host**, except in cases involving a breach of a statutory duty. *Gariup Construction Co. v. Foster*, 519 N.E.2d 1224 (Ind. 1988). The present case does not involve a purely social host. It involves businesses.

Weida and *Thompson* are distinguishable because both involve injuries to the consumer driver or his or her passenger who also consumed alcohol from the defendant, furnisher. In *Weida*, Michelle Weida was at a wedding with her boyfriend, Firth. 664 N.E.2d at 745. Firth had been drinking. *Id.*

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

Michelle and Firth then left the wedding, and while Firth was driving Michelle home, he crossed the center line of the road and struck another vehicle. *Id.* Michelle and her family sued. *Id.* In *Thompson*, the plaintiff's son was drinking at a beer garden. 637 N.E.2d at 179. He left on his motorcycle and died from injuries sustained when he crashed into the rear of another vehicle. *Id.* The deceased mother sued. *Id.*

On the other hand, in *Picadilly*, after Deborah Brewer left the Picadilly bar, she entered an interstate highway going the wrong direction and collided with the plaintiff. 519 N.E.2d at 1219. The plaintiff sued the bar. *Id.* The plaintiff was an innocent third party. This is the same as the present case. This makes the present case distinct from the court of appeals cases Appellants rely upon.

Estate of Cummings by Heck v. PPG Industries, Inc., 651 N.E.2d 305 (Ind. Ct. App. 1995) is also factually akin to *Picadilly* and the present case. In *Estate of Cummings*, a minor was drinking at an office party at PPG. *Id.* at 307. When he left, he crashed into another car, killing the passenger in that car, Cummings. *Id.* Cummings sued. *Id.* The court first analyzed whether the trial court erred in granting summary judgment for PPG regarding claims that PPG violated Indiana's Dram Shop Act. *Id.* at 308-09. The court analyzed this issue under the following heading: "II. Dram Shop Liability." *Id.* at 308. Next, the court analyzed a second question: whether the trial court erred in granting summary judgment for PPG regarding claims that PPG violated the common-law theory of negligence. *Id.* at 309. The court used a separate heading to address this question: "III. Negligence." *Id.* The court then explained the three elements a plaintiff must prove to recover on a theory of common-law negligence. *Id.* Finally, in the "Conclusion" section, the court held:

We find that the trial court correctly concluded that, as a matter of law, PPG did not violate Indiana's Dram Shop Act and that PPG did not owe a duty to supervise the party or otherwise control Duffy's behavior sufficient to sustain Cummings' common law negligence claim.

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

Id. at 312. The present case is factually akin to *Picadilly* and *Estate of Cummings*. In the present case, Adair left the bar and crashed into another car, killing Nathan Blount. Like in *Picadilly* and the *Estate of Cummings*, this case involves an innocent third party.²

Additionally, the *Weida* opinion can arguably be read another way. Appellants focus on the *Weida* court's statement that common law liability for negligence in the provision of alcoholic beverages is restricted to cases involving the breach of a statutory duty. *Weida*, 664 N.E.2d at 747-48. However, later in the *Weida* opinion, the court acknowledges that §15.5 does not preempt the common law and that common law negligence exists despite the provisions of Indiana's Dram Shop Act. *Id.* at 750.

3. Even if §15.5 is in Abrogation of the Common Law, the *Picadilly* Holding Should Still Apply in Cases Involving Injured Third Parties.

Even if this court decides that §15.5 is a statute in abrogation of the common law, any statute that abrogates the common law must be strictly construed so that only those portions of the common law which the legislature specifically intended to address are modified. *See, e.g., Kosarko v. Padula*, 979 N.E.2d 144, 148 (Ind. 2012). Nothing in §15.5 explicitly mentions claims from third parties. In fact, a strict reading of §15.5 **in its entirety** implies that in both §15.5(b) and §15.5(c), the term "person" refers to a patron (the person who was furnished the alcohol). This strict reading leads to the conclusion that §15.5 is meant to apply only to patrons, not injuries sustained by third party victims.

² Even if this Court finds that these court of appeals cases were correct and a common law claim can only exist in connection with a statutory claim, the Court should still uphold the trial court's holding because Appellee's Third Amended Complaint also pleads that Appellants violated a statutory duty.

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

**C. PUBLIC POLICY SUPPORTS RECOGNIZING THE EXISTENCE OF THE
COMMON LAW DUTY OF PERSONS SELLING ALCOHOLIC BEVERAGES TO
EXERCISE DUE CARE.**

One of the most important public policy considerations should be public safety. The *Picadilly* Court specifically noted the ordinary and reasonable care a dram shop must exercise “for the safety of others...” *Picadilly*, 519 N.E.2d at 1220. The Court gave note to statistics regarding the number of alcohol-related vehicle accidents and deaths. *Id.* The Court cited statistics that show the overwhelming danger drunk driving presents to Indiana’s citizens. Requiring businesses engaged in the sale of alcoholic beverages to exercise ordinary and reasonable care is in the best interest of the public.

These statistics have not improved. According to the Centers for Disease Control, in Indiana, from 2003-2012, there were 2,210 deaths caused by drunk drivers. *See* Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Sobering Facts: Drunk Driving In Indiana (December 2014), https://www.cdc.gov/motorvehiclesafety/pdf/impaired_driving/drunk_driving_in_in.pdf. Further statistics show that in 2016, 2017, 2019, and 2019, alcoholic-impaired collisions in Indiana accounted for over 13 percent (13%) of the state’s traffic fatalities. *See* Indiana State Police Automated Reporting Information Exchange System (ARIES), as of March 17, 2020 and June 15, 2020 (2018 and 2019 impaired driving data). *See also* Indiana University Public Policy Institute, Impaired Driving 2019 (September 2020), <https://www.in.gov/cji/research/files/TS-Impaired-Driving-2019.pdf>.

Protecting the public is not a novel idea either. The Indiana Supreme Court has often provided protection for vulnerable individuals against the unreasonable actions of others. *See, e.g., Livingston v. Fast Cash USA, Inc.*, 753 N.E.2d 572 (Ind. 2001) (holding that payday loan lenders cannot collect finance charges exceeding the statutory maximum annual percentage rate); *Burrell v. Meads*, 569

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

N.E.2d 637 (Ind. 1991) (recognizing that business owners must use reasonable care to protect their customers while on the business premises); *Scott County Sch. Dist. One v. Asher*, 324 N.E.2d 496 (Ind. 1975) (recognizing the ability of minors to avoid or disaffirm contracts).

The Indiana Supreme Court has also recognized that when determining whether a duty exists, an essential question is whether the plaintiff's interests may receive legal protection against the defendant's conduct. *See, e.g., Gariup Construction Co., Inc. v. Foster*, 519 N.E.2d 1224, 1227 (Ind. 1988). Some factors courts have considered include the capacity of the parties to bear the loss, a policy of preventing future injuries, and moral blame attached to the wrongdoer. *Id.* "No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." *Id.*

Appellant, Romo, calls recognizing the common law duty of those selling alcoholic beverages to use reasonable care an "unjustifiable burden" *See App. Roma Br.*, p. 10. Appellee disagrees. Protecting the public from a known and foreseeable danger is beyond justifiable. Businesses that sell alcohol are in the best position to bear the loss for their actions. These businesses are also in the best position to prevent the harm caused by intoxicated patrons. The State of Indiana licenses these businesses to serve alcohol to the public. With this privilege should come the responsibility to exercise due care. Afterall, what is a better justification for holding businesses accountable for exercising due care than protecting the public safety? This is especially true when it comes to protecting vulnerable third parties from the dangerous and foreseeable actions of others. Clearly, the Court had public safety on its mind when writing the *Picadilly* decision, and considering the statistics of injuries and deaths resulting from intoxicated driving, public safety in this matter should remain at the forefront of our courts' minds.

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

D. THE COMMON LAW DUTIES STATED IN APPELLEE’S THIRD AMENDED COMPLAINT EXIST.

To recover on a common law negligence claim, a plaintiff must prove three elements: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; and (3) the plaintiff sustained injuries as a proximate cause of defendant’s breach of duty. *See, e.g., Rhodes v. Wright*, 805 N.E.2d 382, 385 (Ind. 2004). Here, elements (1) and (2) are in question.

Because current law establishes that Appellants owed the decedent a duty, the question becomes what duties Appellants owed the decedent. *See, e.g., Picadilly*, 519 N.E.2d 1217, 1219 (Ind. 1988). In Count III of Appellee’s Third Amended Complaint, Appellee argues that Appellants breached four common law duties: (1) the duty to exercise reasonable care when furnishing alcohol to Adair; (2) the duty to stop intoxicated Adair from leaving their premises; (3) the duty to notify law enforcement that Adair left their premises intoxicated; and (4) the duty to arrange alternative transportation for intoxicated Adair. (Appellant, Wings, Etc., App. Vol. II pp. 57-58.) Appellants argue that duties (2)-(4) do not exist.³

While there may not be case law specifically recognizing duties (2)-(4), there is also no case law stating those duties do not exist. The general common law duty of persons selling alcohol is the duty to exercise due care. *Picadilly*, 519 N.E.2d 1217, 1219 (Ind. 1988). To exercise due care means to act as a reasonable person under the facts and circumstances of the case. *See, e.g., Murray v. Indianapolis Public Schools*, 128 N.E.3d 450 (Ind. 2019); *Elder v. Rutledge*, 27 N.E.2d 358, 361 (Ind.

³ Appellants only argue that if there is a common law duty of those selling alcoholic beverages, three of the four duties Appellee alleges do not exist. Appellants say nothing of the first duty Appellants allege. Therefore, even if this court finds that duties (2)-(4) do not exist, this Court should still affirm the trial court’s holding.

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

1940) (stating that what is due care must always be tempered by surrounding circumstances).⁴ *See also* Restatement (Second) of Torts §283. Whether Appellants acted reasonable under the facts and circumstances of this case is a question for the jury to decide. *See, e.g., Elder v. Rutledge*, 27 N.E.2d 358, 361 (Ind. 1940) (stating what is due care is a question of fact for the jury, so it is generally not proper for a court to declare invariable rules governing situations).

Numerous Restatement sections also offer support for the existence of the above-mentioned common law duties of persons selling alcohol. *See* Restatement (Second) of Torts §302 (stating a negligent act or omission may be one which involves an unreasonable risk of harm to another through the foreseeable action of another or third person), §302A (stating an act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person), and §308 (stating it is negligence to permit a third person to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others).

If there are particular facts in this case that Appellants wish to argue, a motion to dismiss is also not the proper means to do so. A motion to dismiss for failure to state a claim tests the legal sufficiency of a claim, not the supporting facts. *See, e.g., Kitchell v. Franklin*, 997 N.E.2d 1020, 1025 (Ind. 2013). The court should view the pleadings in the light most favorable to the nonmoving party and the court should construe every reasonable inference in favor of the nonmoving party. *Id.* Here, the facts most favorable to the Appellee show that Appellants owed the decedent the duty to exercise

⁴ Although this case is discussing reasonable care, Indiana law does not recognize degrees of care. *See, e.g., Midwest Motor Coach Co. v. Elliott*, 182 N.E. 541, 542 (Ind. Ct. App. 1932) (stating that courts regard the terms “due care”, “ordinary care”, and “reasonable care” as having the same significance).

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

due care. What constitutes due care is fact sensitive, and Appellee should be allowed to proceed with Appellee's common law claims against Appellants.

VI. CONCLUSION

For all the foregoing reasons, the Appellee, Leah Niebauer, as Special Representative of the Estate of Nathan Blount, respectfully requests this Court affirm the trial court's holding and for all other just relief in the premises.

Respectfully submitted,

/s/ Sara A. Langer

Jon F. Schmoll, #192-45

Steven L. Langer, #9853-64

Sara A. Langer, #34675-53

LANGER AND LANGER

4 Indiana Avenue

Valparaiso, IN 46383

Telephone: 219-464-3246

Facsimile: 219-462-4198

jschmoll@langerlaw.com

slanger@langerlaw.com

salanger@langerlaw.com

Attorneys for Appellee, Leah Niebauer, as Special
Representative of the Estate of Nathan Blount

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words.

/s/ Sara A. Langer

Jon F. Schmoll, #192-45

Steven L. Langer, #9853-64

Sara A. Langer, #34675-53

LANGER AND LANGER

4 Indiana Avenue

Valparaiso, IN 46383

Telephone: 219-464-3246

Facsimile: 219-462-4198

jschmoll@langerlaw.com

slanger@langerlaw.com

salanger@langerlaw.com

Attorneys for Appellee, Leah Niebauer, as Special
Representative of the Estate of Nathan Blount

Brief of the Appellee, Leah Niebauer,
as Special Representative of the Estate
of Nathan Blount,

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 11, 2023, the brief of Appellee, Leah Niebauer, as Special Representative of the Estate of Nathan Blount, was filed electronically through the Indiana E-filing System with the Clerk of the Indiana Court of Appeals and served on the following counsel through the Indiana E-filing System:

Orfej P. Najdeski
Amalia J. Gemelas
KOPKA, PINKUS & DOLIN, PC
550 Congressional Blvd., Suite 310
Carmel, IN 46032

Alyssa N. Speichert
Nicholas T. Otis
Newby Lewis Kaminski & Jones
916 Lincolnway
LaPorte, IN 46350

J. Thomas Vetne
Brian R. Gates
Jones Obenchain, LLP
130 S. Main St., Suite 400
P.O. Box 4577
South Bend, IN 46634

/s/ Sara A. Langer
Sara A. Langer