DIVISION ONE
FILED: 08/26/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CYMONE J. ANDERSON; GWENDOLYN MOORE, individually and as a natural mother and next best friend of CYMONE J. ANDERSON, an incapacitated adult; and ERIC ANDERSON, JR.,	1 CA-CV 09-0254
	DEPARTMENT C
	MEMORANDUM DECISION
	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
Plaintiffs/Appellants,	
v.	
MATADOR MEXICAN FOOD RESTAURANT, INC.; GRAHAM BROTHERS ENTERTAINMENT OF TEMPE LIMITED PARTNERSHIP, dba GRAHAM CENTRAL STATION,	
Defendants/Appellees.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-017444, CV2007-011013, CV2008-013785
(Consolidated)

The Honorable Edward O. Burke, Judge

AFFIRMED

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And Matthew MacLeod
And
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S W A N N, Judge

¶1 Gwendolyn Moore, Cymone Anderson, and Eric Anderson, Jr. (collectively, "plaintiffs") appeal from the superior court's grant of summary judgment for Matador Mexican Food Restaurant, Inc. ("Matador") and Graham Brothers Entertainment of Tempe Limited Partnership, ("Graham") d/b/a Graham Central Station. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Because we are reviewing a decision granting summary judgment in favor of Matador and Graham, we view the facts in the light most favorable to plaintiffs. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

¶3 Matador and Graham are liquor licensees that operate businesses in Phoenix and Tempe, respectively. On the evening of June 23, 2006, Deanna Devon Charles and her friend Victoria drove to Matador in Deanna's car. They began drinking at Matador at approximately 11:00 p.m. At approximately 12:30 a.m. on June 24,

2006, Deanna called her sister, Nicole, and asked to be picked up. Shortly thereafter, Nicole and her friend Loren met Deanna at her parked car. They observed that Deanna appeared to be intoxicated, and when Deanna asked them to transport her and Victoria to Graham Central Station, they agreed to do so. Matador did not confirm that Nicole and Loren would be providing Deanna's transportation.

¶4 Loren drove Deanna and Victoria to Graham Central Station in Deanna's car, and Nicole followed in a separate vehicle. Loren dropped Deanna and Victoria at Graham Central Station at approximately 1:00 a.m., watched them enter, and then met Nicole at a nearby convenience store.

¶5 According to a toxicology expert's calculation, Deanna consumed liquor at Graham Central Station. She left the establishment at closing time, 2:00 a.m. Loren, who was still driving Deanna's car, then picked up Deanna and Victoria in the parking lot. Loren did not see or speak to any Graham Central Station employees. He and Nicole observed that Deanna appeared to be even more intoxicated than before – she was staggering and leaning on Victoria.

¶6 Loren drove Victoria to her residence and then drove Deanna to her apartment, where Nicole had already arrived in her own vehicle. Stopping only once during the trip (to allow Deanna to urinate on the street), Loren arrived at Deanna's apartment at

approximately 3:00 a.m. Deanna had difficulty getting out of the car, and had to be helped up the stairs to her apartment. Loren put Deanna in her bedroom and left her car keys on a table by the door. Loren and Nicole then left the apartment, leaving Deanna's car. There was no liquor in the apartment.

¶7 Sometime between 3:00 a.m. and 3:45 a.m., Deanna left her apartment in her car. When she failed to stop at a red light, she caused a collision that seriously injured plaintiffs Cymone and Eric Anderson. At the time of the collision, Deanna's blood alcohol concentration was 0.19%.

¶8 Plaintiffs filed a complaint against Matador and Graham for negligence and negligence per se pursuant to A.R.S. §§ 4-244(14) and 4-311. Plaintiffs Cymone and Eric Anderson also filed separate negligence complaints against Deanna; those complaints were consolidated with the complaint against Matador and Graham. Graham moved for summary judgment, asserting, *inter alia*, that Deanna's decision to leave her apartment was an intervening and superseding cause of plaintiffs' injuries. The superior court agreed. The court entered judgment in favor of Graham and Matador,[1] and dismissed all claims against them.[2]

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[1] The parties had stipulated that summary judgment would be entered in favor of Matador, which had not filed a motion for summary judgment, on the same ground as for Graham.

[2] The court originally dismissed the "Complaint in its entirety," but the parties later stipulated to an amended *nunc*

¶9 Plaintiffs timely appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

STANDARD OF REVIEW

¶10 We review the grant of summary judgment *de novo*, *Andrews*, 205 Ariz. at 240, ¶ 12, 69 P.3d at 11, and will affirm if the superior court's ruling is correct for any reason. *Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986).

DISCUSSION

¶11 To establish a negligence claim, a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) the defendant's failure to conform to that standard; (3) a reasonably close causal connection between the defendant's conduct and the plaintiff's resulting injury; and (4) actual damages. *Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983).

¶12 In Arizona, a liquor licensee has a duty "to exercise affirmative, reasonable care in serving intoxicants to patrons who might later injure themselves or an innocent third party, whether on or off the premises." *Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 438, ¶ 13, 153 P.3d 1064, 1067 (App. 2007) (citing *Ontiveros*, 136 Ariz. at 508-11, 667 P.2d at 208-11; *Brannigan v. Raybuck*, 136 Ariz. 513, 515-17, 667 P.2d 213, 215-17

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pro tunc judgment that contained Ariz. R. Civ. P. 54(b) language. The amended judgment acknowledged that plaintiffs' claims against Deanna remained.

(1983)). To recover for negligence, a plaintiff also must show that the liquor licensee's negligent conduct was the proximate cause of his injury. *Hebert v. Club 37 Bar*, 145 Ariz. 351, 353, 701 P.2d 847, 849 (App. 1984). Similarly, to recover under Arizona's "dramshop statute," A.R.S. § 4-311 (Supp. 2009),[3] the plaintiff must show that a licensee sold liquor to an obviously intoxicated[4] person and that person's consumption of the liquor was a proximate cause of the plaintiff's injury.

¶13 Whether proximate cause exists is usually a question for the jury; however, summary judgment is appropriate where reasonable people could not differ. *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990). "The proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred." *Id.* "An intervening cause is an independent cause that intervenes between defendant's original negligent act or omission and the final result and is necessary in bringing about that result." *Id.* An intervening cause becomes a superseding

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[3] We cite the current version of statutes when no revisions material to our decision have since occurred.

[4] "Obviously intoxicated" means "inebriated to such an extent that a person's physical faculties are substantially impaired and the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction that would have been obvious to a reasonable person." A.R.S. § 4-311(D) (Supp. 2009) (previously § 4-311(C)).

cause, and thereby relieves the defendant of liability, when the intervening cause was "unforeseeable by a reasonable person in the position of the original actor *and* when, looking backward, after the event, the intervening act appears extraordinary." *Ontiveros*, 136 Ariz. at 506, 667 P.2d at 206.

¶14 Here, the superior court found an intervening and superseding cause based on *Patterson*. In *Patterson*, a tavern employee confiscated an intoxicated patron's car keys, used a different vehicle to drive the patron to her residence, returned the patron's keys to her, and left. 214 Ariz. at 436, ¶ 3, 153 P.3d at 1065. Within an hour, the patron secretly returned to the tavern parking lot, retrieved her car, and caused a collision. *Id.* The injured plaintiff filed suit against the tavern. *Id.* at ¶ 4. The superior court granted summary judgment in favor of the tavern. *Id.* at 436-37, ¶ 5, 153 P.3d at 1065-66. We affirmed on two grounds.

¶15 First, we held that by separating the patron from her car and providing her safe transportation to her residence, the tavern had fulfilled its legal duty of care to the patron and the public. *Id.* at 439, ¶ 16, 153 P.3d at 1068. Second, we held that even if the tavern had breached its duty, an intervening and superseding cause relieved it of liability. *Id.* at 439-40, ¶¶ 17-19, 153 P.3d at 1068-69. We explained:

> Certainly, it is foreseeable to a tavern owner that patrons of the tavern may become involved in a motor vehicle accident after being served liquor past the point of intoxication.
>
> However, that statement does not end our analysis because the question remains whether the intervening acts of separating [the patron] from her vehicle and driving her home broke the chain of legal causation such as to relieve [the tavern] of liability in this case. We conclude that they did. Although, as [the plaintiff] correctly notes, "[i]t is well known that highly intoxicated people make poor decisions," finding proximate causation based on such reasoning is simply too attenuated and might ultimately subject tavern owners to unlimited liability, a result that would no more serve public policy than finding nonliability in all circumstances. Instead, we hold that *[the patron's] decision to return that night to retrieve her vehicle while she was still intoxicated was unforeseeable and extraordinary and thus constituted a superseding, intervening event of independent origin that negated any negligence on the part of the tavern or its employees*.

Id. at 440, ¶¶ 18-19, 153 P.3d at 1069 (emphasis added) (internal citation omitted).

¶16 Matador and Graham contend that pursuant to *Patterson*, Deanna's decision to leave her apartment after having been transported there by Loren and Nicole was an intervening and superseding cause of plaintiffs' injuries. Plaintiffs contend that *Patterson* is distinguishable because unlike the tavern in *Patterson*, neither Matador nor Graham took any action to ensure that a sober driver would transport Deanna from their premises, place her in a safe location, and take reasonable steps to

ensure that she would not have access to an automobile while she was still intoxicated.

¶17 Plaintiffs' argument addresses breach of duty, rather than causation. To be sure, Matador and Graham may well have breached their duties, and for purposes of our decision we assume that they did. But causation requires a different inquiry. Had the accident occurred as Deanna was driving herself home from a bar, the result here would be different. But the chain of events established by the undisputed facts compels us to recognize that the risk caused by an intoxicated driver, who has safely reached her home and has no known compelling reason to leave, cannot reasonably be said to fall within the risk created by a licensee's act of serving a patron too much alcohol.[5] The latter risk lies chiefly in the fact that a person who becomes intoxicated at a commercial establishment may be unable to return to her home or other place of repose safely. But when the patron has safely been transported home, the risk of her deciding to leave home and take to the roads is no different than if she had become intoxicated at home with alcohol purchased at a store in package form.

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[5] At oral argument on appeal, plaintiffs' counsel contended that an intoxicated patron's negligent acts are always foreseeable, and a liquor licensee's liability is always a question of fact, until intoxication ends. We reject that theory, as it is inconsistent with *Patterson* and would impose essentially unlimited liability.

¶18 As *Patterson* expressly acknowledged, where there is an intervening and superseding cause, a tavern cannot be held liable regardless of breach. We agree with Matador and Graham that as in *Patterson*, Deanna's independent decision to leave her apartment and drive was an intervening and superseding cause that broke the chain of proximate causation. Accordingly, summary judgment in favor of Matador and Graham was appropriate.[6]

¶19 Pursuant to A.R.S. § 12-342 and ARCAP 21, Graham requests an award of costs on appeal. Matador expressly waives any right to recover costs. Because A.R.S. § 12-342 is mandatory, we award Graham its costs on appeal.

CONCLUSION

¶20 For the reasons set forth above, we affirm the superior court's grant of summary judgment in favor of Matador and Graham.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge

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[6] Because we conclude that summary judgment was appropriate on causation grounds, we need not address the issues raised in the parties' appellate briefs regarding duty and breach.