STATE OF MICHIGAN

COURT OF APPEALS

JEFFERY FINLEY,

Plaintiff-Appellant,

v

MATTHEW DAVID LAKE and BROHMAN ONE STOP, INC.,

Defendant/Cross-Plaintiffs-Appellees.

UNPUBLISHED
December 15, 1998

No. 203976
Newaygo Circuit Court
LC No. 95-015304 NS

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Plaintiff Jeffery Finley appeals as of right from a judgment in his favor against defendant Matthew David Lake, which was entered on May 21, 1997, following a trial. On appeal, plaintiff challenges a May 10, 1996, order granting summary disposition to defendant Brohman One-Stop, Inc. ("Brohman") pursuant to MCR 2.116(C)(10) after the court determined that there was no genuine issue of material fact with regard to whether Brohman sold alcohol to Lake in contravention of the Michigan Dramshop Act, MCL 426.22; MSA 18.993. We affirm.

Whether the trial court properly ordered summary disposition under MCR 2.116(C)(10) is a question of law that this Court reviews de novo. *Professional Rehabilitation Ass'n v State Farm Mutual Automobile Ins Co*, 452 Mich 857; 550 NW2d 794 (1996); *Pro Rehab v State Farm (On Remand)*, 228 Mich App 167, 170; 577 NW2d 909 (1998). In the matter at hand, plaintiff argues that deposition testimony from his expert witness, as well as other individuals who were with Lake prior to the car accident, circumstantially prove that Lake was visibly intoxicated at the time Brohman allegedly sold him alcohol. Therefore, plaintiff contends, the trial court erred by granting the motion for summary disposition. This Court must look at all of the evidence in the lower court record in the light most favorable to plaintiff as the nonmoving party, giving him the benefit of every reasonable doubt. *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998). However, we emphasize that a plaintiff must present more than mere allegations in order to demonstrate that there was a genuine issue of material fact. *Etter v Michigan Bell*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

The Michigan Dramshop Act provides the legal context for this appeal, and specifically provides that a retail licensee like Brohman may be found liable for a plaintiff's injury if it "directly or indirectly . . . sell[s], furnish[es], or give[s]" alcohol to a visibly intoxicated person. MCL 436.22(3); MSA 18.993(3). A plaintiff in a dramshop action must also show that the dramshop's decision to sell or dispense alcohol to the allegedly intoxicated person ("AIP") was a proximate cause of his injury. *McKnight v Carter*, 144 Mich App 623, 629; 376 NW2d 170 (1985). Merely showing that the AIP drank intoxicating beverages is insufficient to make the causal connection between the dramshop's actions and the plaintiff's injury. *Id*. Consequently, the Michigan Dramshop Act only imposes liability on the person or establishment selling alcohol when the buyer who caused injury to the plaintiff was *visibly* intoxicated at the time of the sale. *Plamondon v Matthews*, 148 Mich App 737, 740; 385 NW2d 273 (1986). A person is visibly intoxicated when he exhibits signs or symptoms from which an ordinary observer would conclude that he is not sober. *Miller v Ochampaugh*, 191 Mich App 48, 57; 477 NW2d 105 (1991). This is an objective standard focusing on the AIP's behavior and demeanor at the time and in the place the dramshop provides him with alcohol. *Id*. at 58-60.

While we acknowledge the potential persuasiveness of circumstantial evidence, we find that plaintiff has failed to demonstrate how the evidence on the record tended to show that Lake went into Brohman's store, that Lake was visibly intoxicated at the time, and that Brohman's employees directly or indirectly sold, gave, or furnished him with alcohol. The record is devoid of evidence that would account for Lake's appearance and actions after he left the social gathering and before the accident occurred. Even plaintiff's expert toxicologist was unable to come to any sort of firm conclusion on the likelihood of Lake appearing visibly intoxicated at the time plaintiff alleged that Lake went to Brohman's store. If plaintiff has deposition testimony, surveillance videotapes, or any other evidence that would support his case by clarifying how Lake appeared when he went to Brohman's store, he did not provide them at the time of the motion for summary disposition. That Lake drank alcohol earlier in the evening and had a measurable blood alcohol level more than an hour after the accident does not convey any information about Lake's demeanor at Brohman's store or about his interaction, if any, with the store employees. *McKnight*, *supra* at 629-30. Plaintiff's evidence shows that, in all likelihood, Lake's alcohol consumption played a role in the accident, which is relevant to Lake's liability in this case. The evidence does not, however, show a causal connection between any action by Brohman and the accident, as the Michigan Dramshop Act requires.[1]

After carefully reviewing the record in this case in a light most favorable to plaintiff, we find that the record in this case could not have been further developed at trial to show that Brohman sold, furnished, or gave alcohol to a visibly intoxicated Matthew Lake. Accordingly, the trial court did not err when it granted summary disposition to Brohman.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Richard A. Bandstra

[1] Plaintiff relies heavily on what he characterizes as the Michigan Supreme Court's decision in *McKenzie v Taft*, 434 Mich 858; 450 NW2d (1990), to suggest that the factfinder could have considered circumstantial evidence of intoxication, such as a blood alcohol concentration upon arrest, to infer that Lake was visibly intoxicated when Brohman sold, gave or furnished him with alcohol. Plaintiff also suggests that *McKenzie* holds that where numerous individuals saw the allegedly intoxicated person and did not believe him to be visibly drunk, those witnesses need not submit affidavits or deposition testimony to establish that a genuine issue of material fact exists because the weight of that evidence will turn on credibility, which is for the factfinder to determine at trial. *Id*. at 861.

Plaintiff's reliance on *McKenzie* is misplaced for at least two reasons. First, the language on which defendant relies is taken from a dissenting justice to the Supreme Court's decision to deny the plaintiff leave to appeal. See MCR 7.321. Second, even if we were to assume that Justice Levin's dissent in *McKenzie* had precedential effect, the present case is factually distinguishable. Plaintiff confuses the ability of a factfinder to weigh credibility with the current situation in which we are certain the factfinder will have no evidence to weigh.