STATE OF MICHIGAN

COURT OF APPEALS

JUSTIN CARPENTER,

Plaintiff-Appellant,

v

DONNA LEE SIMONIAN and COREY MICHAEL DESROSIERS,

Defendants,

and

SPEEDY Q MARKETS, INC.,
Defendant-Appellee/Cross-Plaintiff,

and

JOHN ALBERT SIMONIAN and KEVIN JAMES LINDKE,

Defendants/Cross-Defendants.

UNPUBLISHED
July 27, 2004

No. 247258
St. Clair Circuit Court
LC No. 01-002601-NI

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

In this dramshop action, plaintiff Justin Carpenter appeals by leave granted from the trial court's order granting summary disposition under MCR 2.116(C)(10) as to defendant Speedy Q Markets, Inc. Plaintiff was injured in a car accident when the driver, John Simonian, lost control of the vehicle. The vehicle occupants, all under the legal drinking age, had consumed beer at plaintiff's home earlier that day and had bought and consumed more beer shortly before the accident. Kevin Lindke, who had a false identification card, purchased the beer at defendant's store. Because defendant cannot be held liable where plaintiff's injuries were not caused by the minor who purchased the beer, we affirm.

We conduct a de novo review of a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). In reviewing a motion granted under (C)(10), this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Michigan Ed Employees Mutual Ins Co v Turow*, 242

Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

The Michigan Liquor Control Code of 1998, MCL 436.1801 *et seq.* provides in pertinent part:

> (2) A retail licensee shall not directly, individually, or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a minor except as otherwise provided in this act. A retail licensee shall not directly or indirectly, individually or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a person who is visibly intoxicated.
>
> (3) Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death. In an action pursuant to this section, the plaintiff shall have the right to recover actual damages in a sum of not less than $50.00 in each case in which the court or jury determines that intoxication was a proximate cause of the damage, injury, or death. [MCL 436.1801(2), (3).]

It is well-settled that in the case of selling alcohol to a minor, the retail licensee will only be held liable where the purchasing minor is the person who causes injury to another. *Id.*; *Dobson v Maki*, 184 Mich App 244, 249; 457 NW2d 132 (1990). Here, plaintiff has demonstrated only that a minor purchased alcohol with fraudulent identification, not that the purchasing minor caused the injuries to plaintiff. Instead the fact is that the purchasing minor gave the alcohol to another minor who then struck plaintiff's vehicle. A literal reading of MCL 436.1801 mandates that plaintiff has no cause of action against the retail licensee under the circumstances and therefore the trial court properly granted summary disposition to defendant.

Where a purchaser is legally acting as an agent for the recipient of the alcohol, the defendant-seller could be liable for damages caused by the recipient "under proper circumstances." *Meyer v State Line Super Mart, Inc*, 1 Mich App 562, 569; 137 NW2d 299 (1965). In order to prevail in such an action, plaintiff must both allege and prove that defendant was "informed that [the purchaser] was purchasing for others or that the circumstances surrounding such purchases would indicate to defendant that such was the fact." *Id.*; see also *Verdusco v Miller*, 138 Mich App 702; 360 NW2d 281 (1984). Defendant argues that Lindke's suspect identification and alleged visual intoxication constitute sufficient evidence to put defendant Speedy Q Markets, Inc. on notice that his purchase of alcohol was for others. We disagree. The fact that Lindke used fraudulent identification to buy beer does not raise any inference that the purchase was intended to benefit others, nor does the fact that he purchased a "twelve pack." Accordingly, plaintiff's claim fails on this issue.

We find that the circumstances alleged by plaintiff did not establish a genuine issue of material fact regarding an indirect sale. See *Maldonado v Claud's, Inc*, 347 Mich 395; 79 NW2d 847 (1956) (holding that defendant was not liable for an indirect sale where there was "no proof tending to show that [the buyer] made any statement to any of defendant's agents or employees indicating that he was making the purchase for others, or that the circumstances known to defendant suggested that such was the fact"). Plaintiff presented no evidence that defendant knew Lindke was purchasing alcohol for Simonian. And, we find that where a patron buys a twelve-pack of cold beer, that purchase does not, as a matter of law, serve to alert a clerk that the alcohol will be shared with others. Plaintiff presented no evidence that could lead a reasonable jury to conclude that the clerk knew or should have known of an agency; in fact, the only testimony plaintiff presented from the clerk's deposition was her statement that she did not see any other customers in the store.

Finally, we also reject plaintiff's apparent attempt to inject a negligence standard into his claim by proffering that the clerk should have looked out of the store and seen the other three gentlemen waiting in the car (despite the fact that plaintiff presented no evidence that the car was visible). The dramshop act preempts common-law claims for injuries arising out of the unlawful selling of intoxicants.[1] *Moran v McNew*, 134 Mich App 764; 351 NW2d 881 (1982).

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[1] Where a retail licensee sells liquor to a visibly intoxicated person, then the seller may be liable if the visibly intoxicated person causes injury to a plaintiff. *Id.*; MCL 436.1801(2), (3). In *Walling v Allstate Ins Co*, 183 Mich App 731; 455 NW2d 736 (1990), we set forth the elements a plaintiff must prove to succeed in holding the seller liable where it is alleged the seller sold alcohol to a visibly intoxicated person:

> In order to recover under the dramshop act, plaintiffs must prove that (1) decedent was injured by the wrongful or tortious conduct of an intoxicated person, (2) the intoxication of that person was the sole or contributing cause of decedent's injuries, and (3) defendants sold, gave or furnished to the alleged intoxicated person the alcoholic beverage which caused or contributed to that person's intoxication. *McKnight v Carter*, 144 Mich App 623, 629; 376 NW2d 170 (1985), lv den 424 Mich 859 (1985). [*Walling, supra* at 738-739.]

Plaintiff argues that because there were signs that should have alerted defendant's clerk that Lindke was using false identification and that he was visibly intoxicated defendant is responsible for the injuries that occurred after Lindke shared the alcohol with another person who was not present in the store and who then caused an accident. Plaintiff is incorrect: to state a cause of action under this section plaintiff must show that the visibly intoxicated person caused the injury.

Affirmed.

/s/ Henry William Saad
/s/ Michael J. Talbot
/s/ Stephen L. Borrello