STATE OF MICHIGAN

COURT OF APPEALS

RONALD UPLINGER, JR.,

Plaintiff-Appellant,

v

JEFFREY HOWE, JEREMY NISE, LINDA NISE, DAVID KEITH GRAY, PAUL D. GRAY, and BRADLEY ASHCRAFT,

Defendants,

and

ROY C. HERBERT, Personal Representative of the Estate of THOMAS A. GRABMAN, and SALLI GRABMAN,

Defendants-Appellees.

UNPUBLISHED
March 20, 2012

No. 302829
Ottawa Circuit Court
LC No. 08-060866-NZ

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals following the circuit court's granting of summary disposition in favor defendants Grabman. We affirm.

Plaintiff was seriously injured as the result of an altercation at a party at the Grabman residence in April 2007 hosted by Mrs. Grabman's son, Bradley Ashcraft, who was then a junior in high school. The party was held after the high school prom, it took place in the area of a pole barn on the Grabman property. Approximately 75 to 100 guests were at the party, some specifically invited and others who apparently showed up uninvited who had heard of the party by word of mouth. Despite the fact that many (though not all) of the attendees were under the age of 21, alcohol was served at the party.

Plaintiff was one of the attendees and was 19-years-old at the time. Defendant Howe was 24-years-old at the time and was one of the "word of mouth" invitees, having heard about the party by defendant Jeremy Nise. Nise and Howe arrived at the party together. They had already consumed alcohol before their arrival and continued to drink at the Grabman residence. At some point, Howe and plaintiff got into an argument, which escalated into a physical altercation. Nise

and Howe left the party and went to the home of defendants David and Paul Gray.[1] Thereafter, Nise and Howe returned to the party, along with the Gray brothers, armed with various weapons (baseball bats, knives, and a pipe). Howe attacked plaintiff with a baseball bat, hitting him in the head. As a result of the attack, Howe was hospitalized at St. Mary's Hospital Brain Trauma ICU in Grand Rapids and thereafter underwent rehabilitation at Mary Free Bed Hospital. Plaintiff alleges that he has sustained brain injuries as a result of the attack. Defendant Howe was convicted of assault with intent to do great bodily harm. MCL 750.84.

Plaintiff filed suit against the various individuals involved in the incident. But only the claims against the Grabmans are at issue in this appeal. The trial court granted summary disposition in their favor and plaintiff challenges that grant of summary disposition on appeal. We affirm.

The trial court granted summary disposition under MCR 2.116(c)(10), concluding that there was no genuine issue of material fact that (1) there was no evidence that the Grabmans knowingly allowed minors to consume alcohol on their premises and (2) that criminal acts cannot form the basis for social host liability.

We need not, however, resolve these issues because defendants in their brief point out the ultimate flaw in plaintiff's argument: Howe is over the age of 21 and was over the age of 21 at the time of the party. Social host liability in Michigan cannot be premised on serving alcohol to an adult. In *Longstreth v Gensel*, 423 Mich 675, 686; 377 NW2d 804 (1985), the Court recognized that furnishing alcohol to a minor creates a rebuttable presumption of negligence. But the Court also made it clear that the common law principle that it is "the drinking of liquor, rather than the furnishing of it, [that is] the proximate cause of the injury" continues to apply with regards to furnishing alcohol to an adult unless that rule is modified by the Supreme Court or the Legislature. *Id.* at 684, 686.

This Court recognized this point in *Ribbens v Jawahir*, 175 Mich App 540, 542; 438 NW2d 252 (1988), where it stated:

> Michigan case law is clear. Social host liability, predicated upon violation of the Liquor Control Act, does not extend to social hosts who serve alcohol to an adult who subsequently injures a third party as a result of his intoxication.

In *Ribbens*, the plaintiff was injured in an automobile accident caused by an allegedly intoxicated driver. That driver was over 21 and had consumed alcohol at a party hosted by the defendants' 19-year-old son at their residence.

[1] We note that the parties spell the last name "Grey" in their briefs. Both spellings, "Gray" and "Grey" are used in various lower court documents, sometimes both variations in the same document. Because the spelling "Gray" was used in the final judgment, we shall use that spelling in this opinion.

This is not to say that we view the trial court's reasoning as being incorrect. With regards to whether there is a "criminal acts exception" to social host liability, this issue was settled by this Court in *Rogalski v Tavernier*, 208 Mich App 302, 307; 527 NW2d 73 (1995), wherein this Court held as follows:

> When the Court in *Longstreth* held social hosts liable for the actions of minors to whom they had served alcohol, it did so in the context of alcohol-related automobile accidents. Such accidents are a danger clearly foreseeable by social hosts. However, criminal or violent acts are not foreseeable results of the serving of alcohol to minors and, therefore, cannot serve as a basis for social host liability.

Plaintiff does point out that a subsequent panel of this Court in *Nichols v Dobler*, 253 Mich App 530, 534; 655 NW2d 787 (2002), distinguished *Rogalski* on the basis that *Rogalski* involved "an attempt by the intoxicated minor to recover respecting the consequences of his own criminal or violent actions" while *Nichols* involved an adult victim of the criminal acts of an allegedly intoxicated minor.

But plaintiff's reliance on *Nichols* is misplaced. First, while the *Rogalski* Court could, as *Nichols* points out, have decided the case with a somewhat narrower holding, it did not. Second, we are somewhat dubious about the validity of the basis that *Nichols* used to distinguish itself from *Rogalski*. While one of the plaintiffs in *Rogalski* was the intoxicated minor herself, there were other plaintiffs (family members) who claimed injury as well. Thus, while the distinction drawn by *Nichols* might have justified dismissing the claim by one of the plaintiffs, it did not adequately address the claims by the remaining plaintiffs. Therefore, the broad statement in *Rogalski* would seem to be necessary to the resolution of the case. Third, and most important, the plaintiff in *Nichols* was injured by the criminal acts of the allegedly intoxicated minor, while in the case at bar plaintiff was injured by the acts of an allegedly intoxicated adult. This brings us back to our original point, that social host liability cannot be based upon furnishing alcohol to an adult.

Similarly, we do not necessarily disagree with the other point upon which the trial court based its decision, that the Grabmans did not knowingly allow minors to consume alcohol at the party. See MCL 750.141a. Mrs. Grabman denied being home at the time of the party and Mr. Grabman claimed that he was asleep in the house during the party. Plaintiff does make a compelling circumstantial case that perhaps the Grabmans were aware that alcohol would be served at the party. Plaintiff could potentially present evidence at trial that Ashcraft had hosted a number parties at the residence in which alcohol was served to minors, with the Grabmans' knowledge and approval. This might lead one to conclude that the Grabmans should have expected that alcohol would be served at this party.

But ultimately plaintiff is unable to point to any evidence that the Grabmans had actual knowledge that alcohol was being served at the party. Mrs. Grabman left before the party started and the alcohol arrived (brought by one of Ashcraft's friends). And while plaintiff does call into

question Mr. Grabman's claim that he slept through the party as being incredible in light of the number of attendees at the party and the likelihood of resulting noise,[2] plaintiff does not point to a single witness who would testify that Mr. Grabman actually made an appearance at the party and observed the alcohol. Thus, at best, plaintiff can make a showing of willful ignorance by Mr. Grabman rather than actual knowledge. And we agree with the trial court that MCL 750.141a requires actual knowledge of the consumption or possession of alcohol by the minors on the premises.

MCL 750.141a(2) prohibits a person to "knowingly allow" a minor to consume or possess alcohol at a social gathering. Under MCL 750.141a(1)(b), the term "allow" does include "any form of conduct, including a failure to take corrective action, that would cause a reasonable person to believe that permission or approval has been given." Had Mr. Grabman actually visited the party in question, observed the drinking, and went back to the house without taking "corrective action," it could certainly be said that he violated the statute. But we do not believe that his remaining in the house and not visiting the party to see if there was drinking constitutes a violation. Nothing in MCL 750.141a imposes an obligation to investigate a suspicion that underage drinking is occurring, no matter how well-founded such a suspicion might be. Indeed, the statute repeatedly uses the word "knowingly," strongly suggesting a requirement of actual knowledge. Moreover, subsection (6) creates a rebuttable presumption where, among other things, the defendant "knew that a minor was consuming or in possession of an alcoholic beverage . . . ." MCL 750.141a(6)(b). The statute does not state "knew or should have known" or words to that effect. Accordingly, we agree with the trial court that actual knowledge, not merely a very strong suspicion or a showing of "should have known" is required under the statute.

For the above reasons, we conclude that the trial court properly granted summary disposition in favor of the Grabmans.

Affirmed. Defendants may tax costs.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Amy Ronayne Krause

[2] We do note that Mr. Grabman later died of a drug overdose. Thus, while plaintiff may speculate that Mr. Grabman would not have been able to sleep through the noise of the party, one might also speculate that he was under the influence of drugs at the time and that "passed out" potentially was a more accurate description than was "sleeping."