IN THE COURT OF APPEALS OF IOWA

No. 3-265 / 12-1455
Filed June 12, 2013

MICHAEL HAWTHORNE and
LENA HAWTHORNE,
Plaintiffs-Appellants,

vs.

ESTATE OF JONATHON KROMMENHOEK,
Deceased, RYAN ROSS, Administrator;
STEPHANIE FERDIG; MARVIN J. STONE;
THERESA FERDIG; MONTERREY II,
LLC, d/b/a MONTEREY,
Defendants,

LAVI 2, INC., d/b/a CORNER POCKET,
Defendant-Appellee.

JOHN MALAISE,
Plaintiff-Appellant,

vs.

ESTATE OF JONATHON KROMMENHOEK,
Deceased, RYAN ROSS, Administrator;
STEPHANIE FERDIG; MARVIN J. STONE;
THERESA FERDIG; MONTERREY II, LLC,
d/b/a MONTEREY,
Defendants,

LAVI 2, INC., d/b/a CORNER POCKET,
Defendant-Appellee.

CHERYL K. KLEIN,
Plaintiff-Appellant,

vs.

ESTATE OF JONATHON KROMMENHOEK,
Deceased, RYAN ROSS, Administrator;
STEPHANIE FERDIG; MARVIN J. STONE;

THERESA FERDIG; MONTERREY II, LLC, d/b/a MONTEREY,
Defendants,

LAVI 2, INC., d/b/a CORNER POCKET,
Defendant-Appellee.

Appeal from the Iowa District Court for Woodbury County, James D. Scott, Judge.

Plaintiffs Michael Hawthorne, Lena Hawthorne, John Malaise, and Cheryl Klein appeal from the district court ruling granting defendant Corner Pocket's motion for summary judgment. **AFFIRMED.**

Thaddeus Cosgrove of Cosgrove Law Firm, Ida Grove, for appellant Malaise.

Phil Redenbaugh of Law Offices of Phil Redenbaugh, P.C.. & Ryan A. Mohr, Storm Lake, for appellants Hawthorne.

Dennis J. Mahr of Law Offices of Dennis J. Mahr, Sioux City, for appellant Klein.

Ryan M. Clark and Jason W. Miller of Patterson Law Firm, L.L.P., Des Moines, for intervenor appellants Ida County and IMWCA.

Guy R. Cook and Adam D. Zenor of Grefe & Sidney, P.L.C., Des Moines, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Michael Hawthorne, Lena Hawthorne, John Malaise, and Cheryl Klein (collectively "Plaintiffs") appeal from the district court ruling granting defendant Corner Pocket's (Corner Pocket) motion for summary judgment. Plaintiffs argue the district court erred in finding no question of material fact existed as to whether Corner Pocket sold and served alcohol to a particular patron. Because we agree with the district court that alcohol was not sold and served by Corner Pocket to the individual in question, we affirm.

I. Background Facts and Proceedings

This case stems from a tragic automobile accident, which occurred on January 29, 2009. It is alleged that the accident was caused by Jonathon Krommenhoek (Krommenhoek) after he was sold and served alcohol at the Corner Pocket bar. The parties are in agreement on most of the facts and course of events that preceded the accident.

On the morning of January 29, 2009, Krommenhoek spent the day with his girlfriend, Stephanie Ferdig (Ferdig). They started the day at a Mexican restaurant eating lunch and drinking margaritas.[1] Following their lunch and drinks, Ferdig left Krommenhoek at her apartment while she ran errands.[2] She does not know how he spent this time. Approximately two hours later, after her

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[1] At all times relevant to this appeal, Ferdig was of legal age to purchase alcoholic beverages. Krommenhoek was not.

[2] The early-afternoon timeline is in some dispute. The district court believed Ferdig ran errands without Krommenhoek before going to her mother's house. The State Patrol investigation report indicates Ferdig and Krommenhoek immediately went to her mother's house and continued to drink alcoholic beverages.

return, the couple stayed in her apartment and smoked marijuana. An hour later, the couple left together and drove to Ferdig's mother's house to meet her brother and uncle. No one consumed any alcoholic beverages during this period.

At approximately eight in the evening, Krommenhoek, Ferdig, as well as her brother and uncle, left the home and traveled to the Corner Pocket. Of the four individuals spending the evening together, only Ferdig and her uncle were of legal age to purchase alcohol. During the two hours the four individuals were at the Corner Pocket, four or five pitchers of beer were purchased and consumed. It is undisputed that Krommenhoek consumed some of the beer while the group played pool.

The Corner Pocket is arranged in a way that the bartender on duty was unable to observe the conduct of the group while they consumed beer and played pool. The bartender did testify that her policy was to give glass mugs, after requiring presentation of valid identification indicating legal age, to anyone drinking beer, and plastic cups to anyone drinking soda. There is some disagreement as to whether Krommenhoek obtained a glass mug, however taking the evidence in the light most favorable to the plaintiffs, the district court assumed Krommenhoek obtained and used a glass mug to drink beer.[3]

Ferdig testified that Krommenhoek displayed significant signs of intoxication while at the Corner Pocket. Around 10:00 p.m. the four individuals left the bar and drove to Ferdig's grandmother's house. They departed her home a short time later with Krommenhoek driving Ferdig's vehicle. While driving,

[3] There is no evidence presented indicating Krommenhoek showed the bartender identification.

Krommenhoek allegedly ran a stop sign and crashed into a vehicle occupied by the plaintiffs. The plaintiffs sustained serious injuries; Krommenhoke lost his life in the accident.

An investigation into the cause and circumstances of the accident began. Several measurements of Krommenhoek's blood alcohol level were conducted, each indicating a level far above the legal limit.

Plaintiffs brought this action against a number of defendants including Corner Pocket.[4] The petition alleges Corner Pocket sold and served alcoholic beverages to Krommenhoek when they knew or should have known that Krommenhoek was or would become intoxicated in violation of Iowa's Dramshop Act as codified in section 123.92 (2011).

Corner Pocket filed its motion for summary judgment arguing the plaintiffs are unable to establish a question of fact on the "sold and served" requirement of the dramshop act. The district court agreed and found that no rational fact finder could conclude Krommenhoek was sold or served alcoholic beverages by Corner Pocket within the meaning of the statute. This appeal followed.

II. Standard of Review

We review the district court's ruling granting the motion for summary judgment for errors at law. *Mueller v. Wellmark,* 818 N.W.2d 244, 253 (Iowa 2012). Viewing the evidence in the light most favorable to the non-moving party, summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Id.* The non-moving

[4] The motion for summary judgment does not address claims brought against any defendant other than Corner Pocket.

party is required to respond with specific facts which create a genuine issue for trial. *Id.*

III. Discussion

The sole issue presented for review is whether a genuine issue of material fact exists as to the "sold and served" prong of the dramshop act. The act reads:

> Any person who is injured in person or property or means of support by an intoxicated person or resulting from the intoxication of a person, has a right of action for all damages actually sustained, severally or jointly, against any licensee or permittee, whether or not the license or permit was issued by the division or by the licensing authority of any other state, *who sold and served any beer, wine, or intoxicating liquor to the intoxicated person when the licensee or permittee knew or should have known the person was intoxicated*, or who sold to and served the person to a point where the licensee or permittee knew or should have known the person would become intoxicated.

Iowa Code § 123.92(1)(a) (emphasis added). To establish liability, the plaintiffs must show that Corner Pocket "sold and served" Krommenhoek. The meaning of the term "sold" has never been clearly defined.

Never has our supreme court examined a situation where a minor was given alcohol by the direct purchaser of the alcohol and stated whether a sale has taken place. We, like the district court, are left to discern an application of the rule from a disparate line of cases.

The cases indicate that some type of consideration or detriment by the purchaser is required for a sale to have occurred. In a normal case, the consideration or detriment is money. The act itself acknowledges, however, that payment of money is not required to prove a sale. *See* Iowa Code § 123.110. In *Summerhays v. Clark*, 509 N.W.2d 748, 749 (Iowa 1993), an employee became

intoxicated at an employee holiday party hosted by the employer bar. An accident occurred during the employee's drive home from the party. *Summerhays*, 509 N.W.2d at 749–50. Our supreme court determined the dramshop act did not apply because no sale took place. *Id.* at 750–51. The court's decision rested upon the fact that wages were not reduced by the cost of the alcohol, nor was any employee's attendance induced by the specific offer of free drinks. *Id.* at 751.

Circumstantial evidence is often the most probative. In *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 148 (Iowa 2002), a casino defended a dramshop claim on the grounds of insufficient evidence to establish a sale. Our supreme court, however, noted that witnesses observed the defendant ordering drinks from waitresses. *Horak*, 648 N.W.2d at 148. Though sales receipts were not produced, the circumstantial evidence was sufficient to support a conclusion that a sale had occurred. *Id.* Similarly in *Smith v. Shagnasty's Inc.*, 688 N.W.2d 67, 70 (Iowa 2004), a bar patron attacked another with a beer bottle. No direct evidence of sale to the attacker was available. *Smith*, 688 N.W.2d at 70. Instead, it was enough, to satisfy the sale requirement, that the individual possessed a beer bottle in a crowded bar that sold beer. *Id.* at 73.

In the instant case, we are asked to infer from circumstantial evidence that a sale occurred to Krommenhoek. The plaintiffs claim that an individual possessing alcohol in an establishment that sells alcohol is enough to infer a sale. *See Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341, 346 (Iowa 1991). As *Summerhays* illustrates, however, possession of alcohol in an establishment that

sells alcohol, standing alone, is not enough. 509 N.W.2d at 749–51. All circumstantial evidence must be examined to determine whether an inference of sale can be found. The evidence before us, taken in the light most favorable to the plaintiffs, is that Krommenhoek was at Corner Pocket, obtained a glass beer mug and consumed beer, but did not make a direct purchase of his own. There is no circumstantial evidence indicating Krommenhoek gave any consideration for the beer.[5] Unlike other cases where the sale of alcohol was at issue, the circumstantial evidence in this case points to a single conclusion: Krommenhoek was not sold and served alcohol by Corner Pocket, but rather it was given to him by his girlfriend. This alone is insufficient under the statute, which requires the sale be made "to the intoxicated person" targeted under the act. Iowa Code § 123.92(1)(a).[6]

AFFIRMED.

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[5] Based upon *Summerhays*, we cannot say that Krommehoek's time spent at Corner Pocket was sufficient consideration to constitute a sale. *See* 509 N.W.2d at 749–51. Uncontroverted evidence also established that Corner Pocket allowed minors into the pool area, further limiting the availability of an inference that mere presence in the bar meant the sale and service of alcohol.

[6] Plaintiffs offer a number of public policy arguments to support a broader interpretation and application of the statute. Whatever the relative merits of these arguments, they are for the legislature, not the court.