

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ESTATE OF DEVON VERONICA ALLISON,  
by GENE WINN, its Personal Representative,

UNPUBLISHED  
December 22, 2011

Plaintiff-Appellant,

v

JOHN DOE, and CEDAR MILL LOUNGE INC.,  
d/b/a MO-DOGGIES BAR AND GRILL,

No. 299370  
Genesee Circuit Court  
LC No. 10-039157-NO

Defendants-Appellants.

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Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Plaintiff, Estate of Devon Veronica Allison, by Gene Winn, its personal representative, appeals as of right from the trial court's order granting summary disposition in favor of defendants John Doe and Cedar Mill Lounge Inc., d/b/a Mo-Doggies Bar and Grill. We affirm.

**I. FACTS**

The estate's decedent and two friends were patrons at Mo-Doggies Bar and Grill. Decedent and her friends were asked to leave after they became visibly intoxicated. They left the premises without decedent's car keys. An unidentified bar employee later found the keys.

When decedent and her friends, still visibly intoxicated, returned to the bar to find her keys, the bar employee returned the keys. Decedent drove away from the premises, lost control of her vehicle, and was involved in a fatal accident.

The estate filed suit claiming that defendants' actions in returning car keys to a visibly intoxicated person were negligent. The trial court granted defendants summary disposition when it determined that the estate's claim fell within the dramshop act.

## II. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo.<sup>1</sup> A motion under MCR 2.116(C)(8) tests whether the complaint states a claim as a matter of law, and "the motion should be granted if no factual development could possibly justify recovery."<sup>2</sup>

### B. LEGAL STANDARDS

Michigan's dramshop act provides the exclusive remedy for an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person arising out of the unlawful sale, giving away, or furnishing of intoxicants.<sup>3</sup> An unlawful sale includes a sale to a visibly intoxicated person.<sup>4</sup> Under the dramshop act, the alleged visibly intoxicated person and his or her family are denied a cause of action.<sup>5</sup>

Despite the exclusive remedy of the dramshop act, a retail licensee remains liable for actions arising out of negligent conduct other than selling, giving away, or furnishing intoxicants if such negligent conduct is can be the basis for a cause of action under common law.<sup>6</sup> A two-part analysis is used to determine if a claim falls outside the reaches of the dramshop act:

(1) Does the claim against "the tavern owner" arise out of an unlawful sale, giving away, or furnishing of intoxicants? If so, the dramshop act is the exclusive remedy.

(2) If the claim arises out of conduct other than selling, giving away, or furnishing of intoxicants, does the common law recognize a cause of action for the negligent conduct? If so, then the dramshop act neither abrogates nor controls the common-law action. If not, there is no independent common-law claim.<sup>[7]</sup>

Premises liability is one example of a cause of action that exists outside the dramshop act.<sup>8</sup> When reviewing a premises liability claim by a visibly intoxicated person, the analysis is

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<sup>1</sup> *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006).

<sup>2</sup> *Id.*

<sup>3</sup> MCL 436.1801; *Millross v Plum Hollow Golf Club*, 429 Mich 178, 187; 413 NW2d 17 (1987).

<sup>4</sup> MCL 436.1801(2), (3).

<sup>5</sup> MCL 436.1801(9).

<sup>6</sup> *Millross*, 429 Mich at 187.

<sup>7</sup> *Id.*

<sup>8</sup> *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 327; 683 NW2d 573 (2004).

based on the duty or standard of care owed in an ordinary premises liability action.<sup>9</sup> A retail licensee or “the tavern owner” does not owe a heightened duty of care based on the visible intoxication of the plaintiff.<sup>10</sup>

If plaintiff’s extent of intoxication were considered in determining defendant’s duty of care to plaintiff, such consideration, in our judgment, would circumvent the dramshop act’s prohibition against permitting a visibly intoxicated person from collecting monetary damages arising from defendant’s unlawful “selling, giving, or furnishing” of alcohol to such plaintiff. MCL 436.1801(9)(10). The dramshop act protects dramshop owners by prohibiting a visibly intoxicated person from recovering damages that have arisen from the dramshop unlawfully “selling, giving, or furnishing” alcohol to such person. In our judgment, the statutory protection would be nullified if dramshop owners, in premises liability actions, were held to a higher duty of care because they unlawfully sold alcohol to a visibly intoxicated person. Accordingly, a dramshop owner, as with any other property owner, has a duty toward the reasonably prudent invitee; he does not, however, have a heightened duty in the case of the visibly intoxicated invitee. Concomitantly, there is no diminished standard of reasonable conduct on the part of a visibly intoxicated invitee in comparison with any other invitee.<sup>[11]</sup>

### C. APPLYING THE LEGAL STANDARDS

The estate claims that this action is based in negligence because it is related to defendants’ conduct of giving car keys to an intoxicated person, not to the actual selling, giving or furnishing of alcohol. Any analysis of this claim, however, hinges on the duty that a dram shop that provided the intoxicants owed to the visibly intoxicated person. If intoxication is not considered in this claim, then the question becomes: is there a common law duty to refrain from returning keys to the vehicle’s lawful owner. It is axiomatic that there is no duty to withhold keys from an unintoxicated owner of a vehicle. However, because intoxication cannot be removed as the key factor from the common law negligence claim asserted by the estate, this claim falls under the dramshop act, and the trial court properly granted defendants’ motion for summary disposition.

We affirm.

/s/ Douglas B. Shapiro  
/s/ William C. Whitbeck  
/s/ Elizabeth L. Gleicher

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 329-330.

<sup>11</sup> *Id.*