STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1066

David Lee Henson and Noah A. Cashman,
co-trustees for the Estate of Maxwell David Henson; et al.,
Appellants,

vs.

Uptown Drink, LLC,
Respondent,
Jason Alan Sunby, et al.,
Defendants,

vs.

Assurance Company of America, intervenor,
Respondent.

Filed December 26, 2017
Reversed and remanded
Florey, Judge

Hennepin County District Court
File No. 27-CV-12-10634

Bernie M. Dusich, Ryan T. Gott, Sieben Polk, P.A., Hastings, Minnesota (for appellants)

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Considered and decided by Jesson, Presiding Judge; Kirk, Judge; and Florey, Judge.

S Y L L A B U S

I. Primary assumption of the risk does not bar, as a matter of law, a negligent-innkeeper claim if the evidence is inconclusive on whether the injured party had actual knowledge of the particular risks associated with helping to remove an intoxicated patron from a premises, and there is evidence that the innkeeper enlarged those risks.

II. For purposes of a dram-shop claim, proximate cause is not lacking, as a matter of law, despite the injured party assuming risk in helping to remove an intoxicated patron from a premises, so long as there is sufficient evidence that the intoxication was a substantial factor in causing the injury, and a direct link exists between the intoxication and the injurious act.

O P I N I O N

FLOREY, Judge

Appellants brought a wrongful-death action. The district court granted summary judgment for respondent thereby disposing of all of appellants' claims. Appellants argue that the district court erred by determining that the doctrine of primary assumption of the risk precluded innkeeper liability; determining that the decedent's voluntary intervention in the removal of an intoxicated patron precluded liability under a dram-shop claim; and failing to consider the emergency, rescue, and continuing-duty-of-care doctrines. We reverse and remand.

FACTS

This case arises from the tragic death of Maxwell Henson, who was fatally injured trying to help an employee of respondent Uptown Drink, LLC in ejecting an aggressive patron. The events leading to that incident were set in motion on March 23, 2011, when Jason Sunby and Nicholas Anderson met up at a restaurant. Sunby and Anderson believe they consumed some beer at the restaurant, and prior to arriving, Anderson had approximately two beers at home.

Sunby and Anderson left the restaurant and arrived at Uptown Drink between 7:00 and 7:30 p.m. Sunby does not remember anything other than being at the restaurant and then waking up in jail the following morning. Sunby told the arresting officer that he had 12 or 14 drinks that night. Anderson stated he had between 6 and 10 beers and a couple shots at Uptown Drink. Bartender Jordan Shaw was working at Uptown Drink and indicated that Anderson and Sunby came to the bar, and he served them one to two beers.

There is a surveillance video of Anderson and Sunby at Uptown Drink, and from looking at the video, Anderson described Sunby as being overly intoxicated because Sunby was being stubborn and stumbling. Anderson stated that he was intoxicated on the night in question and became more intoxicated during his time at Uptown Drink. Anderson stated that he felt sober when he entered Uptown Drink and that Sunby was his normal self when he came into Uptown Drink.

Appellants, the estate and relatives of Henson, retained experts in toxicology and pharmacology. Based upon the description of the amount of alcohol consumed by Sunby and Anderson, the experts reported that Sunby would have had a blood alcohol concentration (BAC) in the range of 0.24 to 0.30 g/dL at approximately 9:37 p.m. on March 23, 2011, the time of the incident. The experts reported that Anderson would have had a BAC in the range of 0.25 to 0.30 g/dL at the time of the incident, and both individuals would have been severely impaired. The experts described the serious impairment of reasoning and judgment that would have occurred, exaggerated emotional states resulting in aggression and violent behavior, impaired balance, muscular incoordination, disorientation and mental confusion, decreased inhibitions, and decreased pain sensation.

The experts further indicated that both Anderson and Sunby would have had a BAC in the range of 0.23 to 0.29 g/dL when served their respective last alcoholic beverages.

In a surveillance video, Sunby and Anderson can be seen drinking shots at 9:21 p.m., and Sunby can be seen drinking another shot at 9:26 p.m. Through much of the video footage, Sunby and Anderson were drinking from glasses of beer. At 9:33 p.m., two individuals who were talking with Sunby moved, and at around 9:34 p.m., Shaw took a drink from Sunby. At around 9:35 p.m., Shaw came to the front of the bar. At around 9:36 p.m., Anderson returned to the bar while talking with the manager, Frank Thalacker. At 9:37 p.m., Sunby started to put his jacket on, while wobbling and stumbling, and Anderson began dancing. At around 9:38 p.m., Sunby threw a punch at Thalacker, others came into the fray, and Anderson then jumped Thalacker from behind and put him in a headlock. Henson rushed to the aid of Thalacker and peeled Anderson off of Thalacker.

Thereafter, the video shows Anderson being escorted out of the establishment with Henson on one side and Thalacker on the other. During this time, Anderson was resisting and fighting Thalacker. Once they got out the doors onto a step, someone fell and dragged the others down. In the process, Henson fell and hit his head. He suffered a traumatic brain injury and later died.

Appellants filed suit alleging that Uptown Drink was negligent (negligent-innkeeper claim) and violated Minn. Stat. § 340A.502 (2016) by providing liquor to an obviously

intoxicated person (dram-shop claim).[1] Appellants also sued Sunby and Anderson individually, but later stipulated to the dismissal of those claims.

Uptown Drink moved for summary judgment, arguing that there was no genuine issue of material fact as to appellants' negligent-innkeeper claim because Sunby's and Anderson's conduct was not foreseeable, and therefore Uptown Drink owed no duty to protect Henson. Uptown Drink also argued that appellants' dram-shop claim lacks evidence of both an illegal sale to Anderson and causation.

The district court granted Uptown Drink's motion, concluding that the negligent-innkeeper claim was barred because Henson made a primary assumption of the risk by voluntarily involving himself in the altercation, and that under the dram-shop claim, there was no genuine issue of material fact because Sunby's and Anderson's intoxication was not the proximate cause of Henson's injury.

Appellants sought permission to file a motion to reconsider, arguing that the doctrine of primary assumption of the risk had not been properly raised by Uptown Drink. The district court granted appellants' request, and the parties briefed that issue. The district court ultimately denied appellants' motion to reconsider and effectively affirmed the prior determination that primary assumption of the risk barred recovery on appellants' negligent-innkeeper claim, and further concluded that the continuing-duty-of-care, emergency, and rescue doctrines did not alter the applicability of primary assumption of the risk. This appeal followed.

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[1] Appellants also claimed that Uptown Drink failed to reasonably protect the bar's patrons (negligent-security claim), but that claim was voluntarily withdrawn.

ISSUES

I. Did the district court err by concluding, as a matter of law, that primary assumption of the risk bars appellants' negligent-innkeeper claim?

II. Did the district court err by concluding, as a matter of law, that Anderson's intoxication was not the proximate cause of Henson's injury?

ANALYSIS

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, appellate courts review de novo "whether there are any genuine issues of material fact and whether the district court erred in its application of the law to the facts." *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). Appellate courts "view the evidence in the light most favorable to the party against whom summary judgment was granted." *Id.* No genuine issue of material fact exists where "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted).

I.

Appellants first argue that the district court erred in concluding that primary assumption of the risk bars appellants' negligent-innkeeper claim.[2] Viewing the evidence in a light most favorable to appellants, we conclude that primary assumption of the risk does not, as a matter of law, bar appellants' claim.

We begin by first determining whether Uptown Drink owed a duty to Henson. *See Snilsberg v. Lake Wash. Club*, 614 N.W.2d 738, 744 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000). Tavern owners have a duty "to exercise reasonable care under the circumstances to protect their patrons from injury." *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). Uptown Drink had such a duty to protect Henson from Anderson only if it was put on notice of Anderson's dangerous propensities by some act or threat, and Henson's injury was foreseeable and preventable. *See Boone v. Martinez*, 567 N.W.2d 508, 510 (Minn. 1997). Uptown Drink asserts that appellants' claim must fail as a matter of law because the injuries to Henson were not foreseeable; Anderson's dangerous propensities were not apparent.

"Foreseeability is a threshold issue and is more properly decided by the court prior to submitting the case to the jury." *Boone*, 567 N.W.2d at 510. However, in close cases, the issue of foreseeability should be submitted to the jury. *Whiteford ex. rel. Whiteford v. Yamaha Motor Corp., U.S.A.*, 582 N.W.2d 916, 918 (Minn. 1998). The district court did

[2]Appellants assert that the issue of primary assumption of the risk was raised sua sponte by the district court. Because we reverse on other grounds, we need not address this procedural issue.

not fully analyze foreseeability, but stated that the issue presented a close question of fact. We agree.

"The foreseeability of danger depends heavily on the facts and circumstances of each case." *Senogles v. Carlson*, 902 N.W.2d 38, 43 (Minn. 2017) (quotation omitted). The issue of foreseeability should be submitted to the jury when reasonable persons could reach different conclusions from the evidence. *Id.* Here, sufficient evidence suggests that an injury to Henson resulting from Anderson's intoxication and aggression was foreseeable and preventable. *See Schwingler v. Doebel*, 309 N.W.2d 760, 762 (Minn. 1981) (noting that foreseeability, for purposes of tavern-owner liability, may be based on the intoxication of a patron). There is evidence in the record sufficient to suggest that Anderson was obviously intoxicated. Anderson jumped Thalacker from behind and put him in a headlock prior to the conduct that led to Henson's fatal injury. There is also sufficient evidence to suggest that Thalacker was aware that Henson was assisting in the removal of Anderson. Reasonable persons could draw different conclusions as to whether the dangerous conduct, that is, Anderson's resisting and fighting while being escorted off the premises, was therefore a foreseeable and preventable danger to Henson.

We next address primary assumption of the risk, which "completely negates a defendant's negligence by negating the defendant's duty of care to the plaintiff." *Eischen v. Crystal Valley Coop.*, 835 N.W.2d 629, 632 (Minn. App. 2013) (quotations omitted), *review denied* (Minn. Oct. 15, 2013). Primary assumption of the risk applies in those instances "where parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks." *Bjerke v. Johnson*, 742 N.W.2d 660, 669 (Minn. 2007)

(quotation omitted). It "defines the limits of a defendant's duty to the plaintiff." *Andren v. White-Rodgers Co.*, 465 N.W.2d 102, 105 (Minn. App. 1991), *review denied* (Minn. Mar. 27, 1991). Essentially, "[b]y voluntarily entering into a situation where the defendant's negligence is obvious, the plaintiff accepts and consents to it and agrees to undertake to look out for himself and relieve the defendant of the duty." *Id.* (quotation omitted). For a person to primarily assume a risk, he or she must have a knowledge and appreciation of the risk, as well as a choice to avoid that risk, and he or she must then voluntarily choose to take that risk. *Id.* at 104-05.

"Whether a party has primarily assumed the risk is usually a question for the jury, unless the evidence is conclusive." *Schneider v. Erickson*, 654 N.W.2d 144, 148 (Minn. App. 2002). Application of the primary-assumption-of-the-risk doctrine is uncommon. *Swagger v. City of Crystal*, 379 N.W.2d 183, 185 (Minn. App. 1985), *review denied* (Minn. Feb. 19, 1986). The doctrine has been applied to restrict the duty owed to patrons of inherently dangerous sporting events, such as baseball. *See, e.g.*, *Aldes v. St. Paul Ball Club, Inc.*, 251 Minn. 440, 88 N.W.2d 94 (1958).

For primary assumption of the risk to apply, Henson needed to have actual knowledge of the particular risks or dangers in assisting in Anderson's removal. *See Crystal Valley Coop*, 835 N.W.2d at 636. Knowledge of a general risk is insufficient. *Id.* Viewing the evidence in a light most favorable to appellants, we conclude that a genuine issue of material fact exists as to whether Henson had actual knowledge of the particular risks.

Uptown Drink asserts that the dangers to Henson were obvious. We disagree. Although a plaintiff may be barred from recovery in cases where he or she consciously assumed risks inherent in roughhousing or fighting, Henson did not voluntarily enter into a fistfight or otherwise initiate an altercation. *See Henkel v. Holm*, 411 N.W.2d 1, 4 (Minn. App. 1987) (concluding that a directed verdict on the issue of primary assumption of the risk was improper where there was conflicting evidence on who initiated the injurious altercation). It is not clear that Henson knew how intoxicated Anderson was or had knowledge that Anderson would continue to be combative and would resist being thrown out. *See Crystal Valley Coop*, 835 N.W.2d at 636 (concluding that primary assumption of the risk did not bar a claim as a matter of law, despite injured party's awareness of some risk, where it was not clear that injured party knew of particular risks). Henson's act of assisting with the removal of Anderson, an act done in the presence of Thalacker, is more consistent with secondary assumption of the risk, where a "plaintiff voluntarily encounters a known and appreciated hazard created by the defendant without relieving the defendant of his duty of care with respect to such hazard." *Rieger v. Zackoski*, 321 N.W.2d 16, 23-24 (Minn. 1982) (quotations omitted). Because reasonable persons could reach different conclusions on whether Henson had actual knowledge of the particular risks presented, application of primary assumption of the risk, as a matter of law, was improper. *See Grady v. Green Acres, Inc.*, 826 N.W.2d 547, 549-50 (Minn. App. 2013) (discussing application of primary assumption of the risk as a matter of law).

Moreover, primary assumption of the risk is not appropriate where there is evidence that a defendant's conduct enlarged the inherent risk assumed by a plaintiff. *Rusciano v.*

State Farm Mut. Auto. Ins. Co., 445 N.W.2d 271, 272 (Minn. App. 1989). The evidence is sufficient for a reasonable factfinder to conclude that Uptown Drink, by providing alcohol to an already intoxicated Anderson and allowing Henson to physically assist in Anderson's removal, enlarged the risks that Henson may have assumed by providing assistance to Thalacker. This too would preclude application of primary assumption of the risk. For the aforementioned reasons, application of primary assumption of the risk, as a matter of law, was not appropriate.

II.

Appellants next argue that the district court erred by disposing of their dram-shop claim on summary judgment. The district court concluded that neither Sunby's nor Anderson's intoxication was the proximate cause of Henson's injury, which was the result of "Henson's voluntary decision to interject himself into a melee." Appellants only challenge the district court's determination as to Anderson. We conclude that a genuine issue of material fact remains on whether Anderson's intoxication was the proximate cause of Henson's injury.

We begin with the elements of a dram-shop claim, a statutorily created cause of action. *See Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (discussing dram-shop claims). The Civil Damages Act, often referred to as the Dram Shop Act, states:

> A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, has a right of action in the person's own name for all damages sustained against a person

> who caused the intoxication of that person by illegally selling alcoholic beverages.

Minn. Stat. § 340A.801, subd. 1 (2016); *Osborne*, 749 N.W.2d at 371. For a successful dram-shop claim, the claimant must first prove that an illegal sale of alcohol took place. *Osborne*, 749 N.W.2d at 372. This might include a sale of alcohol to an obviously intoxicated person. *See* Minn. Stat. § 340A.502. Once an illegal sale is established, then the claimant must show that the illegal sale caused or contributed to intoxication, which in turn proximately caused the claimant's injuries. *Osborne*, 749 N.W.2d at 372.

The district court accepted that there was sufficient evidence that Anderson was overserved at Uptown Drink. We agree that there is sufficient evidence that Anderson was illegally sold alcohol that contributed to his intoxication. We therefore focus on the crux of the matter, whether Anderson's intoxication was the proximate cause of Henson's injury.

For intoxication to be the proximate cause of a certain injury, it "must have been a substantial factor in bringing about the injury." *Id.* at 373. Generally, "[w]hether proximate cause exists in a particular case is a question of fact for the jury to decide." *Id.* However, in some cases, intoxication is entirely unrelated to the injury, and the lack of proximate cause may be decided as a matter of law. *See, e.g.*, *Kryzer v. Champlin Am. Legion No. 600*, 494 N.W.2d 35, 38 (Minn. 1992) (reinstating judgment of dismissal for lack of proximate cause because there was no causal connection between the intoxication and injury). The law surrounding proximate cause "does not invite courts to decide as a matter of law that proximate cause is lacking when . . . the facts suggest a direct link

between the intoxication and the overserved patron's injurious act." *Osborne*, 749 N.W.2d 374 (quotation omitted).

Here, there is sufficient evidence of a direct link between Anderson's intoxication and Henson's injury. Experts retained by appellants reported that Anderson would have had a BAC in the range of 0.25 to 0.30 g/dL at the time of the incident, impairing his reasoning, balance, and muscle coordination, and causing aggression. In a deposition, Thalacker stated that Anderson was resisting being thrown out of the bar, he was twisting and trying to get away, and the trio was moving backwards while removing Anderson. As a result, the trio was not conscious of a step, someone fell, all three were dragged down, and Henson suffered his fatal injury. This is sufficient evidence of a direct connection between Anderson's intoxication and Henson's injury.

The matter is complicated by Henson's act of assisting Thalacker in removing Anderson from the bar. Uptown Drink argues that, as a matter of law, "Henson's decision to interject himself into the altercation between Anderson and Thalacker broke the causal chain." We disagree. This is not a case where the plaintiff's injury is, as a matter of law, entirely unrelated to the intoxication.

The issue of proximate cause in the dram-shop context was thoroughly analyzed by the supreme court in *Osborne*, a case where an intoxicated man jumped off a bridge and died. *Id.* at 381. The supreme court concluded that there was sufficient evidence that intoxication was a substantial cause of the man's choice to jump. *Id.* In reaching that conclusion, the supreme court reviewed prior cases where proximate cause was lacking as

a matter of law because the plaintiff's injuries were not directly caused by the acts of the intoxicated party. *Id.* at 374.

In *Kryzer*, the supreme court held that there was a lack of proximate cause in a case involving an intoxicated patron who was ejected from a bar and injured by a bar employee who removed her from the premises. 494 N.W.2d at 36. The supreme court concluded that the patron's intoxication, while a possible "occasion" for her ejection from the bar, was not a cause of her injury; it was the employee's actions while removing the patron that resulted in the patron's injuries. *Id.* at 37. This case is distinguishable from *Kryzer* because there is sufficient evidence that Anderson, the allegedly intoxicated individual, caused the injury.

In *Crea v. Bly*, an intoxicated female bar patron encouraged a male patron to attack the plaintiff, and the male patron did so. 298 N.W.2d 66, 66 (Minn. 1980). The supreme court held "as a matter of law that there was a break in the chain of causation between" the female patron's intoxication and the injuries the male patron inflicted on the plaintiff. *Id.* Again, this case is distinguishable because there is sufficient evidence that Anderson, the intoxicated individual, caused the injury. Unlike in *Crea*, the link between Anderson's alleged intoxication and the resulting injury is direct.

In *Kunza v. Pantze*, the defendant became intoxicated at a bar and then left the bar with his wife in a motor vehicle; while driving, the defendant began abusing his wife, and she jumped out of the moving vehicle to avoid further abuse. 527 N.W.2d 846, 847-48 (Minn. App. 1995), *rev'd*, 531 N.W.2d 839 (Minn. 1995). The supreme court agreed with the district court that the wife's act of opening the door severed the causal chain between the defendant's intoxication and the injury. 531 N.W.2d at 839. This case is

distinguishable from *Kunza* because there is sufficient evidence that Henson did not knowingly cause his own injuries. *But see Osborne*, 749 N.W.2d at 374, 381 (concluding that fact issue remained on proximate cause, despite fatal injury being self-inflicted, where there was sufficient evidence that intoxication directly caused the fatal choice).

In the three aforementioned cases, the supreme court "concluded that summary judgment was appropriate because, as a matter of law, the intoxicated party's faculties, which were impaired by alcohol, could not have directly caused an injury that resulted from the actions and choices of another person." *Id.* at 374. Here, there is sufficient evidence of a direct link between Anderson's intoxication and the injury suffered by Henson. That is, it is not clear that Henson's injury was caused by factors unrelated to Anderson's intoxication, such as the actions or choices of another person. *See id.* at 374-75.

Even if Henson was negligent in assisting with the removal of Anderson, there is no requirement that "intoxication must be the sole proximate cause of injury in the dram shop context," and "a defendant is liable under the dram shop act when the allegation is that intoxication was only a contributing cause of the injury." *Id.* As noted in *Osborne*, "[t]he Dram Shop Act explicitly provides that comparative negligence principles . . . apply to dram shop actions," and the inclusion of comparative-fault principles in the dram-shop context "evidences the legislature's intent to hold dram shop owners liable for an illegal sale of alcohol even if another party shares responsibility for causing the injury." *Id.* at 375-76.

Intoxication need only be a substantial factor in bringing about the injury. *Id.* at 373. Viewed in a light most favorable to appellants, there is sufficient evidence that

intoxication was a substantial factor in causing Henson's injury, and there is sufficient evidence of a direct link between that intoxication and the injury.[3]

D E C I S I O N

Primary assumption of the risk does not, as a matter of law, bar appellants negligent-innkeeper claim, and a genuine issue of material fact remains as to whether Anderson's intoxication was the proximate cause of Henson's injury. We therefore reverse and remand for further proceedings.

Reversed and remanded.

[3] Because we reverse and remand on both appellants' negligent-innkeeper and dram-shop claims, we do not address appellants' other arguments.