COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1500 **Cir. Ct. No. 02CV002307**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

SARAH ALDERMAN AND JEAN MEANS,

PLAINTIFFS-APPELLANTS,

V.

TOPPER A1 BEER & LIQUOR, NORMAN E. SUTTON, VALLEY FORGE INSURANCE COMPANY, DANIEL HELINSKI, MICHAEL PETERSON, BRUCE GENDELMAN & CO., INC., SARAH KERBEL AND STATE AUTO INSURANCE COMPANY OF WISCONSIN,

DEFENDANTS,

CHRISTINE A. HELINSKI, ROBERT E. HELINSKI AND FIRE INSURANCE EXCHANGE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Sarah Alderman and Jean Means (Means) appeal from an order granting summary judgment, dismissing their claims against Christine A. and Robert E. Helinski, and their insurer, Fire Insurance Exchange. Means claims the trial court erred as a matter of law in ruling that the Helinskis, who allowed twenty-year-old Michael Peterson to drink alcohol in their home and then drive while intoxicated, resulting in serious injury to an innocent third person, are not liable under statutory or common law. Specifically, Means argues: (1) the term "procure" as used in WIS. STAT. § 125.035 (2001-02)[1] includes the Helinskis' actions of knowingly providing Peterson with a place to illegally consume alcohol; (2) the term "premise" as used in WIS. STAT. § 125.07 should include a social host's home and not be restricted to "licensed premises"; and (3) common law liability exists to maintain a negligence claim against the Helinskis. Because the trial court did not err in applying the plain language of the statutes and there is no sustainable common law negligence, we affirm.

BACKGROUND

¶2 On November 3, 2000, twenty-year-old Peterson went to the home of his friend, twenty-year-old Daniel Helinski. He brought beer, which he had illegally purchased earlier, into the home. Peterson, Daniel, and his twenty-one-year-old girlfriend, Sarah Kerbel, were watching a movie in the recreation room of the Helinski home. During this time, Peterson consumed the beer he had brought and asked Sarah, who had also brought beer into the Peterson home, if he could have some of hers. She said "yes," and Daniel went to the refrigerator to retrieve

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

one of Sarah's beers for Peterson. Daniel's parents, Christine and Robert, were home. According to Peterson, Christine knew that he was drinking beer in her home.

¶3 Later in the evening, Peterson and Daniel decided to go and get something to eat. They told Christine of their plans and left in Peterson's car, with Peterson driving. Before reaching the restaurant, they noticed Sarah Alderman parking her car at her home. Peterson stopped his car and they convinced Alderman to join them. Alderman had nothing alcoholic to drink that evening. On the way home from the restaurant, Peterson lost control of the car and crashed into a tree. Alderman was seriously injured in the accident. Peterson was charged criminally and convicted of injury to Alderman by intoxicated use of a vehicle.

¶4 Alderman and her mother, Means, filed this civil suit against a variety of allegedly responsible individuals, including Christine and Robert Helinski and their homeowner's insurer. The allegations against Christine and Robert were that by permitting Peterson to consume beer in their home, and allowing family members to furnish him with beer while at their home, they "procured" alcohol for Peterson, and thus are liable to Alderman pursuant to WIS. STAT. § 125.035.

¶5 The Helinskis filed a motion seeking summary judgment on the basis that the statute did not create liability under the facts in this case. The trial court agreed, ruling that the term "procure," as used in WIS. STAT. § 125.035, did not include a passive willingness to allow an underage person to consume alcohol in a private home. A judgment was entered dismissing Christine, Robert and their insurer from the lawsuit. Alderman and Means now appeal from that judgment.

DISCUSSION

¶6 Means raises three issues in this appeal, whether: (1) the trial court erred in ruling that the term "procure" within WIS. STAT. § 125.035 encompasses the factual scenario presented in this case; (2) the trial court erred in ruling that the term "premises" in WIS. STAT. § 125.07(1)(a)3 does not include the Helinski home; and (3) there is a basis in the common law to maintain a negligence action against Christine and Robert for permitting a twenty-year-old to consume alcohol in their home and then get behind the wheel of a motor vehicle. The standard of review following a grant of summary judgment is well known and need not be repeated here. *See* WIS. STAT. § 802.08(2); ***Mullen v. Walczak***, 2003 WI 75, ¶11, 262 Wis. 2d 708, 664 N.W.2d 76. Our review is *de novo*. ***Mullen***, 262 Wis. 2d 708, ¶11. This case involves the interpretation of several statutes, which also presents a question of law subject to this court's independent review. ***Kwiatkowski v. Capitol Indem. Corp.***, 157 Wis. 2d 768, 774-75, 461 N.W.2d 150 (Ct. App. 1990), *abrogated on other grounds by* ***Miller v. Thomack***, 204 Wis. 2d 242, 555 N.W.2d 130 (Ct. App. 1996).

A. WISCONSIN STAT. § 125.035.

¶7 Our legislature has been active in determining when it is appropriate to impose liability for vendors or social hosts who provide alcohol to underage persons. *See* ***Meier v. Champ's Sport Bar & Grill, Inc.***, 2001 WI 20, ¶¶32-34, 241 Wis. 2d 605, 623 N.W.2d 94 (recognizing that the legislature agreed with the holdings in ***Sorensen v. Jarvis***, 119 Wis. 2d 627, 646, 350 N.W.2d 108 (1984) (holding that a vendor who negligently supplies alcohol to minors may be responsible for injuries those minors cause to third parties) and ***Koback v. Crook***, 123 Wis. 2d 259, 276-77, 366 N.W.2d 857 (1985) (holding that social hosts who

serve alcohol to minors at a party in their home, knowing that the minor who consumed the alcohol will later be driving a motor vehicle, can be liable to a third-party who is injured by the minor driver)). These cases departed from the prior common law, which placed liability solely with the intoxicated driver and not with the provider of the alcohol.

¶8 The legislature agreed with the courts that the common law should be changed and the liability of vendors and social hosts found to exist in those cases codified by statute. The statutory language found in WIS. STAT. § 125.035, provides in pertinent part:

> **(2)** A person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person.
>
> ….
>
> **(4)** … (b) Subsection (2) does not apply if the provider knew or should have known that the underage person was under the legal drinking age and if the alcohol beverages provided to the underage person were a substantial factor in causing injury to a 3rd party. In determining whether a provider knew or should have known that the underage person was under the legal drinking age, all relevant circumstances surrounding the procuring, selling, dispensing or giving away of the alcohol beverages may be considered, including any circumstance under subds. 1. to 4.

¶9 Thus, the legislature made it clear that vendors and social hosts who knowingly provide an underage person with alcohol are not immune from liability when that action is a substantial factor in injuring a third party. The question is whether this statute is applicable under the facts of the instant case. Means argues that the statute clearly applies in that Christine knew Peterson was drinking alcohol in her home, and she did nothing to stop the illegal consumption; she

permitted him to drink illegally in her home and then drive his vehicle, which was a substantial factor in the injuries to Alderman.

¶10 Christine and Robert respond that the statute does not apply here because it requires social hosts to engage in some affirmative act before liability will attach. They point out that the undisputed facts demonstrate that they did not purchase the alcohol for Peterson, nor did they physically provide it to him. They argue that under the facts of this case, there is nothing to support an affirmative act on their part to define either of them as a "procurer" or provider of alcohol to Peterson. The trial court agreed with Christine and Robert:

> The long-time common law rule in Wisconsin was that the imbiber and not the provider of alcohol was [who] the plaintiff must turn to for recovery. That rule was abrogated in the ***Sorenson*** and ***Koback*** cases …. According to the ***Meier*** case … sec. 125.035(4)(b) of the statutes signaled the legislature's approval of ***Sorenson*** and ***Koback***. ***Koback*** is the case that needs to be examined in our case because it involves a social guest situation. In ***Koback***, unlike the case before the court, the hosts there furnished alcohol to the minor. The Supreme Court made much of that fact in its decision in that case. No such thing happened here. The defendants Helinski provided no liquor to Michael Peterson. There was no affirmative act by the Helinskis to cause his drinking. They merely allowed him into their home as their son's friend. They did not "bring about" Michael Peterson's consumption of beer. He brought his own beer and drank it, along with one provided by the purchase of Sarah Kerbel, their adult son's girlfriend who legally purchased her beer. The plaintiff's argument stretches the word "procure" out of shape. Letting someone into one's home does not make one a procurer of alcohol; something that is more directly related to the consumption of alcohol is needed. There was no liquor provided by the Helinskis and there was no money to purchase liquor provided by them either. They did not "procure" liquor for Michael Peterson and they cannot be held liable either statutorily or by common law.

¶11 Although this court does not condone the Helinskis' failure to take any action to cease or prevent illegal activity—both in allowing Peterson to illegally consume alcohol in their home and, even more troubling, in allowing an intoxicated underage person to get behind the wheel of a motor vehicle, we cannot overturn the trial court's correct interpretation of the statute given the facts of this case.

¶12 Based on the clear language of the statute, we agree that simply providing a place for an underage person to consume alcohol does not satisfy the definition of "procure" as that term is used within the statute. In ***Miller v. Thomack***, 210 Wis. 2d 650, 563 N.W.2d 891 (1997), our supreme court looked to the common dictionary definition of "procure" to ascertain its meaning. ***Id.*** at 661-62. The definition provided: "(1) to get possession of: obtain, acquire … esp. to get possession of by particular care or effort[,] and sometimes by devious means … [(2)] to cause to happen or to be done: bring about: effect …." ***Id.*** at 662 (large caps and other emphasis omitted). Thus, we agree that to "procure" requires some affirmative act more than simply allowing an underage person into one's home and not taking any action to prevent him or her from drinking an alcoholic beverage he or she brought with him or her.

¶13 The facts in this case are similar to those in ***Smith v. Kappell***, 147 Wis. 2d 380, 433 N.W.2d 588 (1988), wherein a social host permitted the use of her parent's home "for possession and consumption of alcohol beverages with apparent knowledge of her guest's age, intoxicated condition, and intent to drive." ***Id.*** at 382. The supreme court found that these facts were insufficient to impose liability on the social host for the injuries to a third party caused by the drinking and driving of an underage guest after leaving the home. ***Id.*** at 387-88.

¶14 Our legislature has taken an active role in attempting to dissuade underage drinking and driving. It has enacted legislation, which imposes liability on both vendors and social hosts under certain conditions. This case may provide an incentive for the legislature to extend liability to parents who knowingly allow the illegal consumption of alcohol in their home. But until the legislature sees fit to enact such legislation, we must follow the current statutes. Those statutes do not impose liability on Christine and Robert under the facts presented in this record.

B. WISCONSIN STAT. § 125.07.

¶15 As another potential source of liability, Means points to WIS. STAT. § 125.07, which provides in pertinent part:

> **(1)** ALCOHOL BEVERAGES; RESTRICTIONS RELATING TO UNDERAGE PERSONS. (a) *Restrictions.* 1. No person may procure for, sell, dispense or give away any alcohol beverages to any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age.
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> ….
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> 3. No adult may knowingly permit or fail to take action to prevent the illegal consumption of alcohol beverages by an underage person on premises owned by the adult or under the adult's control. This subdivision does not apply to alcohol beverages used exclusively as part of a religious service.

¶16 Means argues that this statute provides a basis for liability against Christine and Robert. She bases this argument, in part, upon the contention that "premises" should be interpreted to include the Helinski home. We reject this argument.

¶17 Again, WIS. STAT. § 125.07(1)(a)1 would apply only if Christine or Robert had procured, sold, dispensed or gave alcohol beverages to Peterson. We have already concluded that the Helinskis' conduct was insufficient to satisfy the definition of "procured" and it is undisputed that they did not sell, dispense or give Peterson any alcohol. Therefore, this part of the statute does not impose liability on the Helinskis.

¶18 Thus, that leaves us to analyze the language of WIS. STAT. § 125.07(1)(a)3. Although Means makes a credible argument that "premises" should include the home owned by the social host, we must reject it because the statute specifically defines the term "premises," and the Helinski home does not fit that definition.

¶19 "Premises" is defined in WIS. STAT. § 125.02(14m) as "the area described in a license or permit." It is presumed that when a chapter of the statutes defines terms, that definition should be used to define the term as it is used throughout the entire chapter. Given the development of dram shop liability and its extension to social hosts, this court understands Means's argument to be that "premises" should include the home of a social host. However, we must apply the statutes as written. Here, premises is specifically defined to mean an area described in a license or a permit. Means cannot show that the Helinskis' home is described in a license or a permit; thus, this statute cannot be used to impose liability in this case.

C. Common Law Liability.

¶20 Means also contends that even without statutory liability, the Helinskis are liable under a negligence common law theory. She argues that the Helinskis had an obligation to supervise Peterson's illegal acts. Although this

court can sympathize with Means's position that parents should not permit underage drinking to take place in their home, followed by drunken driving by underage persons, case law in Wisconsin clearly indicates that an adult does not have a heightened duty to supervise another adult's underage drinking.[2] *See, e.g.*, ***Anderson v. American Family Mut. Ins. Co.***, 2002 WI App 315, ¶20, 259 Wis. 2d 413, 655 N.W.2d 531, *aff'd*, 2003 WI 148, 267 Wis. 2d 121, 671 N.W.2d 651. Accordingly, the Helinskis cannot be held legally liable for Peterson's negligent actions.

¶21 Based on the foregoing, we conclude that the trial court did not err in granting summary judgment in this case.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] A person is considered an adult at age eighteen, but is still "underage" for the purposes of drinking alcohol until age twenty-one.