STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1095

Martha Lamas,
Appellant,

vs.

A-Du Enterprises, LLC,
d/b/a Best Buy Liquor and Beverage Warehouse,
Respondent.

Filed March 3, 2009
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CV0718001

Harry A. Sieben, Jr., Michael M. Miller, Sieben, Grose, Von Holtum & Carey, Ltd., 900 Midwest Plaza East, 800 Marquette Avenue, Minneapolis, MN 55402 (for appellant)

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Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

In this dram-shop action, appellant challenges summary judgment granted to respondent, arguing that she raised a genuine issue of material fact regarding whether respondent made an illegal sale of alcohol to the intoxicated driver who injured her in an automobile accident. Because there is insufficient evidence to create a genuine issue of material fact regarding whether the intoxicated driver purchased alcohol from respondent, we affirm.

FACTS

Appellant Martha Lamas was injured when an intoxicated driver, Thomas Oliver, collided with her vehicle in February 2006. After Lamas settled her claim against Oliver, she sued respondent A-Du Enterprises, LLC, d/b/a Best Buy Liquor and Beverage Warehouse (Best Buy), alleging that Best Buy sold alcohol to an obviously intoxicated Oliver prior to the accident.

Oliver, who has only vague recollections about the day of the accident, testified in depositions taken in 2006 and 2008 that, prior to the accident, he purchased a six-pack of Miller High Life beer for $5 cash. Oliver testified that he may have purchased the beer from Best Buy, and he might have been exhibiting signs of intoxication at the time of the purchase. Oliver recalls drinking most of this six-pack of beer at his home prior to being involved in the accident. Best Buy records for the date in question document two sales of a six-pack of Miller High Life for $5 cash, but both sales occurred well outside of the time frame that Oliver thought he made the purchase and was seen in the area.

Best Buy moved for summary judgment based on the absence of sufficient evidence to support a determination that Best Buy made an illegal sale of alcohol to Oliver. Best Buy also asserted that Lamas's release of Oliver released any claims she may have had against Best Buy. The district court concluded that the release did not release Best Buy, but granted summary judgment to Best Buy because Lamas did not produce evidence sufficient to create a material fact question on the issue of an illegal sale. This appeal followed.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). On summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. *McIntosh County Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008).

In order to survive summary judgment in her dram-shop action against Best Buy, Lamas had to present evidence sufficient to create a material question of fact about whether Best Buy sold alcohol to Oliver when Oliver was obviously intoxicated. *See* Minn. Stat. § 340A.801 (2008) (providing a cause of action against one who sells alcohol

to an obviously intoxicated person who then injures another person). On appeal, Best Buy does not dispute Lamas's claim that Oliver was obviously intoxicated at the time that he purchased a six-pack of beer on the day of the accident, despite the district court's conclusion that the evidence is insufficient on this issue. The parties agree that the only issue on appeal is whether there is sufficient evidence to create a material fact question about whether Oliver purchased the beer from Best Buy.

Oliver has been deposed twice: once on August 30, 2006, in connection with Lamas's action against him, and again on March 25, 2008, in Lamas's action against Best Buy. In his 2006 deposition, Oliver testified that, on the day of the accident, he drank beer and rum and Cokes at a friend's house. Oliver testified that he then stopped briefly at another friend's house but did not leave his car. Oliver testified, "Then I—I believe I stopped at the liquor store and got a six-pack of beer, then I went home." When asked what liquor store he stopped at, Oliver replied, "I can't—I can't remember. There's one in town across—I don't know if that's on Eighth Avenue. . . . And that's typically where I would stop in and get a six-pack. . . . I believe that—I would have stopped there if I stopped anywhere."

In his 2008 deposition, Oliver was even more uncertain about what he did when he left his second friend's house. He testified that he left that house between four and five in the afternoon, but when he was asked where he would have gone next, Oliver said, "I don't remember. I couldn't tell you for sure." Oliver identified three liquor stores–Driskill's, Leaman's and Best Buy–that he could have stopped at on his way to the Hopkins Tavern. His sister testified that she saw Oliver at the Hopkins Tavern between

5:30 p.m. and 6:00 p.m. Best Buy is located directly across the street from the Hopkins Tavern.

When asked at the 2008 deposition if he could identify the liquor store where he purchased the six-pack, Oliver testified, "I frequent the place by Driskill's and . . . Best Buy, because they have Miller for $5 a six-pack." He also testified that he shops at Leaman's liquor store. Oliver could not recall the price of Miller High Life at Leaman's, but he could not rule out the possibility that he had purchased the six-pack at Leaman's on the day of the accident. Oliver agreed that in his 2006 deposition he said that he thought he bought the six-pack at Best Buy. When asked if he still thought it was the most likely scenario, Oliver replied, "Yes. I mean, that's–we're creatures of habit." When asked if he still thought that Best Buy is where he bought the six-pack, Oliver testified, "I believe so. It's what I thought, but I can't tell you 100 percent." Oliver agreed that his testimony in 2006 was based on an assumption of what may have happened based on "habit."

The district court concluded that Oliver "cannot testify as to where he purchased the beer" and that there was no evidence that Oliver bought the beer at Best Buy as opposed to the two other liquor stores mentioned in the pleadings. We agree.

Lamas argues that evidence that Oliver frequently purchased beer at Best Buy is sufficient to prove that his conduct on the day of the accident was in conformity with the habit and creates a material fact question sufficient to preclude summary judgment. But admissible evidence of habit "describes one's regular response to a repeated specific situation. . . ." Minn. R. Evid. 406 1989 comm. cmt. (quotations and citations omitted).

"Whether the response is sufficiently regular and whether the specific situation has been repeated enough to constitute habit are questions for the trial court." *Id.* In this case, Oliver's testimony that he frequently purchases beer from Best Buy does not establish a regular response to a repeated specific situation sufficient to allow this evidence to prove that Oliver's conduct on the day of the accident was in conformity with a habit or routine practice. Oliver's deposition makes it clear that he can only speculate about where he purchased the beer that day, and the district court did not err in concluding that this speculation, coupled with evidence that Best Buy did not make a sale within the time frame that Oliver purportedly made the purchase, is insufficient to permit reasonable persons to find by a preponderance of evidence that Oliver made the purchase at Best Buy. The district court did not err in granting summary judgment.

Because we conclude that the evidence is insufficient to support Lamas's action against Best Buy, we decline to reach the issue of whether the release she gave to Oliver also released any additional claims she had arising out of the accident.

Affirmed.