

CASE NO. A06-1007

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State of Minnesota  
In Court of Appeals

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ERIN J. OSBORNE, Individually and as Parent and  
Natural Guardian of ALEXIA RAY OSBORNE RILEY,  
MICHAEL R. RILEY, SR., MARIE A. RILEY AND KELLEY M. RILEY,

*Appellants,*

vs.

TWIN TOWN BOWL, INC., d/b/a JERRY DUTLER BOWL,

*Respondent.*

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**APPELLANTS' REPLY BRIEF**

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LAW OFFICE OF  
KENNETH R. WHITE, P.C.  
Kenneth R. White, Esq. (#141525)  
325 S. Broad Street  
Suite 203  
Mankato, Minnesota 56001  
(507) 345-8811

*Attorney for Appellants*

TOMSCHE, SONNESYN  
& TOMSCHE, P.A.  
Steven E. Tomsche, Esq. (#190561)  
610 Ottawa Avenue North  
Minneapolis, Minnesota 55422  
(763) 521-4499

*Attorney for Respondent*

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## ARGUMENT

1. The trial court erred in granting summary judgment where the evidence established that Riley jumped due to the influence of alcohol.

- a. The evidence is sufficient to raise a fact question of causation.

The core issue in this case is simply stated and established by the record – did Riley’s intoxication cause his decision to jump into the flood-swollen Minnesota River? The answer is “yes.” If Riley had driven his car into the bridge guard rail, crashing through, and drowning as a result, causation would not be a summary judgment issue. *See* Ascheman v. Village of Hancock, 254 N.W.2d 382 (Minn. 1977) (liquor vendor could not join intoxicated person in action brought by his wife and daughter, following a one-vehicle accident, since no common liability existed and to do so would frustrate the purposes of the dram shop statute); Harden v. Seventh Rib, Inc., 311 Minn. 27, 247 N.W.2d 42 (1976) (affirming a jury verdict in a family’s claim brought against a bar following a single vehicle accident); Blank v. Golden Eagle, Ltd., 1996 WL 745223 (Minn. App. Dec. 31, 1996) (family’s action against bar could go forward where father decided to ride in pickup truck bed, rather than the cab, and fell out). Even the Defendant acknowledges that, “this would be a different case if Riley had been so drunk that he simply fell off the bridge into the swollen Minnesota River.” (Defendant’s Memorandum, page 8; AA46). The Defendant fails to distinguish these scenarios or why the result should be different here where Riley jumped into the river.

In addition, the record establishes that Riley's intoxication contributed to his death. Whether through the testimony of Dr. Komaridis, or the well known "effects of excessive alcohol consumption," State v. Frank, 364 N.W.2d 398, 400 (Minn. 1985), the record demonstrates that Riley's intoxication significantly contributed to the decision. Those well-known effects include the loss of inhibition, increased sense of power and decreased decision-making ability. All of those contributed to Riley's decision to jump into the River. The record thus establishes sufficient evidence to allow a reasonable jury to find Riley's intoxication was a cause of his decision to jump.<sup>1</sup>

This Court, therefore, should reverse the trial court and remand this case for trial.

b. The Weber decision is distinguishable.

In addition to the decisions relied upon by the trial court, the Respondent relies heavily upon Weber v. Au, 512 N.W.2d 348 (Minn. App. 1994). Such reliance, as with the decisions relied upon by the trial court and Respondent in its Brief, is misplaced.

In Weber, a police officer pursued a juvenile after the officer interrupted a fight outside the bar. During that pursuit, the officer sustained a knee injury. Weber, 512 N.W.2d at 349. In rejecting the claim, this Court stated: "In neither his notice of a civil liability claim, nor in his complaint, did Weber allege that the minor was intoxicated, let alone that the minor's intoxication caused Weber's injury. ... Weber has made no

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<sup>1</sup> Defendant notes in its Brief that Riley had expressed thoughts in the past of fleeing from police by jumping into the river and swimming away. His intoxication reduced any inhibition he had about such an act, and impacted his decision-making ability in terms of his abilities to swim the Minnesota River that night. Causation is sufficiently established to create a jury question.

allegation that the intoxication played any role in the injury Weber sustained when he apprehended the minor after chasing him on foot.” Weber, 512 N.W.2d at 350. Instead, Weber relied upon a “but for” argument that if the minor had not been served, the officer would not have had to arrest the minor and they would not have fallen down during that arrest. In effect, the record established nothing more than the officer fell while pursuing a suspect. This Court noted the importance of the missing allegation and supporting evidence, distinguishing Hannah v. Jensen, 298 N.W.2d 52 (Minn. 1980) and Hannah v. Chielewski, 323 N.W.2d 781 (Minn. 1982), on their facts since the officer there was injured in a scuffle with the intoxicated person. Weber, 512 N.W.2d at 350-51.

Here, as in the Hannah cases, the record establishes the requisite causation missing in Weber. The evidence shows that Riley would not have jumped had he not been intoxicated. *See also* Sworski v. Coleman, 208 Minn. 43, 293 N.W.2d 297 (1940) (affirming a jury verdict despite proximate causation challenge where person became intoxicated, was arrested and died in jail). Reliance on Weber is thus misplaced.<sup>2</sup>

2. The report from Dr. Komaridis has probative value.

In its Brief, the Respondent challenges the admissibility of the report of Dr. Komaridis. This issue is not properly before this Court. The trial court accepted the report and considered it, although stating it was of “minimal” value. The Respondents

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<sup>2</sup> In addition, of course, Weber involves an injury to the officer, not the decision by an intoxicated person to try to escape arrest by taking an action he would not have undertaken while sober. Since Weber does not involve the actions of an intoxicated person causing harm to himself, it is a completely different scenario.

did not file a notice of review and so that decision is not properly before this Court. City of Ramsey v. Holmberg, 548 N.W.2d 302, 305 (Minn. App. 1996) (“Even if the judgment below is ultimately in its favor, a party must file a notice of review to challenge the district court's ruling on a particular issue.”).

In addition to the improper challenge to the trial court’s decision, the Respondent asserts that Dr. Komaridis’ report lacks probative value. (Respondent’s Brief, pages 20-22). Again, the trial court found it had minimal value, and that is the fundamental problem - the trial court engaged in improper weighing of the evidence.

Respondent attempts to make light of the report by challenging the basis for the opinion and by questioning the conclusions Dr. Komaridis reaches. As the report reveals, Riley was treated at ASC Psychological Services, where Dr. Komaridis practices, as a youth. (AA15). Dr. Komaridis also had the benefit of extensive other treatment records. (AA15-16). He also relied upon other sources of information regarding Riley, such as the reports of friends and family, police reports and so on. (AA15-16). From this information, Dr. Komaridis was able to develop a personality profile and assessment of Riley’s condition, both when he was not under the influence of alcohol and when intoxicated. (AA17-19). Contrary to the report in In re Estate of Meiners, 2006 WL 1390267 (Minn. App. May 23, 2006), the report here lays the foundation for the opinions, explains the basis for the conclusions and is far more than the conclusory opinion rejected in Meiners.

On this basis as well, this Court should reverse the trial court's judgment and remand the case for trial.

**CONCLUSION**

This matter is before this Court on appeal from the grant of summary judgment. The Motion, and the trial court's decision, was based solely upon the assertion that the evidence failed to show proximate cause as a matter of law. A review of the relevant case law, and the specific facts of this case, demonstrates a jury issue on causation. The trial court should be reversed and the case remanded for trial.

Dated this 30 day of August 2006.



Kenneth R. White, No. 141525  
LAW OFFICE OF KENNETH R. WHITE, P.C.  
Attorney for Appellants  
325 South Broad Street, Suite 203  
Mankato MN 56001  
507/345-8811