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NO. A06-1007

State of Minnesota
In Court of Appeals

Erin J. Osborne, individually and as parent and natural guardian of Alexia Ray Osborne Riley, Michael R. Riley, Sr., Marie A. Riley and Kelly M. Riley,

Appellants,

vs.

Twin Town Bowl, Inc., d/b/a Jerry Dutler Bowl,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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

Attorney for Appellants

TOMSCHE, SONNESYN
& TOMSCHE, P.A.
Steven E. Tomsche, Esq. (#190561)
Daniel P. H. Reiff, Esq. (#0329046)
610 Ottawa Avenue North
Golden Valley, MN 55422
(763) 521-4499

Attorneys for Respondent

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PROCEDURAL HISTORY

April 19-20, 2001: Michael Riley, Jr., the allegedly intoxicated person, is pulled over by a Minnesota Highway Patrol Officer for speeding, is then arrested for suspicion of drinking, and subsequently jumps into the Minnesota River while attempting to escape the officer and drowns.

April 11, 2003: Appellants commence a dram shop action against Twin Town Bowl, Inc. d/b/a Jerry Dutler Bowl alleging that Riley was illegally served an alcoholic beverage, causing or contributing to his intoxication, which intoxication was a direct cause of his decision to jump into the river.

April 15, 2005: Twin Town Bowl moves to dismiss the Complaint for failure to state a claim upon which relief can be granted.

July 12, 2005: The District Court, The Honorable Kurt D. Johnson, denies Twin Town Bowl's motion to dismiss.

March 9, 2006: Twin Town Bowl moves for summary judgment.

April 5, 2006: The District Court, The Honorable Kurt D. Johnson, grants summary judgment in favor of Twin Town Bowl.

May 26, 2006: Appellants' file the Notice of Appeal.

LEGAL ISSUES

1. Did the district court err in ruling that Riley's alleged intoxication was not a proximate cause of Riley's decision to jump into the Minnesota River?

District Court's Ruling

The district court ruled that Riley's alleged intoxication was not a proximate cause of his decision to jump into the Minnesota River.

Apposite Authority

Kunza v. Pantze, 531 N.W.2d 829 (Minn. 1995)
Kryzer v. Champlin Am. Legion No. 600, 494 N.W.2d 35 (Minn. 1992)
Weber v. Au, 512 N.W.2d 348 (Minn. App. 1994)

2. Did the district court impermissibly weigh the evidence when it placed minimal evidentiary value on Dr. Komaridis' report?

District Court's Ruling

The district court ruled that Dr. Komaridis' report was of minimal evidentiary value.

Apposite Authority

Minn. R. Evid. 702
McDonough v. Allina Health System, 685 N.W.2d 688 (Minn. App. 2004)
In re Estate of Meiners, 2006 WL 1390267 (Minn. App. 2006)

STATEMENT OF THE CASE

Respondent accepts Appellants' statement of the case with the following exception:

The date of the alleged incident is April 19-20, 2001, not August 19, 2001.

STATEMENT OF THE FACTS

On April 19, 2001, and into the early morning hours of April 20, 2001, Michael Riley, Jr., the allegedly intoxicated person (AIP), and some friends went out drinking in the Mankato, Minnesota, area, stopping at Respondent Twin Town Bowl Inc. d/b/a Jerry Dutler Bowl. While present at the bowling alley, the bartender served Riley one or two drinks. (Respondent's Appendix "RA" 2). After leaving Jerry Dutler Bowl, State Trooper Kevin McDonald of the Minnesota State Patrol observed Riley driving 74 miles per hour in a 50 mile per hour zone. (RA 8). Because of this excessive speed and only because of his speeding,[1] Trooper McDonald decided to pull Riley over and activated his squad car's emergency lights. (RA 9). Riley continued driving for some time until he finally stopped at the entrance to Highway 14, in the middle of the bridge over the Minnesota River. (*Id.*).

When Trooper McDonald approached the vehicle that Riley had been driving, he smelled alcohol on Riley's breath and decided to test Riley for intoxication. (RA 10). Trooper McDonald then had Riley perform a variety of Field Sobriety Tests (FSTs), which Riley failed. (RA 10-14). While performing the FSTs, Riley was compliant and non-threatening. (RA 13, 15). Trooper McDonald then had Riley blow into a Preliminary Breath Test (PBT) machine, which indicated that Riley's blood alcohol was .18. (RA 15).

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[1] Trooper McDonald testified that there was nothing about Riley's driving conduct that in any way indicated to him that Riley was intoxicated and testified that the sole reason for the stop was Riley's speed.

As a result, Trooper McDonald informed Riley that he was going to arrest him. (RA 16). Because Riley had been compliant, Trooper McDonald turned his back on Riley before he handcuffed Riley in order to place the PBT back in his squad car. (*Id.*). As Trooper McDonald was doing this, Riley said, "I'm out of here." (*Id.*).

Trooper McDonald then turned and saw that Riley had run to the edge of the bridge, which spanned the Minnesota River. (*Id.*). As Trooper McDonald watched, with no time to intervene, Riley jumped off of the bridge and into the swollen river. (*Id.*). Riley had been cooperative and completely rational, up until the time he jumped into the river. (*Id.*). To be clear, Riley did not accidentally fall or lose his balance; instead, Riley voluntarily and intentionally jumped into the river. (RA 16-17).

At the time of the incident, Trooper McDonald believed that Riley was trying to commit suicide but now believes that Riley was attempting to escape the arrest situation (RA 17) because Riley had told a number of people that he believed that he could swim the river. (*Id.*, RA 26). Months later, Riley's body was found in the river. Throughout his life, Riley consistently either ran from law enforcement officers or fought them when they attempted to apprehend him. (RA 18).

The Appellants, consisting of one of Riley's girlfriend (who is now married), his daughter, his sister, and his parents, brought a dramshop lawsuit against Twin Town Bowl, Inc. d/b/a Jerry Dutler Bowl, alleging that the bartender

for the bowling alley illegally served Riley an alcoholic beverage, that this illegal service caused Riley to become intoxicated, and that Riley's intoxication caused him to jump into the river resulting in his death. (Appellants' Appendix "AA" 2-3). Initially, Twin Town Bowl moved for dismissal pursuant to Rule 12 of the Minnesota Rules of Civil Procedure. (AA 8). This motion was denied. (AA 8, 12). Subsequently, Twin Town Bowl moved for summary judgment. (AA 24). In response to this motion, appellants produced a report from a Dr. Komaridis, a psychologist. (AA 14, 24).

Dr. Komaridis never met Riley, and his report states that his opinions are based solely on Riley's records and conversations with the Appellants and Riley's friends.[2] (AA 14-20). Dr. Komaridis' report opines that Riley was an alcoholic and drug addict and notes that Riley was treated on numerous occasions for his addictions. (AA 15-16). Based on a review of Riley's records, Dr. Komaridis concluded that Riley's personality, apparently when sober, showed a "lack of concern for situations, with what appeared to be a very nonchalant attitude towards outcomes or consequences affecting his life," that Riley "defiantly challeng[ed] others, especially authority," and that Riley was "somewhat bold in his behaviors, and somewhat of a risk taker." (AA 17).

[2] Appellants contend that Dr. Komaridis had previously treated Riley. (Appellants' brief p. 3). There is no such evidence in the record. Dr. Komaridis' report states that it is based on "a post-mortem psychological evaluation of records" and conversation with Appellants and Riley's friends. (AA 14).

Riley had been boasting for weeks that he could swim the Minnesota River. (RA 17, RA 26, AA 19). As recent as two days before his death, Riley talked about swimming the river in a conversation with his mother when he was completely sober. (AA 19). Nonetheless, Dr. Komaridis concluded that Riley would not have attempted to escape by jumping into the river if Riley had been sober (AA 20) because Riley exhibited "poor judgment" when intoxicated. (AA 19).

In granting summary judgment, the district court relied on Trooper McDonald's deposition testimony that he did not suspect that Riley was intoxicated until he stopped him. (AA 26). The district court also stated that Riley jumped into the river to escape from Trooper McDonald and not to kill himself. (AA 27). In a footnote to the court's memorandum, the district court further stated that this conclusion was not based on Dr. Komaridis' report and that the report was "of minimal evidentiary value." (AA 27). As a result of the fact that Riley intentionally jumped into the river, the district court concluded that proximate causation was lacking as a matter of law. (AA 29). The district court also concluded that Riley's intoxication was the occasion of his escape attempt, not its cause. (AA 29).

ARGUMENT

Summary judgment is appropriate when there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. The evidence is to be viewed in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). The nonmoving party may not just rest on averments to avoid summary judgment "but must present specific facts." Minn. R. Civ. P. 56.05. The evidence the nonmoving party presents must do more than "merely create[] a metaphysical doubt as to a factual issue" in order to avoid summary judgment. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

On appeal, there are two questions for the appellate courts: (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). Proximate causation is a question of policy for the court to decide. The Minnesota Supreme Court has stated:

> Courts have always used the tort doctrine of proximate cause, as distinguished from causation in fact, to implement public policy in establishing the parameters of liability. Thus this court has frequently quoted Prosser's statement, that "[a]s a practical matter, legal responsibility must be limited to those causes which are so close to the result, or of such significance as

> causes, that the law is justified in imposing liability. This limitation is not a matter of causation, it is one of policy...."

Lewellin v. Huber, 465 N.W.2d 62, 65-66 (Minn. 1991); *see also Kryzer v. Champlin American Legion No. 600*, 494 N.W.2d 35, 36-38 (Minn. 1992) (holding that *proximate* causation is, and always has been, the standard to be used in dramshop cases and finding, as a matter of law, that proximate causation was lacking) and *Crea v. Bly*, 298 N.W.2d 66, 66 (Minn. 1980) (holding that proximate cause is a matter of law and reversing a jury verdict against a bar)

1. The district court did not err in concluding that Riley's intoxication was not a proximate cause of his death

The Minnesota Civil Damage Act, commonly known as the Dram Shop Act, allows those who have been harmed by the intoxication of another person to recover against the bar that sold the alcohol if the sale was illegal. Minn. Stat. § 340A.801, subd. 1 (2000). The most common type of an illegal sale is a sale to a person who is obviously intoxicated. Minn. Stat. § 340A.502 (2000). In order for a plaintiff to recover in a dramshop action, the plaintiff must establish four elements: (1) the defendant bar unlawfully sold alcohol (i.e. sold alcohol to an obviously intoxicated person), (2) that illegal sale caused the obviously intoxicated person's intoxication, (3) the obviously intoxicated person's intoxication caused the plaintiff's damages, and (4) the plaintiff suffered damages. *Hartwig v. Loyal Order of Moose, Brainerd Lodge No. 1246*, 253 Minn. 347, 356, 91 N.W.2d 794, 801 (1958).

In this case, the third element is lacking, as a matter of law, because Riley's intoxication did not cause him to jump into the river, resulting in his death and the Appellants' claimed damages. Instead, Riley's death, and the resulting damage claims, was caused by Riley's voluntary decision to jump into the river in an apparent attempt to escape arrest from Trooper McDonald.

The causation requirement in dramshop cases is proximate causation. *Kryzer* 494 N.W.2d at 36-37. "Proximate cause exists if the . . . conduct was a substantial factor in bringing about the injury." *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980) (*citing Johnson v. Evanski*, 221 Minn. 323, 328, 22 N.W.2d 213, 216 (1946) and *Medved v. Doolittle*, 220 Minn. 352, 356 19 N.W.2d 788, 790 (1945)). The Minnesota Supreme Court has expressly ruled that, in dram shop cases, "[t]he fact that damage would not have happened but for defendant's tortious act, does not, as a matter of law, necessitate the conclusion that such act was the proximate cause of the damage." *Kryzer*, 494 N.W.2d at 37 (*citing Childs v. Standard Oil Co.*, 149 Minn. 166, 170, 182 N.W. 1000, 1001 (1921)).

In *Kryzer*, the plaintiffs were the husband, the children, and the family business of the alleged intoxicated person (AIP); the AIP had been injured while being ejected from a bar because of her intoxication. *Id.* at 35. The case was decided on a Rule 12 motion. *Id.* at 36. A unanimous Minnesota Supreme Court rejected the use of the "but for" test in dramshop cases and ruled that, although the AIP's "intoxication may have been the occasion for her ejection from the legion

club . . . it did not cause either her injury or that sustained by the plaintiff." 494 N.W.2d at 37.

Kryzer has been repeatedly reaffirmed and cited with approval since it was issued. For example, in *Weber v. Au*, the plaintiff, a police officer, approached the AIP[3] when the AIP started a brawl. 512 N.W.2d 348 (Minn. App. 1994). The AIP then fled, which resulted in the officer chasing and apprehending the AIP. *Id.* at 349. Both the officer and the AIP fell when the two collided, injuring the officer. *Id.* The officer subsequently brought suit against the bar under the Dramshop Act, alleging that the AIP's intoxication "caused the [AIP] to engage in disorderly conduct in the fight outside the bar." *Id.* at 350. In response to the bar's summary judgment motion, the officer argued:

> "[B]ut for" [the bar] contributing to the [AIP]'s becoming drunk and disorderly by illegally selling him alcohol, [the officer], as a police officer, would not have had the duty to apprehend the [AIP], and 'but for' that duty, [the officer] and the [AIP] would not have fallen down and injured [the officer]'s knee.

Id. This Court ruled that this string of causation was clearly the type of causation that *Kryzer* declared to be inappropriate in dramshop cases and held that there was no causation as a matter of law. *Id.*

Even more recently, the Minnesota Supreme Court has reaffirmed *Kryzer* in the case of *Kunza v. Pantze*, 531 N.W.2d 829 (Minn. 1995). In *Kunza*, the

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[3] While the typical AIP was illegally served because the AIP was obviously intoxicated, the AIP in *Weber* was illegally served because the AIP was a minor. This fact is of no consequence because the same proximate causation analysis applies.

plaintiff was married to the AIP, and the two of them had spent an evening drinking at a bar. *Kunza v. Pantze*, 527 N.W.2d 846 (Minn. App. 1995), *reversed* 531 N.W.2d 829 (Minn. 1995). After they left the bar, the AIP began to abuse his wife, the plaintiff, while they were driving in a van being driven by the AIP. *Id.* at 847. In order to prevent further abuse, the plaintiff jumped out of the van. *Id.* at 847-848.

The plaintiff in *Kunza* testified that the AIP became abusive only when he was intoxicated and that her only alternatives were to continue to be abused or to jump out of the van. *Id.* at 848. This Court laid out the plaintiff's position, "[The AIP]'s intoxication caused him to be abusive; therefore, it also caused [the plaintiff] to open the van door, which resulted in her injuries." *Id.* This Court ruled that there could be causation in this case, *id.*, but the Minnesota Supreme Court summarily reversed the decision even before briefs were submitted in the case. *Kunza,* 531 N.W.2d at 829.

Since *Kryzer* was decided, the "but for" analysis has been repeatedly rejected. It must be again rejected in this case. In that regard, consider the fact that the "but for" analysis used by the plaintiffs used in *Weber* and *Kunza* is the same analysis that the Appellants use in this case. This analysis provides that, but for the AIP's, *i.e.* Riley's, intoxication, certain decisions would not have been made and, but for those decisions, the injuries or damages being claimed would not have occurred.

Appellants would have this Court utterly reject *Weber* because the Appellants argument would find causation in the same fact situation where *Weber* found none. Appellants argue that there is causation because Twin Town Bowl should have anticipated that an AIP "might be seen by law enforcement," that the officer might decide to stop the AIP, that the AIP might flee, and that someone may get hurt as a result of the AIP's flight. (AA 8). In *Weber*, the AIP was seen by a police officer, the officer decided to stop the AIP, the AIP fled, and the officer was hurt as a result of the AIP's flight. If Appellants' argument were correct, then *Weber* would have found causation to exist; the fact that this Court found that causation did not exist in *Weber* means that Appellants' argument is incorrect. In fact, *Weber* compels a ruling that there is no proximate causation in a situation such as this.

The present case is also similar to *Kunza* because the injured person in *Kunza* decided to jump out of a moving car to escape a most difficult and troubling situation involving a husband battering a wife. Likewise, in the present case, Riley decided to jump off of a bridge to escape the unpleasant and troubling situation of being placed under arrest. The Minnesota Supreme Court in *Kunza* ruled that causation was lacking as a matter of law and this Court should follow suit in this case. In summary, Riley's intoxication did not proximately cause his death based on the holdings found in *Kryzer*, *Weber*, and *Kunza*.

Said another way, if Appellants' argument was correct, then *Kryzer*, *Weber*, and *Kunza* would all have been decided differently. In *Kryzer*, the AIP was

injured while being ejected (because of her intoxication) from a bar by a bar employee. It certainly is at least as foreseeable for a bar to expect that an intoxicated person may be injured while being manhandled by a bar employee as it is for a bowling alley and lounge to expect that a person will jump off a bridge to evade arrest. It also seems more foreseeable that an intoxicated person will become violent and assault his spouse, as happened in *Kunza*, than it does that an intoxicated person will jump off a bridge after being placed under arrest. Of course, this Court has already ruled that it is NOT foreseeable that one will be hurt by an AIP fleeing from law enforcement in *Weber*.

Despite statements to the contrary, Appellants would have this Court reject *Kryzer*, *Weber*, and *Kunza* and would have the Court utilize a "but for" test, even though they do not call it as such. Appellants talk about the "chain" of causation and the "unbroken sequence" that, Appellants argue, began with Riley driving "in such a bad fashion as to lead a state trooper to pull him over," then to test Riley, then to arrest Riley. (Appellants' brief, p. 8). Appellants' attempt to camouflage their utilization of the "but for" test by saying that Twin Town Bowl should have anticipated that Riley could get hurt or die while attempting to evade arrest.

To reiterate, it is undisputed that Riley was not stopped because he was intoxicated. Rather, Riley was stopped for speeding, and it was his decision to speed that set the stage for the bizarre and tragic events that followed, leading to his death. Yet, Appellants persist in their argument that Riley's intoxication must be viewed as a proximate cause for his decision to jump into the Minnesota River.

At best, Riley's intoxication may have been the occasion for Trooper McDonald's decision to arrest Riley, as described in *Kryzer*, supra. However, an obvious missing link in this already attenuated chain of events is that Riley would never been stopped if he had not been speeding. Riley would not have even have had the occasion to jump into the river, while intoxicated, if he had not been speeding.

There is also no connection between Riley's speeding and his intoxication; not even Dr. Komaridis, Appellants' hired expert, has attempted to connect Riley's decision to speed with his intoxication. How then can Riley's intoxication be considered a proximate cause for his decision to jump into the river, resulting in his death and the Appellants' damage claims?

Ultimately, this case points out exactly what the Minnesota Supreme Court cautioned in *Harpster v. Hetherington,* when it stated, "The problem with the 'but for' test . . . is that with a little ingenuity it converts events both near and far, which merely set the stage for an accident, into a convoluted series of 'causes' of the accident." 512 N.W.2d 585, 586 (Minn. 1994). It should be kept in mind that this Court stated in *Kryzer* that the interpretation used in that case "allows an injury to come within the [Dramshop] Act when the intoxicated person commits no affirmative injury-causing act other than the consumption of alcohol." 481 N.W.2d, 98, 103 (Minn. App. 1992) *reversed* 494 N.W.2d 35 (Minn. 1992). The supreme court, though, determined that this interpretation was too *broad. Kryzer*, 494 N.W.2d at 37 (reversing the court of appeals and finding that there was no

causation as a matter of law). Even under the overly broad statement in the reversed *Kryzer* decision, though, there is no causation because Riley committed an "affirmative injury-causing act" in intentionally jumping off the bridge. Thus, even the broadest, indeed overly broad, definition of causation inevitably leads to the conclusion that there is no proximate causation here as a matter of law.

Specifically, the Appellants' theory is that, but for Twin Town Bowl serving an alcoholic beverage to Riley, Riley would not have been intoxicated; and, but for Riley's intoxication, he would not have been speeding; and, but for his speeding, Riley would not have been pulled over; and, but for Riley's being pulled over, Trooper McDonald would not have decided to arrest Riley; and, but for the decision to arrest Riley, he would not have jumped off the bridge; and, but for Riley's jump off the bridge, Riley would not have died.

In summary, it is debatable if causation would even lie in this case under the "but for" causation standard that has been repeatedly rejected by the Minnesota appellate courts. Similarly, under the proximate causation standard enunciated in *Kryzer*, it is again debatable whether Riley's intoxication was even the *occasion* for his decision to jump into the river. However, there can be no debate but that causation is clearly lacking, as a matter of law, in this case.

2. The district court did not impermissibly weigh the evidence when it placed minimal evidentiary value on Dr. Komaridis' report

Appellants argue that the district court erred when it stated that Dr. Komaridis' report was of "minimal evidentiary value." This statement was merely

made in conjunction with the court's conclusion that it assumed, and properly so, for purposes of the summary judgment motion that "Riley jumped to escape, not to kill himself". (AA 27) In other words, the trial court reached this conclusion without relying on the speculative opinions of Dr. Komaridis. There is no weighing of the evidence in such a statement. The parties agree that Riley was attempting to escape, and not attempting to commit suicide, when he jumped into the river.

What's more, the district court properly ignored Dr. Komaridis' report because it is inadmissible. The evidence used to attempt to thwart a summary judgment motion "must be such evidence as would be admissible at trial." *Hopkins v. Empire Fire & Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991). In order to be admissible, an expert's opinion must both (a) assist the trier of fact and (b) be reliable. Dr. Komaridis' report is neither.

a. The report does not assist the trier of fact

Rule 702 states that an expert may render an opinion only if it "will assist the trier of fact." Minn. R. Evid. 702. Thus, the Minnesota Supreme Court has stated:

> Opinion evidence of an expert is not admissible simply because he is an expert in some field or another, but it is admissible, if at all, for the reason that his special knowledge and skill may be of assistance to the jury in arriving at a correct conclusion where the subject matter is of such a nature that the jury ordinarily would be unable to do so as well as the expert. On the other hand, where the subject matter is of such a nature that it ordinarily would lie within the knowledge or

> experience of people of common intelligence, the opinion of experts should not be permitted as a substitute for the combined opinion of the jury.

Carmody v. Aho, 251 Minn. 19, 24, 86 N.W.2d 692, 696 (1957). One area that the Minnesota Supreme Court has singled out as being unnecessary for expert opinion is the effect of intoxication on one and the court has made clear, "Most jurors have some experience with the effects of excessive alcohol consumption and therefore, in an ordinary case, will not need expert assistance." *State v. Frank*, 364 N.W.2d 398, 400 (Minn. 1985).

There is nothing atypical about this case and nothing helpful about Dr. Komaridis's opinion that Riley's claimed intoxication played a substantial part in his decision to jump into the river. This opinion that Riley's intoxication played a substantial part in his decision to jump is fraught with speculation and lacking in foundation. Thus, Dr. Komaridis's opinion does not assist the trier of fact in any way and should be stricken under rule 702. *See State v. Borchardt*, 478 N.W.2d 757, 761 (Minn. 1991) (stating that evidence must add something to the trier of fact's understanding or else be excluded under rule 702).

b. Dr. Komaridis' report is unreliable as a matter of law

In Minnesota, in order for scientific evidence to be admissible, it must satisfy two elements: (1) the theory must be generally accepted in the relevant scientific community and (2) the methodology must be reliable. *McDonough v. Allina Health System*, 685 N.W.2d 688, 694 (Minn. App. 2004). One reason that an expert's methodology is unreliable is if the opposing party points out "'a

plausible alternative cause and the doctor offers no explanation of why he or she has concluded that was not the sole cause.'" *Id.* at 695 (quoting *Heller v. Shaw Indus. Inc.*, 167 F.3d 146, 156 (3d Cir. 1999)).

Here, Dr. Komaridis's opinion is unreliable for two reasons. The first and most obvious is that Dr. Komaridis never met or interviewed Riley, yet he reaches conclusions as to the factors involved in Riley's decision to jump into the river. Dr. Komaridis only reviewed old records and now baldly asserts that Riley would not have jumped into the river if he had not been intoxicated. Putting aside the fact that it is impossible to ever know what was going on inside someone else's head, the fact is that Dr. Komaridis asserts he can do just that based solely on Riley's old treatment records; this is pure speculation.

This speculation leads to the second reason that Dr. Komaridis's opinion is unreliable. It is equally plausible that Riley would have jumped into the river if he had been sober. Riley had a long history of attempting to flee from law enforcement and of fighting law enforcement when he was in trouble.[4] Furthermore, as Dr. Komaridis noted in his report, while sober, Riley had stated on numerous occasions that he could swim the river, which was in keeping with Riley's character as Dr. Komaridis described it. Specifically, Dr. Komaridis described Riley's personality as being one that was "very nonchalant . . . towards outcomes or consequences affecting his life" and as "a risk taker."

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[4] Indeed, Psychologist Komaridis described the decedent as "defiantly challenging others, especially authority."

Based on Dr. Komaridis's own observations of Riley's personality as being one who takes risks and does not consider the consequences, even if they may be deadly consequences, and based on the fact that Riley stated on numerous occasions while sober that he could swim the river, it certainly seems plausible to conclude that Riley may have acted exactly as he did even if he had been sober at the time of his arrest. For example, if Riley had been stopped for speeding and had not been drinking, and was placed under arrest for an outstanding warrant, then it would be reasonable to conclude that Riley would have jumped into the river because Riley had long thought that he could swim the river, was defiant toward authority, often acted without regard for the consequences, and had consistently fought or fled law enforcement officers when they attempted to arrest him.

Dr. Komaridis makes no attempt to explain why he believes that Riley would not have acted as he did if he had been sober. Because there is no such explanation, Dr. Komaridis's opinion is unreliable, as a matter of law, because there is a plausible alternative that the doctor does not include in his opinion. *See McDonough*, 685 N.W.2d at 695 (stating that an expert's opinion is unreliable if there is a plausible alternative that the expert does not explain).

c. Even if admissible, Dr. Komaridis' report is still of no value and does not change the outcome of the case

While the court may not weigh the evidence, "the court is not required to ignore its conclusion that a particular piece of evidence may have no probative

value, such that reasonable persons could not draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). "A party cannot rely upon speculation to demonstrate the existence of a genuine fact issue." *Johnson v. Van Blaricom*, 480 N.W.2d 138, 140 (Minn. App. 1992). This case illustrates the reason for these rules: Dr. Komaridis' opinion is based on speculation and therefore has no probative value.

In May 2006, this Court decided *In re Estate of Meiners*, 2006 WL 1390267 (Minn. App. 2006) (attached hereto in Respondent's Appendix). In *Meiners*, the appellant contested a will and sought to introduce two reports from a psychiatrist concerning the decedent's mental state at the time the will was created. *Id.* at 1-2. The psychiatrist had reviewed old reports and spoken to the decedent's friends. *Id.* at 2. This led the psychiatrist to conclude that the decedent was depressed at the time that the will was written and that the decedent's ability to comprehend the will was impaired at the time that the will was created. *Id.* This Court concluded that the district court properly ignored the psychiatrist's report because they had no probative value as they were conclusory and failed to properly establish a causal link between the decedent's alleged depression and the alleged lack of testamentary capacity. *Id.* at 3.

Likewise, in this case, Dr. Komaridis' report, a mental health professional's report like the report in *Meiners*, lacks probative value. Dr. Komaridis' opinion is that Riley would not have jumped into the river because Riley had previously made poor decisions when intoxicated. Dr. Komaridis' opinion, though, ignores

his other conclusions about Riley's personality, namely that Riley was impulsive, defied authority, and took risks without regard for the consequences, when sober. Dr. Komaridis does not explain why he concluded that Riley would not have jumped if sober but merely asserts it. This is no different than the psychiatrist's affidavits in *Meiners* where the expert provided little explanation for his conclusion.

Appellants argue that Dr. Komaridis' report is helpful because Dr. Komaridis stated the, as Appellants concede, generally understood statement that alcohol affects a person's decision making, leading Dr. Komaridis to opine that Riley would not have jumped off the bridge but for the fact that he was intoxicated. (Appellants' brief 14). Of course, such an opinion is unhelpful because most jurors are already aware of this information. *See Frank*, 364 N.W.2d at 400 (stating that expert opinion about the effects of alcohol is rarely helpful because most jurors are already familiar with the effects of alcohol on a person's decisionmaking). Thus, even if this Court concludes that Dr. Komaridis' report is admissible, the result in this case should not change. This court should rule, like it did in *Meiners,* and conclude that the district court properly gave Dr. Komaridis' report no weight because it has no probative value.

CONCLUSION

The district court did not err in ruling that proximate causation is lacking in this case, as a matter of law. Riley's intoxication was not the proximate cause of his decision to jump into the river. Furthermore, it was not even a factor in why he was stopped by Trooper McDonald. At best, Riley's intoxication may have been the occasion of his escape attempt but is certainly not its cause. Lastly, the district court did not impermissibly weigh the evidence when it stated that Dr. Komaridis' report is of minimal evidentiary value. The grant of summary judgment in favor of Respondent Twin Town Bowl d/b/a Jerry Dutler Bowl should be affirmed.

Respectfully submitted.

Dated: 8/17/06

Steven E. Tomsche, (#190561)
Daniel P. H. Reiff (#0329046)
Tomsche, Sonnesyn & Tomsche, P.A.
610 Ottawa Ave. N.
Minneapolis, MN 55422
(763) 521-4499

Attorneys for Respondent Twin Bowl, Inc. d/b/a Jerry Dutler Bowl

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).