

**APPELLATE COURT CASE NUMBER A061796
STATE OF MINNESOTA
IN COURT OF APPEALS**

Mark A. Christiansen, Individually and as Trustee
for the Heirs of Ken J. Christiansen, Decedent;
Lisa Harma and Sherry Christiansen,

Respondents,

vs.

University of Minnesota Board of Regents, Jeramy M.
Katchuba, Kevin J. McGuigan, Wesley W. Omer,
and Brian G. Warden,

Appellants.

BRIEF OF RESPONDENTS

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INTRODUCTION

The legal issue certified for appellate review as important and doubtful is whether an action brought under Minn. Stat. § 340A.90 is governed by a six year statute of limitations. Respondents accept appellant Wesley W. Omer's succinct statement of facts to frame the legal issue. The trial court concluded that a six year statute of limitations applies. Respondents urge this Court to affirm the trial court's decision that denied appellant's motion for summary judgment, thereby allowing this case to proceed to trial on the merits.

ARGUMENT

The civil action created by Minn. Stat. § 340A.90 is not a wrongful death action and is governed by the six year statute of limitations applicable to an action upon a liability created by statute within the meaning of Minn. Stat. § 541.05, Subd. 1(2) and a negligence action for injury to the person or rights of another within the meaning of Minn. Stat. § 541.05, Subd. 5.

Appellant correctly states the general rule that where a more specific statutory provision irreconcilably conflicts with a more general provision, the more particular provision controls over the more general provision. *Ford v. Emerson Electric Co.*, 430 N.W.2d 198 (Minn. Ct. App. 1988). Discerning what is the applicable statute of limitations in the cases cited by appellant is relatively easy. Claims for injuries arising from defects in improvements to real property are specifically barred if not brought within 2 years of discovery. Minn. Stat. § 541.051. Actions against health care professionals for conduct within the scope of their professional license are governed by a four year statute of limitations, whereas the negligent conduct of a blood bank was held not to constitute professional licensure malpractice and was, accordingly, governed by a six year statute of limitations. *Kaiser v. Memorial Blood Center*, 486 N.W.2d 762 (Minn. 1992). If the

respondents' action were one brought under the Minnesota Wrongful Death Act, we could agree that the action would be time barred if not brought within 3 years after the date of death and in no event longer than six years after the act or omission giving rise to the wrongful death action. The applicable statute of limitations is clearly stated in the Wrongful Death Act, Minn. Stat. § 573.02, Subd. 1. The common thread running throughout the cases cited by appellant stands for the proposition that the search for the applicable statute of limitations must focus on the nature and source of the action and whether there is provision for a more general or specific statute of limitations.

As we review the common law and legislative history of the so-called Social Host Liability Statute, Minn. Stat. § 340A.90, the conclusion is inescapable that respondents' rights are exclusively created by statute. Appellant appears to concede that the individual respondents' action is one to enforce a right created by statute. One must, therefore, look to the various statutes of limitations to discern what period of limitations governs this statutorily created right. The answer lies in Minn. Stat. § 541.05, Subd. 1. This section states, in part:

Subd. 1. - Six-year limitation. Except where the Uniform Commercial Code otherwise prescribes, the following actions shall be commenced within six years:

- (1) Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed;
- (2) Upon a liability created by statute, other than those arising upon a penalty or forfeiture or where a shorter period is provided by section 541.07;

Inasmuch as the liability of the adult social host to persons injured by the intoxication of an underage drinker to whom alcoholic beverage was furnished by the host is a liability created by statute, the six year limitations statute controls. This should end the inquiry.

It is useful to understand some of the background that predated the year 2000 enactment of the Social Host Liability Statute, Minn. Stat. § 340A.90. This history is described by Judge Schumaker in *Wollan v. Jahnz*, 656 N.W.2d 416 (Minn. Ct. App. 2003). The common law did not recognize a cause of action against a liquor vendor for injuries resulting from the sale of intoxicating beverages. *K. R. v. Sanford*, 605 N.W.2d 387. Minnesota first imposed liability on vendors in 1911 by enacting the Civil Damages Act. In 1985, the Supreme Court held that “a social host is not liable in a common-law action for negligently serving alcohol to a minor.” *Holmquist v. Miller*, 367 N.W.2d 468 (Minn. 1985), holding that only the legislature could create social host liability. The legislature responded in 1990 by amending the Civil Damages Act to provide that a common law tort claim against any person 21 years or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years was not precluded by the Civil Damages Act. After observing that “most negligence causes of action are governed by Minn. Stat. § 541.05, Subd. 1(5) (2002) which provides a 6 year limitations period for “criminal conversion, or for any other injury to the person or rights of another, not arising out of contract, and not hereinafter enumerated,” Judge Schumaker continued:

In the past, Minnesota courts have consistently analyzed social host liability using principles of negligence. *See, e.g., Trail v. Christian*, 298 Minn. 101, 213 N.W.2d 618 (Minn. 1973);

Wegan v. Village of Lexington, 309 N.W.2d 273 (Minn. 1981). Both *Trail* and *Wegan* were superceded by legislation passed in 1982. See Act of Mar. 22, 1982, c. 528, § 7, 1982 Minn. Laws 978; *Holmquist*, 367 N.W.2d at 471 (recognizing *Trail*'s ineffectiveness after 1982 statute). Neither the 1982 modification of the Civil Damages Act to include malt liquor containing more than 3.2% alcohol by weight ("3.2 beer") nor the addition of subdivision 6 in 1990 altered the negligence analysis used in *Trail* or *Wegan*. The inclusion of 3.2 beer in the Civil Damages Act merely expanded the types of alcohol included under the purview of the statute; it did not alter the cause of action upon which the claim was based. Similarly, by adding subdivision 6, the legislature did not create a new cause of action, but has merely granted permission to apply existing common-law principles to the defined social hosts.

Since the 1990 addition of subdivision 6, this court has continued to apply negligence principles to actions permitted by that subdivision. In *VanWagner*, this court determined that the common-law action permitted by subdivision 6 should be analyzed using negligence principles and noted that common-law actions permitted by subdivision 6 do not arise directly under Civil Damages Act. *VanWagner*, 533 N.W.2d at 75. Professor Michael Steenson has also noted that the legislature, by adding subdivision 6, consciously permitted social-host liability to be decided using common-law negligence principles. Michael K. Steenson, *With the legislature's Permission and the Supreme Court's Consent, Common Law Social Host Liability Returns to Minnesota*, 21 Wm. Mitchell L. Rev. 45, 106 (1995) ("[T]he legislature acted with full awareness of the division that would be created by permitting social host liability on the basis of common law negligence principles."). We do not believe that the promulgation of subdivision 6 compels this court to discontinue applying a negligence analysis and its concomitant six-year limitations period.

We disagree with the district court's determination that subdivision 6 is controlled by the two-year limitations period found in Minn. Stat. § 541.071(1) (2002). By adding subdivision 6, the legislature did not take it upon itself to create a new cause of action or statutory scheme, but it only gave its

permission for common-law actions to go forward. The legislature provides no indication that it intended to diverge from the negligence analysis used in the past. Applying the two-year limitations period in Minn. Stat. § 340A.802, subd. 2 (2002), which controls other portions of the Civil Damages Act, is similarly inappropriate. The *VanWagner* court noted that by enacting subdivision 6, the legislature indicated its intent that the Civil Damages Act not preempt actions under that subdivision.

* * * *

Because we find no compelling reason to diverge from the negligence analysis used in prior cases under the Civil Damages Act and subdivision 6, we hold that the six-year limitations period under Minn. Stat. §541.05, Subd. 1(5) is the proper measure for those common-law actions permitted by section 340A.801, subdivision 6.

Just as the *Wollan* court held that a common-law action for injuries resulting from providing alcohol to a minor is governed by a six-year limitation period, notwithstanding the two year statute of limitations contained in the Civil Damages Act with respect to an action against a liquor licensee, negligence analysis should apply to the instant case. Given the history of social host liability in Minnesota, it is clear that the 2000 legislature intended to create a right of action by enacting section 340A.90 that did not theretofore exist. Just as the common law negligence analysis recognized by *Wollan* supported a concomitant six year limitations period, and because the action brought by respondents against appellants and the other social hosts is an action created by statute, the six year period of limitations provided in Minn. Stat. § 541.05, subd. 1 governs.

Appellants mischaracterize the respondents action against appellants as a wrongful death action. It is not, for all of the following reasons:

1. An action under the Wrongful Death Act must be brought by a court appointed trustee who represents a limited class of persons: the decedent's spouse and next of kin. Section 340A.90 creates a right of action in favor of not only a spouse, child, parent, guardian, employer but **any other person** injured in person, property or means of support or who incurs other pecuniary loss.
2. One who is injured so as to give rise to an action under Section 340A.90 has a right of action "in the person's own name against a person who is 21 years or older who: . . ." permitted consumption or furnished alcoholic beverage to a person under the age of 21 years that caused the intoxication of that person. A careful reading of respondents' complaint shows that respondents Mark A. Christiansen, Lisa Harma and Sherry Christiansen bring their section 340A.90 actions in their own names, even though the complaint also states a separate claim for relief by Mark A. Christiansen against the University of Minnesota Board of Regents in his fiduciary capacity as trustee for the heirs of Ken J. Christiansen, decedent. For appellants to state that this is only an action for wrongful death clearly disregards the fact that two distinct theories of liability are separately pleaded but joined in a single complaint.
3. The Wrongful Death Act is invoked only upon death, whereas a right of action under section 340A.90 arises in favor of any person injured in person,

property, or means of support, or incurs other pecuniary loss. By its terms, the Social Host Liability Statute exists for the benefit of **all persons** who sustain damage or injury caused by an intoxicated person under 21 years of age whose intoxication was facilitated by a person who is 21 years or older. For example, assume an intoxicated 19 year old to whom alcoholic beverages were furnished by a 40 year old host, leaves a Super Bowl house party driving his car, crosses the centerline and collides with another vehicle, causing property damage to the vehicle, non-fatal injuries to one occupant and the death of another. The damaged vehicle owner has a personal action against the host under section 340A.90 for his property damage; the injured occupant has a claim against the host for bodily injuries; and family members of the fatally injured occupant has a claim under section 340A.90 for injury to their means of support and for other pecuniary loss. Assume the 19 year old died as well. His surviving family members would also have social host liability claims against that host. The result urged by appellant is both incongruous and inconsistent with the remedial purpose of the Social Host Liability Statute. Under appellant's theory, the applicable statute of limitations would depend on whether or not the intoxicated, underage driver's victim died or survived the collision. Implicit in appellant's argument would be the notion that the surviving victims of the accident could bring their section 340A.90 action within six years, whereas any person who sustained injury to means of support or incurred other

pecuniary loss by reason of the victim's death would have their claim governed by a three year statute of limitations. We find nothing in section 340A.90 to suggest that the applicable statute of limitations should turn on whether or not the injured person survived.

4. In a Wrongful Death Act, the decedent's fault is compared to the fault of the tortfeasor to produce the result required by the Comparative Fault Statute. A surviving spouse and next of kin might recover nothing if the decedent's negligence were greater than the tortfeasor defendant's negligence. On the other hand, the surviving spouse and children of an intoxicated decedent do not have the decedent's fault imputed and compared to the conduct of one who illegally furnishes alcoholic beverage that causes the intoxication. *Kuiawinski v. Palm Garden Bar*, 392 N.W.2d 899 (Minn. Ct. App. 1986). As this Court observed in *Kuiawinski*, if the AIP's conduct were imputed to his surviving spouse and children, that conduct would almost always be more egregious than the conduct of the offending liquor licensee, thereby frustrating the remedial purpose of the Civil Damages Act. Although the rule against imputing negligence announced in *Kuiawinski* was developed in the context of an action against a licensed vendor of alcoholic beverage, the same reasoning applies to the instant case. By the express terms of the statute, and consistent with the Civil Damages Act, Wrongful Death Act analysis is inapplicable because the legislature has created a class of persons who may recover damages from one

who furnishes alcoholic beverages to an underage person, so long as they suffered pecuniary or financially compensable injury (whether economic or non-economic) and regardless of whether the person injured occupied a legal relationship to the AIP or to his victim. *Lefto v. Hoggsbreath Enterprises, Inc.*, 567 N.W.2d 746 (Minn. Ct. App. 1987), rev. granted, aff'd. 581 N.W.2d 855 (Minn. 1997); *Haugland v. Maplevue Lounge and Bottle Shop, Inc.*, 666 N.W.2d 689 (Minn. 2003). In short, section 340A.90 has nothing whatsoever to do with the Minnesota Wrongful Death Act's three year statute of limitations. The civil action created by section 340A.90 is the statutory equivalent of common law social host liability, a liability founded in negligence, in response to the Supreme Court's decision in *Holmquist v. Miller, supra*.

There is no sound reason to apply a three year wrongful death statute of limitations to a civil action created by statute for social host liability. Section 340A.90 does not contain a statute of limitations period. Had the legislature intended to apply another statute of limitations, it could have easily done so when section 340A.90 was enacted. A three year statute of limitations may have been disfavored by the legislature. Indeed, many jurists believe that the three year limitations period in the Minnesota Wrongful Death Statute is contrary to sound public policy. See *Ortez v. Gavend*, 590 N.W.2d 119 (Minn. 1999) and the dissenting opinions of Justices P. Anderson and Gilbert in *Miklas v. Parrott*, 684 N.W.2d 458 (Minn. 2004).

We contend that there is no lack of clarity, but rather that the six year negligence statute of limitations that governs injury cases under the common law social host doctrine applies equally to civil actions brought under a right of action created by statute, namely section 340A.90.

CONCLUSION

The Court of Appeals should hold that an action brought under Minn. Stat. §340A.90 is governed by a six year statute of limitations, thereby affirming the trial court's decision denying appellant's motion for summary judgment.

Respectfully submitted,

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