
State of Minnesota
In Court of Appeals

JEAN CLARK, Individually and as Trustee for
the Next of Kin of TINA GROVE, Deceased,
MICHAEL JUETTEN, as Parent and Natural Guardian of
CHELSEA GROVE, AND CHAD LINDBERG,
as Parent and Natural Guardian of CODY LINDBERG,
Respondents,

vs.

ROY JORGEN MUNKHOLM PETERSON,
Defendant,
GORDON WHEELER d/b/a CAMP RIPLEY STORE/BAR/CAFÉ
AND KRAZY RABBIT,
Appellant,
STATE OF MINNESOTA DEPARTMENT OF TRANSPORTATION,
Defendant.

APPELLANT'S BRIEF AND APPENDIX

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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).

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STATEMENT OF ISSUE

- I. Whether an entirely new form of Civil Damages “illegal sale” should be created, based upon a liquor vendor’s violation of the Minn. Stat. § 340A.410 “compact and contiguous” building requirement.

Trial court held: Yes.

Authorities: Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (Minn. 1955); Rambaum v. Swisher, 435 N.W.2d 19 (Minn. 1989); Englund v. MN CA Partners/MN Joint Ventures, 555 N.W.2d 328 (Minn. Ct. App. 1996), aff’d 565 N.W.2d 433 (Minn. 1997); Urban v. American Legion Department of Minnesota, 723 N.W.2d 1 (Minn. 2006).

STATEMENT OF THE CASE

Introduction

Plaintiffs/Respondents Jean Clark et al. (“Clark”) have no traditional Civil Damages (dram shop) claim against the Camp Ripley Bar – i.e., for service of alcohol to an obviously-intoxicated person. Neither can they claim any other existing category of Civil Damages claim – for service to a minor, service after hours, service to non-club members, or service on prohibited days.

Instead, Clark asserted a completely new and impractical category of Civil Damages claim – for breach of the Minn. Stat. § 340A.410 requirement that all parts of the building covered by a liquor license must be “compact and contiguous.” Clark asserted that (1) the Camp Ripley Bar sold alcohol from a building addition that was not compact and contiguous with the main building; (2) because the structure was not compact and contiguous, the Camp Ripley Bar’s license did not extend to the addition; and therefore (3) sales from the addition should be found retroactively to violate the Civil Damages Act, even though the addition had been approved by Minnesota Liquor Control and the violation itself caused no additional alcohol consumption. Amazingly, as set forth below, the district court accepted Clark’s argument.

Facts

Gordon Wheeler Sr. (“Wheeler”) owns seven acres of land in Little Falls, Minnesota, across the road from the Camp Ripley military base. (A. 6, 72, 77)

Wheeler runs the Camp Ripley Bar on the property. (A. 6) The Camp Ripley Bar is a sole proprietorship owned by Wheeler. (A. 78)

Wheeler assigned separate names to various sections of the Camp Ripley Bar, such as the “Camp Bar,” the “Brass Buckle,” the “Spice of Life,” and the “Bottle Shop.” (A. 72) The Camp Bar had on/off sale liquor; the Brass Buckle had non-exotic dancing; the Spice of Life had adult entertainment; the Bottle Shop had on/off sale liquor and a café. (A. 72-73)

Wheeler used the separate names to reduce confusion to the public. (A. 74) For example, new people from the military base might go to the wrong section, not find the entertainment they expected, and decide to leave. (Id.) But it was all part of the same business, the Camp Ripley Store/Bar/Café. (A. 72) All sections were part of the same sole proprietorship, with the same federal tax ID number. (A. 78) All the liquor was sold under the same license. (A. 79)

The Camp Ripley Bar’s street address is 15041 Highway 115 in Little Falls. (A. 71, 84) That is the street address on the Camp Ripley Bar’s liquor license. (A. 89) It is the street address for all sections of the Camp Ripley Bar, including the Krazy Rabbit, discussed below. (A. 73, 80, 86-87)

On July 23, 1999, the County approved Wheeler’s permit to add a 40-by-100 foot structure (F-1) to the Camp Ripley Bar. (A. 7) (F-1 was later called the “Krazy Rabbit.” (A. 8))

On April 5, 2000, State and County representatives told Wheeler that his liquor license would not cover liquor sales from structures that were not “compact

and contiguous” with the existing licensed premises. (A. 7) Minnesota Liquor Control agent Michael McManus told Wheeler that this requirement could be met by constructing an 8-foot wide walkway between F-1 and the main building. (A. 25-26) The County Sheriff was present during these discussions. (A. 26)

Consequently, on April 6, 2000, Wheeler applied to the County for a zoning permit to erect an enclosed walkway between building F-1 and the main building. (A. 7) Wheeler’s application expressly told the County that he was building the walkway “to obtain a liquor license.” (Id.) The County approved his application on April 20, 2000. (Id.)

In early 2001, Wheeler began building the enclosed walkway. (A. 7) It was approximately 8 feet wide, as the State Liquor Control had directed. (A. 27)

Despite the State’s approval, on June 27, 2001, the County Planning and Zoning Office issued a stop work order, directing Wheeler to discontinue the construction of the walkway, stating that it was unpermitted construction under a land use ordinance restricting liquor within 200 feet of adult entertainment. (A. 8) The next day, Wheeler went to the County Planning and Zoning Office and applied for an after-the-fact land use permit for the walkway. (Id.) The Planning and Zoning Administrator denied this application on July 5, 2001. (Id.)

Wheeler believed that the County Administrator had mistakenly denied the permit, because the ordinance only restricted new adult uses. (A. 32) In August of 2001, Wheeler’s attorney wrote to the County, explaining their position that building F-1 did not violate the ordinance. (A. 32, 92-93) However, after a

lengthy conversation with the Commissioner, Wheeler was convinced that an administrative appeal of the issue would be fruitless. (A. 32) Wheeler recognized that the issue would have to be decided by the district court. (Id.)

In December of 2001, Minnesota Liquor Control agent McManus again came out to the Camp Ripley Bar, and verbally approved the Krazy Rabbit's sale of alcohol. (A. 81-82) Verbal approval is customary with the State. (A. 82)

On December 29, 2001, following McManus' approval, Camp Ripley Bar opened F-1 as its "Krazy Rabbit" sports lounge. (A. 75, 79) Krazy Rabbit had a separate name to designate it as the sports bar area, rather than adult entertainment. (A. 76)

The Camp Ripley Bar remained a unified business. Employees working in the Krazy Rabbit also worked in other parts of the Camp Ripley Bar. (A. 75-76) They did not fill out separate Krazy Rabbit timesheets. (A. 76) They received the same paychecks and the same rate of pay as all Camp Ripley Bar employees. (Id.)

Underlying Licensing and Zoning Case

On January 22, 2002, Morrison County started the underlying licensing and zoning case against Wheeler and the Krazy Rabbit. (A. 48-59) The County alleged that the Krazy Rabbit's sale of alcoholic beverages, food, and non-alcoholic beverages violated various ordinances. (A. 49-52) For the sale of alcohol, the County generally alleged that the Krazy Rabbit lacked a valid liquor license. (Id.) However, for alcohol, the specific focus of the litigation was on

whether Section 1202.8.a.5 (adult use) of the 1995 Land Use Ordinance had been violated. (A. 10)

The Land Use Ordinance had a “grandfather” clause, Section 304.2.a, allowing non-conforming uses to continue – uses “not permitted by this ordinance but which were legally in existence prior to the effective date of this ordinance.” Based upon this provision, Wheeler contended that the sale of alcohol in the Krazy Rabbit structure was permissible, because the structure was permanently and physically connected with his pre-1995 adult use premises, and because the adult use remained restricted to its pre-1995 location. (A. 10)

On March 13, 2003, the district court issued its Findings, Conclusions and Order. The court agreed with Wheeler that either the adult use or the sale of alcohol could have been separately expanded. (A. 10) But the court held that the combination of the two – adult use within 200 feet of the expanded sale of alcohol – violated the Land Use Ordinance. (Id.) Therefore, based upon the Land Use Ordinance, the court enjoined the Krazy Rabbit from further sales of alcoholic beverages. (A. 9)

Significantly, the district court did not base its decision upon the “compact and contiguous” requirement, and did not find that the Krazy Rabbit violated that statute. (There was no such ruling until almost two years later, in the January 2005 partial summary judgment decision in the present case, discussed below.)

The Accident

On the evening of April 6, 2002, Roy Peterson drove his jeep to the Westside Bar with his cousins Jim and Shawn Willhite. (A. 124-126) A Westside patron, Kelly Billig, began annoying the Willhites and throwing ice at them. (A. 97-98) To get away from Billig, they left Westside after about 15 minutes and went to the Krazy Rabbit building at the Camp Ripley Bar. (A. 102)

Peterson consumed some drinks at the Krazy Rabbit. (A. 98, 126, 133) However, Peterson did not appear intoxicated while at the Krazy Rabbit. (A. 129, 136)

The Willhites were friends with Tina Grove. They saw Grove at the Krazy Rabbit, and offered her a ride home. (A. 135-136) They all left together in Peterson's Jeep. (A. 127, 136)

Peterson drove east on Highway 115, across the Mississippi River bridge, to the intersection with Highway 371 northbound. (A. 131, 138) The right wheels of Peterson's Jeep caught in the railroad tracks embedded in the highway. (Id.) His vehicle overturned, and Tina Grove was killed in the accident. (A. 132)

Present Case

In February of 2003, Plaintiffs Jean Clark et al. ("Clark") served their original Complaint in the present case, with claims against Roy Peterson, the Minnesota Department of Transportation, and the Camp Ripley Bar. Clark alleged that the accident was caused by (1) Peterson's negligence, (2) the State's poorly-

designed roadway-railroad connection, and (3) the Camp Ripley Bar's service of alcohol to Peterson while he was "obviously intoxicated." (A. 105-108)

In December of 2003, Camp Ripley Bar moved for summary judgment against Clark, based upon the lack of evidence that Peterson was obviously intoxicated. In response, Clark asserted new, unpled claims -- that Camp Ripley Bar had made an illegal sale to Peterson because its "Krazy Rabbit" addition had no separate liquor license, violated the County's Land Use Ordinance, and violated the County's Food and Beverage Ordinance. Camp Ripley Bar objected to these unpled claims as not being a valid basis to avoid summary judgment.

The court granted Camp Ripley Bar's summary judgment motion on the existing obvious-intoxication claim, because there was no evidence that Peterson appeared intoxicated. (A. 141) However, the court stayed entry of judgment, giving Clark 30 days to move to amend her Complaint to assert the new license and zoning claims. (A. 143)

On March 4, 2004, Clark moved to amend her Complaint. The Amended Complaint asserted two counts against Camp Ripley Bar. Count I alleged violation of the County's Land Use Ordinance (no alcohol sale within 200 feet of adult use). Count II alleged violation of Minn. Stat. § 340A.401 (no sale without liquor license). Significantly, the Amended Complaint made no mention of the Minn. Stat. § 340A.410 "compact and contiguous" requirement (the sole issue in this appeal). (A. 115-120)

Camp Ripley Bar objected to Clark's motion to amend, because Clark included no legal or factual support for the new claims. However, the district court granted Clark's amendment, finding that a summary judgment motion was the better way to test the viability of Clark's new liquor-liability theories. (A. 146)

On December 14, 2004, Camp Ripley Bar and Clark brought cross motions for summary judgment. On January 20, 2005, the district court granted partial summary judgment for each party. (A. 147-157) The court granted the Bar's motion to dismiss Count I of Clark's Amended Complaint (land use), because it involved no violation of Chapter 340A. The court granted Clark partial summary judgment on Count II of the Amended Complaint (unlicensed sale), ruling that the Camp Ripley Bar's sale of alcohol from the Krazy Rabbit lounge (1) violated the 340A.410 compact-and-contiguous requirement, and (2) was an "illegal sale" under the Civil Damages Act. The court denied Clark summary judgment on causation and damages.

In short, the district court gave Clark much leeway. She was allowed to avoid summary judgment by amending her Complaint after the original summary judgment hearing. She was then allowed to assert a new and novel illegal-sale claim, without supporting evidence. She was then granted partial summary judgment based upon Minn. Stat. § 340A.410 -- a statute she had not pled in her original Complaint or her Amended Complaint, and a statute never before recognized as a basis for liability under the Civil Damages Act.

The parties and the district court resolved the remaining claims. The court dismissed Clark's claims against the State, based upon sovereign immunity and the statute of repose. (February 6 and 9, 2004 Orders) Clark settled her negligence claims against Peterson, along with her related UIM claims, for a total of \$150,000. (June 29 and July 14, 2004 Orders) Finally, Clark and the Camp Ripley Bar entered into a stipulation on causation and damages, to allow this appeal to proceed on the issue of liability. (A. 158-160)

Judgment was entered on August 28, 2006. (A. 161) The Camp Ripley Bar filed its Notice of Appeal on October 20, 2006. (A. 162)

SUMMARY OF ARGUMENT

The district court improperly created a new category of "illegal sale" under the Civil Damages Act, stretching Minnesota law beyond any reasonable limits. Minnesota recognizes only six forms of illegal sale, all based upon 340A violations that *expressly* govern the dispensing of alcohol and *directly* affect public consumption. Here, the district court created an illegal sale based upon a provision governing the shape of the licensee's building! This is a radical and troubling departure from Minnesota precedent. It is a large step in the wrong direction, and it should be reversed.

ARGUMENT

The Civil Damages Act should be narrowly construed. It should not be expanded to include a new form of "illegal sale" based upon violation of the 340A.410 "compact and contiguous" building requirement.

I. CIVIL DAMAGES ACT LIABILITY IS NARROWLY CONSTRUED

The district court construed the Civil Damages Act very broadly, using reasoning that would extend strict civil liability to virtually all liquor-law violations. Such a construction is inconsistent with the purpose, history and language of the CDA.

The Civil Damages Act, commonly known as the Dram Shop Act, is found at Minn. Stat. § 340A.801 et seq. The Civil Damages Act is a subpart of the Liquor Act, which is found at Minn. Stat. §§ 340A.101 – 340A.909.

The Civil Damages Act is a creature of statute and has no common-law counterpart. Whitener v. Dahl, 625 N.W.2d 827, 833 (Minn. 2001).

Before the Civil Damages Act was passed, no injured person had any action against a vendor for improperly selling alcohol. The common-law rule was based on the premise that “the proximate cause of the injury is the act of the buyer in drinking the liquor” and “not the act of the vendor of intoxicating liquor in selling it.” Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886, 891 (1955).

The Civil Damages Act created a statutory exception to this common-law prohibition. The CDA imposes civil liability for damages caused by an “illegal sale” of alcoholic beverages. Minn. Stat. § 340A.801, subd. 1.

Neither the CDA, nor the Liquor Act more generally, defines the term “illegal sale.” However, case law has established a two-part test. First, there must be a violation of the Liquor Act (Chapter 340A). Second, the particular 340A violation must be “*substantially related* to the purposes sought to be achieved by

the Civil Damages Act.” Rambaum v. Swisher, 435 N.W.2d 19, 21 (Minn. 1989) (emphasis in original). This two-part test is discussed more fully below.

Because the CDA is a statutory creation, enacted in derogation of the common law, its scope must be narrowly construed. “Since a civil damage law is one highly penal in its nature introducing a remedy unknown to the common law, it is to be strictly construed in the sense that it cannot be enlarged beyond its definite scope.” Beck, 70 N.W.2d at 891.

Thus, on the threshold issue of liability – whether a particular category of sales is an “illegal sale” -- the CDA is narrowly construed. See Urban v. American Legion Department of Minnesota, 723 N.W.2d 1, 4 (Minn. 2006) (“The class of persons subject to CDA liability defines the Act’s scope, and we must construe it strictly in this regard”); Whitener, 625 N.W.2d at 833 (whether a CDA cause of action exists must be “strictly construed”).

On another level, the CDA is broadly construed. Once liability is established by the Act’s clear language, then the courts will shift gears and broadly construe the Act to accomplish its “remedial” purposes. Beck, 70 N.W.2d at 891 (when the Act’s language is “clear and explicit,” then its provisions will be “liberally construed”).

The CDA is “remedial” in the sense that it ensures qualified plaintiffs are “fully compensated.” Hartwig v. Loyal Order of Moose, 253 Minn. 347, 91 N.W.2d 794, 803 (1958), citing DeLude v. Rimek, 351 Ill. App. 466, 115 N.E.2d 561 (1953) (Dram Shop Act is “remedial” because it measures recovery by “all

damages sustained”). “Remedial” statutes are those which “pertain to or affect a remedy, as distinguished from those which affect or modify a substantive right or duty.” Black’s Law Dictionary at 896 (6th ed. Abridged 1991).

Therefore, there is a two-stage statutory analysis, with two different standards of statutory construction. First, liability must exist under the clear and explicit language of the CDA. (Strict construction) Second, if that threshold is met and there is a clear CDA violation, then the Act is liberally construed to provide full compensation to injured parties. (Broad construction)

In this appeal, though, we do not get beyond the first stage. The entire issue here is the threshold issue of whether the Act’s clear and explicit language supports the creation of an entirely new category of “illegal sales.” For determining this issue of liability, the scope of the CDA is narrowly construed. Thus, the principle of liberal remedial construction has no application.

II. TRIAL COURT IMPROPERLY EXPANDED SIX EXISTING CATEGORIES OF “ILLEGAL SALE”

Ignoring the penal nature of the Civil Damages Act, the district court took a very broad approach to liability. The court found that the Camp Ripley Bar had violated the compact-and-contiguous requirement of Minn. Stat. § 340A.410. The court then found the Bar *retroactively* liable under the Civil Damages Act. As set forth below, the district court’s analysis was flawed on multiple levels.

A. “Illegal Sale” Requires “Substantial Relation” to Increased Alcohol Consumption and Abuse.

As noted above, not all 340A violations are “illegal sales” creating civil liability under the CDA. The plaintiff must also prove that the particular 340A violation was “*substantially related* to the purposes sought to be achieved by the Civil Damages Act.” Rambaum v. Swisher, 435 N.W.2d 19, 21 (Minn. 1989) (emphasis in original). Specifically, the plaintiff must demonstrate that the violation had an impact on “the public’s access to and consumption of alcoholic beverages” and on resulting “alcohol abuse.” Id. at 22. Concisely put, the plaintiff must show a “substantial relationship” between the 340A violation and overall public alcohol consumption and abuse.

Here, as set forth below, Clark failed to meet her burden. She failed to prove a “substantial relationship” between the 340A violation (compact and contiguous requirement) and the public’s consumption and abuse of alcohol. Thus, she failed to show why a narrowly-construed Civil Damages Act should be expanded to include improper building design.

B. Six Established Categories of “Illegal Sale” Should Not Be Expanded to Include 340A Building Violations.

The Minnesota courts have only recognized six categories of 340A violations to be “illegal sales.” All six directly govern the way alcohol is dispensed to patrons. None govern the physical layout of the vendor’s building.

Until recently, only five categories of illegal sales under the Act were recognized: (1) sale to obviously intoxicated person, (2) sale to minor, (3) sale to

non-member of club, (4) after-hours sale, and (5) sale on prohibited day. Rambaum, 435 N.W.2d at 21. Then, in Englund v. MN CA Partners/MN Joint Ventures, 555 N.W.2d 328 (Minn. Ct. App. 1996), aff'd 565 N.W.2d 433 (Minn. 1997), a sixth category was added – violation of an on-sale liquor license.

The Supreme Court clearly has serious reservations about further expanding the list of CDA categories. In Holmquist v. Miller, 367 N.W.2d 468, 471-72 (Minn. 1985), the Supreme Court questioned whether the “Minnesota judicial branch presents a proper forum” to expand CDA liability on public-policy grounds. In Rambaum, 435 N.W.2d at 21, the Supreme Court noted that the CDA substantial-relationship test is difficult to apply, and that there would be some appeal to limiting the Act to cases of obvious intoxication. Then in Englund, the Court of Appeals decision was affirmed by an evenly-divided Supreme Court, suggesting that the violation there (on-sale license) is on the outer edge of the CDA.

Although Englund stretched the boundaries of the CDA, it still fit the general pattern. All six recognized categories of “illegal sales” involve 340A provisions that directly govern the dispensing of alcohol to patrons:

1. Category one (obvious intoxication) is based upon the violation of Minn. Stat. § 340A.502, which states: “No person may sell, give, furnish, or in any way procure for another alcoholic beverages for the use of an obviously intoxicated person.”
2. Category two (minors) is based upon the violation of Minn. Stat. § 340A.503, subd. 1, which makes it unlawful for any liquor vendor “to permit any person under the age of 21 years to consume alcoholic beverages on the licensed premises.”

3. Category three (non-club-members) is based upon the violation of Minn. Stat. § 340A.404, subd. 1(4), which mandates that “liquor sales will only be to members and bona fide guests.”
4. Category four (after hours) is based upon the violation of Minn. Stat. § 340A.504, subd. 2, which prohibits the “sale of intoxicating liquor for consumption on the licensed premises” after 2:00 a.m.
5. Category five (prohibited days) is based upon the violation of Minn. Stat. § 340A.501, subd. 2(2) and 4, which restrict the “sale of intoxicating liquor for consumption on the licenses premises” on Sundays, and prohibit the “sale of intoxicating liquor ... by an off-sale licensee” on Sundays, Thanksgiving and Christmas.
6. Category six (on-sale) is based upon the violation of Minn. Stat. § 340A.101, subd. 21, which for on-sale vendors allows “the sale of alcoholic beverages for consumption on the premises only.”

Plainly, these six categories all involve 340A provisions that *expressly* and *directly* govern the sale and consumption of alcohol. They directly restrict either the **customers** who can purchase alcohol or the **time** when they can consume it. Thus, by their very nature, these statutes have a “substantial relationship” to public alcohol consumption and abuse, as required by Rambaum.

The present case has nothing in common with these six established categories. This case does not involve a statute expressly and directly governing the sale and consumption of alcohol. Instead, the statute at issue **governs the shape of the vendor’s building**, requiring it to be “compact and contiguous.” Minn. Stat. § 340A.410, subd. 7. The statute says in its entirety:

Subd. 7. License limited to space specified. A licensing authority may issue a retail alcoholic beverage license only for a space that is compact and contiguous. A retail alcoholic beverage license is only effective for the licensed premises specified in the approved license application.

Obviously, this provision says nothing expressly or directly about limiting the sale and consumption of alcohol. It does not restrict customers or times of service. It only restricts the shape of the licensed building! This would truly mark a radical departure from current Minnesota jurisprudence.

Violating the compact-and-contiguous requirement might have an indirect impact upon alcohol consumption. (Or it might not.) It is the same indirect impact that any other 340A.410 licensing violation might have. See e.g. Minn. Stat. §§ 340A.410 subd. 4 (conspicuous posting of liquor licenses), subd. 5 (gambling devices prohibited), subd. 6 (racial discrimination prohibited), subd. 9 (coin-operated devices restricted). All these regulations generally affect the licensee's building and operations. But none by their plain language restrict the process of selling individual drinks to patrons.

Under Rambaum, a plaintiff cannot create civil liability under the CDA simply by arguing that the vendor's building violates 340A. (Such as the improper use of coin-operated devices, or a non-compact bar design.) Instead, there must be a "substantial relationship" between the violation and increased public consumption and abuse of alcohol. That substantial-relationship test requires, *at a very minimum*, that the statute directly restrict the dispensing of alcohol to patrons.

In the present case, the district court cut the law free from any such constraints. In effect, the district court construed the CDA to extend to *any* violation of Chapter 340A, as long as the violation had some *indirect* connection to restricting alcohol consumption. However, virtually every provision of 340A is

geared to controlling and regulating the vendor's business, which can have an indirect impact on alcohol consumption. Thus, the district court's rule would open the door to numerous new CDA causes of action, in future cases, based upon the numerous business regulations embedded in Chapter 340A.

In conclusion, the compact-and-contiguous statute at issue here is nothing like the six existing categories of "illegal sales." This statute governs the bar's physical layout. It does not restrict the dispensing of alcohol to patrons. Such a radical expansion of the CDA is a public-policy question that should be left for the Legislature. Courts, as compared to the Legislature, are ill-equipped to determine what constitutes "public policy." See Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc., 637 N.W.2d 270, 277-78 (Minn. 2002) (Blatz, C.J., concurring). Therefore, the district court grossly overreached by expanding the CDA to include the compact-and-contiguous requirement.

C. Clark Failed to Meet Factual Burden of Proof

As the plaintiff, Clark had the burden of proving all elements of her claim, including liability. However, Clark made no effort to meet her factual burden of proof. She presented *no* evidence of *any* causal connection between the compact-and-contiguous violation and increased public consumption – much less the "substantial relationship" required by Rambaum. She presented no studies or even anecdotal evidence. **If the courts are to change the law, it should not be done in an evidentiary vacuum.**

The only evidence in the record concerns the specific individuals in this case. The Krazy Rabbit's configuration clearly made no difference to them. Peterson, the person who caused the accident, could have gone to any bar. If not the Krazy Rabbit, he would have gone to another. There is no evidence the Krazy Rabbit was any more desirable from his perspective.

On the contrary, the Krazy Rabbit was actually the Peterson group's *second* choice. They went first to another bar, Westside Bar. They left due to a personality conflict with a Westside patron, Kelly Billig, who was throwing ice at them. (A. 98-99) To get away from Billig, the Peterson group left Westside after 15 minutes, *then* went to the Krazy Rabbit/Camp Ripley. (A. 102)

Therefore, there is no evidence that Peterson was drawn to the Krazy Rabbit's "non-contiguous" configuration. He actually preferred a traditional bar, Westside. Moreover, there is no evidence that Peterson drank any more at the Krazy Rabbit than he would have at Westside, or any other bar.

Despite this dearth of evidence, the district court hypothesized that the Krazy Rabbit's configuration might increase public alcohol consumption, because (1) it had an outside entrance, and (2) the connecting walkway was not open to the public. (A. 150, 153-156) However, this was pure guesswork. Clark had provided no such evidence. Specifically, Clark provided no evidence that a purely outdoor exit/entrance at the Krazy Rabbit materially increased the public's consumption of alcohol. Likewise, she provided no evidence that opening the

connecting tunnel would have materially decreased the public's consumption of alcohol.

In fact, the only evidence was to the contrary. According to Mr. Wheeler's undisputed affidavit, by only having an outside exit/entrance, the Krazy Rabbit **reduced** the incidence of patrons moving freely indoors between the various sections of the Camp Ripley Bar, possibly consuming alcohol in each section. (A. 103-04) A purely outdoor exit increased the chances that Krazy Rabbit patrons would leave the building, go outside, and just drive home. (A. 104)

So the Krazy Rabbit's outside exit had the **opposite** effect from an "illegal sale" under the Civil Damages Act. It **reduced** the public's access to and consumption of alcoholic beverages.

In conclusion, Clark presented absolutely no competent evidence that the Camp Ripley Bar's violation of the compact-and-contiguous requirement increased **anyone's** consumption of alcohol. She came nowhere close to meeting the legal standard of a "substantial relationship." When asking the courts to take the radical step of recognizing a new "illegal sale" category, the plaintiff must provide competent and compelling evidence, not just conjecture and speculation.

D. "Illegal Sale" Should Not Create Uncertain, Retroactive Liability

The district court's rule would create unpredictable retroactive liability for liquor vendors. This violates the canon of statutory construction that the Legislature intended a "certain" result. Minn. Stat. § 645.17, subd. 2.

Violation of the compact-and-contiguous requirement is a fact-intensive determination. It seldom becomes clear until after trial. Thus, making it the basis for CDA liability would create uncertain liability at the time of sale.

That danger is perfectly illustrated in the present case. Wheeler did not know in advance whether the Krazy Rabbit would be found in violation of 340A. On the contrary, Wheeler truly believed that the Krazy Rabbit was a valid extension of the Camp Ripley Bar. In fact, Minnesota Liquor Control had specifically approved the extension. Consequently, Wheeler vigorously defended the underlying licensing and zoning case. And he was not found in violation of the “compact and contiguous” requirement until **January of 2005** – almost a full three years after the accident.

Clark’s position is that Wheeler’s erroneous prediction about the outcome of the licensing ruling **rendered all past sales retroactively illegal**, despite a valid existing liquor license that covered the entire property. It is one thing for a court to **prospectively** limit liquor sales. It is quite another thing to **retroactively** invalidate prior sales, then hold the bar civilly liable for all past violations. Yet that is precisely what the district court did in our case.

To put this in perspective, this case should be contrasted with a bright-line violation, such as where the vendor loses its license entirely, yet continues to serve alcohol. It is one thing to have a clear termination of a liquor license. The expiration, cancellation, suspension or revocation of a liquor license provides clear and sufficient notice to the licensee. In contrast, a judicial determination that a

license does not extend to a particular part of the premises does not provide clear notice to the licensee. **There is no certainty where the vendor must first litigate the issue and then await a court's determination (in the present case, almost three years after the fact) regarding the particular "reach" of a liquor license.** A vendor must know *at the time* whether a particular sale is legal. It should not be found retroactively illegal, years after the sale.

CONCLUSION

The district court radically expanded the Civil Damages Act. The existing six categories of "illegal sales" all involve statutes that expressly and directly govern the dispensing of alcohol to patrons. The district court went well beyond that, creating liability based upon a statute defining the shape of the licensed building! Any such radical alteration of the Act should be left to the Legislature.

Respectively submitted,



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