CASE NO. A06-1007

State of Minnesota
In Supreme Court

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,

and

MINNESOTA ASSOCIATION FOR JUSTICE,
Amicus Curiae.

APPELLANTS' 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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LEGAL ISSUES

1. Do the available evidence and the inferences from that evidence raise an issue of fact regarding proximate cause where the evidence demonstrates the decedent died while under the influence of alcohol and attempting to avoid arrest?

The majority of the court of appeals held no issue of probable cause existed.

Most apposite cases and statutes: Minn. Stat. § 340A.801 (2006); Lubbers v. Anderson, 539 N.W.2d 398 (Minn. 1995); Kryzer v. Champlin Am. Legion No. 600, 494 N.W.2d 35 (Minn. 1992); Flom v. Flom, 291 N.W.2d 914 (Minn. 1980); Sworski v. Coleman, 208 Minn. 43, 293 N.W. 297 (1940); Fette v. Peterson, 404 N.W.2d 862 (Minn. App. 1987).

2. Is a post-mortem psychological expert report regarding the effects of alcohol on the decision making process of the decedent admissible?

The trial court held the evidence was of minimal evidentiary value and the majority of the court of appeals affirmed.

Most apposite cases and statutes: State Farm Fire & Cas. Co. v. Wicka, 474 N.W.2d 324 (Minn. 1991); State v. Frank, 364 N.W.2d 398 (Minn. 1985).

STATEMENT OF THE CASE

This matter comes before this Court on appeal from the grant of summary judgment in this dram shop action, affirmed by a majority of the panel of the court of appeals in a published decision, Osborne v. Twin Town Bowl, Inc., 730 N.W.2d 307 (Minn. App. 2007). The facts material to the decision were not significantly disputed. Despite the evidence connecting the illegal sale of alcohol to Michael Riley, Jr. while he was obviously intoxicated to his subsequent jump into the flood swollen Minnesota River to avoid arrest, the trial court granted summary judgment.

On April 11, 2003, the Plaintiffs, the family, girlfriend and daughter of Michael Riley, Jr., brought this action against Twin Town Bowl, asserting a dram shop claim. (Appellant's Appendix, page A-2; AA2). The Complaint alleged that Michael Riley, Jr. was served alcoholic beverages while obviously intoxicated and, as a result of that intoxication, he attempted to avoid arrest by jumping into the flood swollen Minnesota River. He was unable to swim the river and drowned. (AA2-3). Twin Town Bowl answered, denying liability. (AA4).

Twin Town Bowl brought a Motion to Dismiss, asserting that the Complaint failed to state a cause of action because of a lack of proof of causation. Following a hearing, the trial court, the Honorable Kurt D. Johnson presiding, denied the Motion. (AA9).

The parties then undertook some discovery focused on the causation issue. Upon completion of that discovery, Twin Town Bowl brought a summary judgment motion on the same basis as the motion to dismiss. Following a hearing, the trial court granted summary judgment. (AA29).

The Plaintiffs filed a timely appeal. (AA35). A majority of the court of appeals affirmed, with one judge issuing a dissent. Osborne v. Twin Town Bowl, Inc., 730 N.W.2d 307 (Minn. App. 2007). (AA36). The Plaintiffs served and filed a Petition for Review. By Order filed July 17, 2007, this Court granted further review. (AA44).

STATEMENT OF THE FACTS

On August 19, 2001, Michael Riley, Jr., went out drinking with friends. They consumed alcohol at Twin Town Bowl late that night and into the early morning hours of

April 20, 2001. (AA29). After leaving the Twin Town Bowl, Riley was observed driving 74 miles per hour in a 50 mile per hour zone on Highway 169. Trooper Kevin McDonald of the Minnesota State Patrol activated his lights and siren in an effort to get Riley to pull over. (AA29). Riley did not stop immediately, but instead continued his aggressive driving. Riley took the Highway 14 exit ramp and once on the Highway 14 bridge over the Minnesota River, he pulled over still on the bridge. (AA30).

Once stopped, Trooper McDonald approached Riley's vehicle. There, he smelled alcohol and suspected Riley was driving while intoxicated. (AA30). Trooper McDonald had Riley get out of the vehicle to administer some field sobriety tests. (AA30). Riley failed all of the field sobriety tests and the Trooper administered a PBT which read .18. (AA30). Trooper McDonald placed him under arrest for driving under the influence. (AA30).

Instead of handcuffing him, the Trooper turned and requested Riley to follow. (AA30). Riley did not and instead the Trooper heard him exclaim, "I'm out of here." (AA30). By the time Trooper McDonald turned, all he could see was Riley jumping into the river. (AA30). His body was not recovered for several months. (AA30).

The Plaintiffs secured a report from an expert to address Michael Riley, Jr.'s psychological condition and whether the intoxication contributed to his decision on the bridge to jump to avoid arrest. (George Komaridis, Ph.D., report of February 1, 2005; AA15). Dr. Komaridis had access to his medical and psychological records. (AA15). In the conclusion of the report, Dr. Komaridis opined that "Mr. Riley's alcohol inebriation

played a substantial part in bringing about his decision to jump into the river, and he almost certainly would not have done so if sober." (AA21). Dr. Komaridis further identified some of the effects of alcohol on Riley – specifically including his view that Riley was inebriated and "possibly in a blackout state with the grandiose belief that he had the physical capacity to overcome the cold swift currents of the Minnesota River and escape arrest by swimming to the other shore." (AA21).

ARGUMENT

Summary judgment is a "blunt instrument" which should only be granted where no fact issue exists for trial. Republican Nat'l Life Ins. Co. v. Lorraine Realty Co., 279 N.W.2d 349 (Minn. 1979). This Court explained the standard for summary judgment in Minnesota as follows:

> Accordingly, we hold that there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.

DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). The Court noted a number of Minnesota decisions as well as the U.S. Supreme Court "trilogy" concerning the federal standard for summary judgment, noting that the language of the U.S. Supreme Court and the Minnesota Court differed, but the import was the same. A trial court is not to weigh the evidence, but also "is not required to ignore its conclusions 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, 566 N.W.2d at 70. Where

different conclusions may be drawn, therefore, summary judgment should not be granted. Applying this standard, the court of appeals erred in finding insufficient evidence to raise a jury question on the causation element in this case.

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

The dram shop statute exists to compensate persons harmed by intoxicated persons precisely because of the impact of alcohol on the decision making process. Hahn v. City of Ortonville, 238 Minn. 428, 436, 57 N.W.2d 254, 261 (Minn. 1953) ("It is to be borne in mind that civil damage acts, although penal in nature, are also remedial in character and, according to the prevailing view, are to be liberally construed so as to suppress the mischief and advance the remedy.") People who are drunk make bad decisions and act in an inappropriate manner.[1] As a result, society seeks to limit that harmful behavior by placing a burden on bar owners to avoid providing alcohol to obviously intoxicated persons. Englund v. MN CA Partners/MN Joint Ventures, 555 N.W.2d 328, 332 (Minn. App. 1996) *aff'd* 565 N.W.2d 433 (Minn. 1997).

In order to state a claim under the dram shop statute, Minn. Stat. § 340A.801 (2006), a plaintiff must prove four elements:

1. The defendant unlawfully furnished intoxicating beverages;
2. The illegal sale caused or contributed to intoxication;

[1] The DSM-IV, for example, lists the effects of alcohol intoxication as including aggressive behavior, impaired judgment and other "maladaptive behavioral or psychological changes." Diagnostic & Statistical Manual of Mental Disorders, 4th Ed., Am. Psychological Ass'n, § 303.00, p. 214-15 (2000). Such changes in behavior and judgment are the precise basis for the claims here.

3. The intoxication was a cause of the plaintiff's injuries; and
4. The plaintiffs suffered damages.

Hartwig v. Loyal Order of Moose, Brainerd Lodge No. 1246, 253 Minn. 347, 346, 91 N.W.2d 794, 801 (1958). Here, the Defendant acknowledged, for the purposes of its motion in the trial court, that the first, second and fourth elements were met. It was solely the third element, causation, which formed the basis for the dispute before the trial court and thus on appeal. In describing the nature of the causation element, this Court has described it as "elementary" that before plaintiffs are allowed to recover in dram shop cases they must prove the first two elements and "that the same was the *proximate cause*" of the damages. Hartwig, 253 Minn. at 346, 91 N.W.2d at 801 (emphasis added).

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

i. Proximate cause in a dram shop case is the same as in any other claim for liability in a civil law suit.

Causation in a dram shop action is a question of proximate cause. Kryzer v. Champlin Am. Legion No. 600, 494 N.W.2d 35, 37 (Minn. 1992), *citing* Flom v. Flom, 291 N.W.2d 914, 917 (Minn. 1980). Proximate cause is a cause which was "a substantial factor in bringing about the injury." Flom, 291 N.W.2d at 917. "Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow." Dellwo v. Peterson, 259 Minn. 452, 454-55, 107 N.W.2d 859, 861-62

(1961). As a result, "[i]t is enough to say that negligence is tested by foresight but proximate cause is determined by hindsight." Dellwo, 259 Minn. at 456, 107 N.W.2d at 862.[2] In a dram shop setting, therefore, the ultimate issue for the jury to resolve is whether the illegal sale and resulting intoxication was a substantial factor in the conduct which forms the basis for the claimed liability.

The court of appeals seems to have concluded that proximate cause, for dram shop purposes, is in some manner different than proximate cause in other civil cases. The court of appeals never described "proximate cause" as it interpreted the phrase as used in Kryzer, which it described as the "controlling caselaw." Osborne, 730 N.W.2d at 310-11. The court rejected application of one examination of proximate cause drawn from Ponticas v. K.M.S. Investments, Inc., 331 N.W.2d 907, 915 (Minn. 1983), on the basis that it was not cited in Kryzer. Osborne, 730 N.W.2d at 310 n.1. The court went on to state that the way Osborne framed the issue – whether Riley's decision to jump was "infected by the level of intoxication" was not the correct inquiry, but instead the inquiry

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[2] This Court has also recognized that proximate cause focuses on that connection, not the particular injury which occurred:

> For negligence to be the proximate cause of an injury, it must appear that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting from it, even though he could not anticipate the particular injury which did happen.

Ponticas v. K.M.S. Investments, Inc., 331 N.W.2d 907, 915 (Minn. 1983).

should have been whether the "intoxication proximately caused the injury." Osborne, 730 N.W.2d at 310 n.2. As a result, the court of appeals changed the focus to the actions of Riley from the time he left the bar until he was stopped by the state trooper and jumped from the bridge. Osborne, 730 N.W.2d at 311.[3] Such a focus ultimately caused the court of appeals to ignore the evidence of proximate cause related to the Appellant's claims and to focus instead on the "breaks" in the causation chain allegedly created by Riley's conduct from the time he was last served until his fateful jump into the River.

As the dissent in Osborne noted, the issue in any dram shop case is "whether the intoxication impaired the patron's physical or mental faculties so that his injurious actions can be said to result from the overservice and excessive consumption of alcohol." Osborne, 730 N.W.2d at 313 (Ross, J. dissenting). In a case such as this, where the claim arises from the actions of a single intoxicated person and the decisions that person made, the issue must focus on the impact of alcohol on the mental faculties and decision-making process of the decedent. Thus, as recognized by the dissent, and as argued by the Appellants, the issue is whether the alcohol so affected Riley and impaired his decision-making that illegal service of alcohol was a substantial contributing factor to his decision to jump.

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[3] The court of appeals opines that: "Absent evidence that Riley's intoxication was the reason for his speeding, the trooper's stop, or *Riley's fleeing arrest*, these actions constitute breaks in the chain of causation between Riley's intoxication and his drowning." Osborne, 730 N.W.2d at 311 (emphasis added). The Plaintiff's theory is, of course, that Riley's fleeing arrest was caused by his intoxication and that if had not been intoxicated, he never would have taken such a risky action.

Generally, proximate cause is an issue for the jury. Lubbers v. Anderson, 539 N.W.2d 398, 402 (Minn. 1995). Given the issue, such a jury issue exists.

Riley was served intoxicating beverages at Twin Town Bowl. As a result, he became intoxicated. When he operated a motor vehicle, he did so in such a bad fashion as to lead a state trooper to pull him over and administer field sobriety tests. When Riley failed those tests, he was placed under arrest. Rather than follow the officer to the squad car, Riley jumped into the Minnesota River in an apparent attempt to avoid arrest, a step he would not have taken had he not been intoxicated. The effects of the alcohol so impaired his judgment that he concluded he could swim the flood-swollen river. He was unable to swim the river and drowned. The illegal sale thus leads, in an "unbroken sequence", to his death by drowning. In looking at the facts from a hindsight perspective, the unbroken nature of the causation chain is apparent – Riley jumped into the river because he was intoxicated and wished to avoid arrest; the arrest followed from his driving under the influence; the driving under the influence followed from the illegal sale at Twin Town Bowl. As a result, a jury could find proximate cause. *See* Sworski v. Coleman, 208 Minn. 43, 293 N.W. 297 (1940) (affirming a jury verdict despite proximate causation challenge where intoxicated person died in jail by suicide).[4]

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[4] Considered in a different way, under the Ponticas approach, Twin Town Bowl could anticipate that an intoxicated person would be harmed due to the level of intoxication. In fact, the dram shop law is predicated upon the risk that intoxicated persons pose to themselves and others. Harm from being an intoxicated person on the road, pursued by the police, was certainly a harm that the Defendant could and should anticipate.

Thus, the court of appeals erred in its analysis of proximate cause in this case. Applying the notion of proximate cause as established by this Court, the family should be allowed to pursue the claim against Twin Town Bowl and have a jury determine if his intoxication caused his untimely death. This Court should reverse the court of appeals and remand this case for trial.

ii. An intervening cause analysis does not apply in a dram shop setting.

Significantly, Twin Town Bowl in its memorandum in the trial court acknowledged that exactly the sequence of events which occurred here, up to the point of the attempted escape, would create a fact issue of causation. Twin Town Bowl stated 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; AA27). Twin Town Bowl's analysis, at its core, thus appears to be that since Riley made the decision to jump, no matter how influenced by alcohol, his heirs cannot recover – "Therefore because Riley intentionally jumped into the river, in an apparent escape attempt, Riley's intoxication did not cause his death, as a matter of law." (Defendant's Memorandum, page 8; AA33). The trial court adopted this analysis, stating "Riley's choice to jump from the bridge is too remote from his intoxication to suffice for proximate cause." (AA33).

The court of appeals then magnified this error, relying upon a series of events which, it asserted, broke the causation chain:

> Events occurring between Riley's intoxication at Jerry Dutler Bowl and his drowning preclude the conclusion that the intoxication caused the drowning. First, Riley drove 24 miles over the speed limit and was stopped for speeding. No evidence indicates that Riley's speed-limit violation or that the trooper's decision to stop Riley for speeding was directly caused by the intoxication. In fact, the trooper stated that Riley's speed was the only reason he stopped him. Only after these events, did the trooper smell alcohol, test Riley, and then advise him he was under arrest. The parties do not dispute that Riley jumped off the bridge to "escape arrest." Absent evidence that Riley's intoxication was the reason for his speeding, the trooper's stop, or Riley's fleeing arrest, these actions constitute breaks in the chain of causation between Riley's intoxication and his drowning.

Osborne, 730 N.W.2d at 311 (footnote omitted). In effect, the court of appeals undertook an examination of the record for events which served as an intervening cause. That is, since Riley drove his vehicle without exhibiting signs of intoxication and then made the decision to jump, as opposed to simply falling, the causation chain was broken the same as by an intervening cause.

Although, this Court has never had the opportunity to address the issue, the court of appeals has done so, holding that in a dram shop action, as a strict liability action, a superseding cause analysis has no application. Fette v. Peterson, 404 N.W.2d 862 (Minn. App. 1987). Fette was killed when his vehicle was struck by another vehicle operated by Peterson, who was intoxicated. "Peterson mistakenly thought that a stop sign at the intersection was a green light. Peterson ran the stop sign at a high rate of speed colliding with Fette's vehicle." Fette, 404 N.W.2d at 864. The heirs sued Peterson and the bar where Peterson drank. The bar sought an instruction on superseding cause. In rejecting the claim, the court of appeals noted that a dram shop action was a strict liability claim and so no original negligent act occurred. Fette, 404 N.W.2d at 864. The court further

noted that to allow an intervening cause instruction would effectively emasculate the statute since the conduct of the intoxicated person would be an intervening cause in almost every case. Fette, 404 N.W.2d at 864-65.

Such a decision makes sense. First, the notion of an intervening cause is inconsistent with the purposes of the dram shop statute. In almost every case, the conduct of the intoxicated person occurs between the illegal sale and the harm-producing event. As a result, an intervening cause analysis might well emasculate the statute.

Second, consideration under the elements of an intervening cause demonstrates it has no application here or in general. Proof of an intervening cause requires that: "(1) Its harmful effects must have occurred after the original negligence; (2) it must not have been brought about by the original negligence; (3) it must actively work to bring about a result which would not otherwise have followed from the original negligence; and (4) it must not have been reasonably foreseeable by the original wrongdoer." Regan v. Stomberg, 285 N.W.2d 97, 100 (Minn. 1979). In a dram shop case, no original negligence exists since the dram shop statute created a strict liability claim. Dahl v. Northwestern Nat'l Bank of Minneapolis, 265 Minn. 216, 220, 121 N.W.2d 321, 324 (1963). The claim by its nature arises after the claimed illegal sale has occurred. The entire dram shop claim is predicated upon proof that the original wrongful sale to an intoxicated person "brought about" the subsequent act; a plaintiff must prove that the illegal sale and resulting intoxication brought about a result which would not otherwise have occurred. Finally, in a dram shop case, most often the consequences of the illegal

sale can be foreseen by the bar, based upon the general understanding of the effects of alcohol on driving and other conduct.

Thus, whether considered under the holding of the Fette court or under an analysis of the elements of an intervening cause, it is apparent that such a defense cannot exist in the dram shop setting.

Here, Riley's "voluntary decision" or "choice" to jump does not break the causal chain between the illegal sale and his death. Riley's decision is not legally different than the "voluntary decision" of an intoxicated person to drive or to operate a vehicle in a particular manner, such as to ignore the red light in Fette. Each decides to undertake an action which causes harm to innocent third parties. Yet, claims against bars arising from single vehicle accidents have been successfully pursued on many occasions. *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). The intentional nature of Riley's conduct is also legally immaterial. Sworski, 208 Minn. at 49-50, 293

N.W. at 300 (holding that the decision to commit suicide by the decedent did not avoid dram shop liability).

Thus, the relevant issue is whether Riley's decision was brought about by the alcohol he consumed. Put another way, was the alcohol Riley consumed "a substantial factor in bringing about the injury." Flom, 291 N.W.2d at 917. Based upon the evidence submitted, precisely such a conclusion may be reached. Riley had previously talked to others about swimming the river to escape if he was confronted with an arrest situation. He drove quite a distance before stopping for Trooper McDonald, stopping on a bridge over the river. He jumped into the river after being told he was under arrest and being told to get into a squad car. Bothe the common understanding of the effects of alcohol on decision-making and the opinion of Dr. Komaridis demonstrate a jury issue over whether the alcohol consumption triggered that decision.

The evidence and reasonable inferences, therefore, are sufficient to create an issue of material fact for a jury to resolve. The court of appeals' decision to affirm summary judgment should be reversed and the case remanded for trial.

b. The decisions upon which the lower courts and Respondent relied can be readily distinguished.

The trial court, the court of appeals and the Defendant cited a number of decisions addressing proximate cause in the dram shop setting. The court of appeals described Kryzer as the "controlling caselaw on proximate cause in a civil-damage action." Osborne, 730 N.W.2d at 310 (footnote omitted). An analysis of those cases and their

facts in relation to the facts known here demonstrates that each is readily distinguished and thus not determinative of the result here.

i. Kryzer v. Champlin Am. Legion No. 600, 494 N.W.2d 35 (Minn. 1992).

In Kryzer, the plaintiff was injured when she became intoxicated and a bouncer attempted to remove her from the bar. She sustained an injury in that interaction. The defendant brought a Rule 12 motion, seeking dismissal of the Complaint. Kryzer, 494 N.W.2d at 36. The Supreme Court held that her intoxication was only the "occasion for her ejection," but not the cause of her injury. Kryzer, 494 N.W.2d at 37. That decision was based upon the allegation in the Complaint "that it was the act of the club employee in ejecting her which caused the injury." Kryzer, 494 N.W.2d at 37. The complaint simply failed to allege "any causal connection between the intoxication and the injury." Kryzer, 494 N.W.2d at 38.

Here, on the other hand, the evidence shows the requisite causal connection. As noted above, Riley's intoxication led directly to his decisions when confronted by the police officer. His death did not occur due to the intervention of some third party, such as a bouncer, causing an injury. Instead, the intoxication so impacted his judgment and reactions that he decided to undertake an extremely risky maneuver, swimming the flood-swollen Minnesota River.

Kryzer is thus readily distinguished and not determinative of the result here.

ii. Kunza v. Pantze, 531 N.W.2d 839 (Minn. 1995).

Second, the trial court placed reliance on Kunza v. Pantze, 531 N.W.2d 839 (Minn. 1995), where this Court overruled a Court of Appeals decision, Kunza v. Pantze, 527 N.W.2d 846 (Minn. App. 1995), in a single sentence order, citing Kryzer. In Kunza, the plaintiff was drinking with her husband at a bar. They left together and started to drive away, with Pantze driving even though he was intoxicated. At some point during the trip they argued and Pantze allegedly began to physically abuse Kunza. As they approached a red light, Kunza prepared to jump out of the vehicle, but Pantze did not stop. When she jumped anyway, she sustained significant injuries. Kunza sued the bar, alleging that the bar caused the intoxication and that the intoxication caused her injuries. Kunza, 527 N.W.2d at 847-48. The court of appeals held that the evidence could establish proximate cause since Kunza was attempting to avoid the direct consequences of Pantze's wrongful conduct, "even though [Kunza's] own actions may have been the immediate cause of those injuries." Kunza, 527 N.W.2d at 850. This Court reversed, simply citing Kryzer. Kunza, 531 N.W.2d at 839.

A review of the facts here, and the facts in Kunza, demonstrates the distinct and important differences. In Kunza, the Plaintiff was not intoxicated or the person to whom the alleged illegal sale occurred. Instead, she was asserting the intoxication of a third person led to his actions, which forced her to make a decision. Here, on the other hand, the claim is for the death of the intoxicated person, Michael Riley, Jr., and that those decisions were made under the influence of that intoxication.

In Kunza, the plaintiff had to acknowledge that her own actions were the immediate cause of her injuries – she decided to exit the vehicle with no evidence that the decision was influenced in any way by her own intoxicated state. And, she did not seek to recover for the injuries from the beating. Here, on the other hand, the claim requires a determination of whether Riley's decision to jump was influenced by his state of intoxication. The record creates a fact issue given both the common understanding of the effects of alcohol and the expert report.

Kunze, therefore, is readily distinguished and not determinative of the result here.

iii. Crea v. Bly, 298 N.W.2d 66 (Minn. 1980).

In Crea v. Bly, 298 N.W.2d 66 (Minn. 1980), this Court addressed a claim against a bar for injuries sustained during a fight. The intoxicated person was not involved in the fight. Instead, the plaintiff alleged that the intoxicated person "aided, abetted, instructed or encouraged" the assault. Crea, 298 N.W.2d at 66. This Court held that dram shop liability "do[es] not extend to anticipating and protecting the public from the excesses of third parties beguiled into committing assaults on innocent victims by the importuning of intoxicated female patrons." Crea, 298 N.W.2d at 66.

Here, on the other hand, the claim arises from the alcohol served to Riley, the decedent, and the effects of that alcohol on his subsequent conduct on the bridge. No intoxicated third party encouraged Riley to jump or otherwise contributed to the events resulting on Riley's tragic death. Riley's family instead bases their claim upon the effects of alcohol on his behavior after being arrested by the state trooper.

Crea, is readily distinguished and not determinative of the result here.

iv. Weber v. Au, 512 N.W.2d 348 (Minn. App. 1994).

In addition to the decisions relied upon by the lower courts, the Respondent relied heavily upon Weber v. Au, 512 N.W.2d 348 (Minn. App. 1994) before the court of appeals. In Weber, a police officer pursued a juvenile after the officer interrupted a fight outside a bar. During that pursuit, the officer sustained a knee injury. Weber, 512 N.W.2d at 349. In rejecting the claim, the court of appeals 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 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 two Hannah cases, the record establishes the requisite causation missing in Weber. The evidence shows the existence of a fact issue over whether Riley would have jumped had he not been intoxicated. In addition, of course, Weber involves

an injury to the officer, not the harm to the family of the deceased intoxicated person caused by the alcohol-infected decision Riley made 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.

Weber, therefore, is readily distinguished and not determinative of the result here.

v. The court of appeals dissent recognized these distinctions.

As the dissent in the court of appeals notes, each of these decisions is based upon a "third-party's reaction to the intoxicated person, which in turn causes the injury. These cases stand for the unremarkable proposition that the merely responsive injurious action by a third person, as a matter of law, is too attenuated to constitute proximate cause because the action is not a direct product of the patron's intoxication." Osborne, 730 N.W.2d at 313-14 (Ross, J. dissenting). "In sharp contrast ..., the appellants here rely upon a traditional dram-shop theory, focusing directly on action taken by Riley that caused injury. ... Whether Riley's reckless decision to plunge into the river resulted from his intoxication or from some other motivation is precisely the kind of factual consideration that juries have made in time-honored dram-shop cases." Osborne, 730 N.W.2d at 313-14 (Ross, J. dissenting).

This Court should adopt the cogent analysis of the dissent and reverse the majority decision, remanding this case for trial.

2. The report of Dr. Komaridis is properly part of the record.

The court of appeals also addressed the issue of the expert opinion rendered by Dr. Komaridis. While not excluding the report, the court of appeals agreed with the trial court that the opinion had "minimal evidentiary value." Osborne, 730 N.W.2d at 312. The court of appeals reached this conclusion using the analysis of criminal cases and the admissibility of evidence to rebut a claim of the ability to form specific intent, State v. Griese, 565 N.W.2d 419, 425 (Minn. 1997). Osborne, 730 N.W.2d at 312. This analysis is erroneous on two bases.

First, nothing in this claim involves a specific intent crime. It is, instead, a dram shop action based upon the issue of whether the Riley's intoxicated state was a substantial contributing factor in his decision to jump into the flood-swollen Minnesota River. The report addresses the impact of alcohol on people's decision-making process and specifically how the alcohol impacted Riley's judgment. While the general effects of alcohol are well known, the trial court retains the discretion to admit or reject the proffered expert testimony. State v. Frank, 364 N.W.2d 398, 400 (Minn. 1985). Here, at least for the purposes of this summary judgment motion, the trial court accepted the report. It is, therefore, properly part of the record.

Second, this Court has recognized the evidentiary value of a post-mortem psychological report. State Farm Fire & Cas. Co. v. Wicka, 474 N.W.2d 324, 332-33 (Minn. 1991). The court of appeals appears to have been concerned about that aspect of

the report as well. Osborne, 730 N.W.2d at 312. Any objection on this basis, is not well-founded.

CONCLUSION

This matter is before this Court on appeal from the grant of summary judgment. At this stage of the proceedings, Twin Town Bowl has claimed only that the evidence fails to prove causation. This Court has long recognized that dram shop causation is the same as other proximate causation requirements: "a substantial factor in bringing about the injury." Flom, 291 N.W.2d at 917. Whether viewed from the standpoint of the general knowledge of the effects of intoxication or through the lens of the expert report, the evidence demonstrates a factual dispute about that issue. The evidence raises a jury question over whether Riley's intoxication was a substantial factor in his decision to jump into the flood-swollen Minnesota River. This Court should reaffirm the nature of proximate cause in a dram shop setting and remand this case for trial on the merits.

Dated this 14 day of August 2007.

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