

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
Kelly M. Riley,

Petitioners,

vs.

Twin Town Bowl, Inc.,

Respondent.

**BRIEF OF AMICUS CURIAE
MINNESOTA ASSOCIATION FOR JUSTICE**

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STATEMENT OF LEGAL ISSUES

1. In a Dram Shop claim, what is the causal nexus between the illegal sale and the injuries suffered by the plaintiff necessary to impose legal liability on the bar?

Apposite Authority:

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

Hartwig v. Loyal Order of the Moose, 257 Minn. 347, 91
N.W.2d 794 (1958).

2. In a Dram Shop claim, is it proper to consider the concept of intervening, superceding cause when determining whether to impose legal liability on the bar?

Apposite Authority:

Fette v. Peterson, 404 N.W.2d 862 (Minn. App. 1987).

ARGUMENT¹

This court has held that for a plaintiff to recover damages under Minnesota's dram shop statute, Minnesota Statutes Section 340A.801, he or she must come forward with probative evidence to support each of four elements:

¹This brief was authored solely by Sharon L. Van Dyck on behalf of the Minnesota Association for Justice, its members and their clients. No person other than the Minnesota Association for Justice, its members and counsel made a monetary contribution to the preparation and submission of this brief.

1. The defendant unlawfully furnished intoxicating beverages to an alleged intoxicated person ("AIP");
2. The illegal sale caused or contributed to the AIP's intoxication;
3. The AIP's intoxication was a cause of the plaintiff's injuries; and
4. The plaintiff suffered damages.²

The AIP in the case before the court was Michael Riley, who dove off a bridge in an intoxicated state thinking he could swim to shore but drowned instead. The parties have stipulated that three of the four *prima facie* elements the plaintiffs must prove to collect damages under the dram shop statute have been met. Jerry Dutler Bowl illegally sold alcohol to Michael Riley when he was obviously intoxicated, the illegal sale caused or contributed to Riley's intoxication, and the plaintiffs, the immediate members of Riley's family including a minor daughter, have suffered damages compensable under the act due to his untimely death. The single issue to be decided is whether Riley's intoxication was a cause of his own death, and by direct extension, of his family's pecuniary loss.

In recent years the Minnesota appellate courts have held that the causal link required between the AIP's intoxication and the plaintiff's loss is one of proximate cause.³ A "direct causal

² *Hartwig v. Loyal Order of Moose*, 253 Minn. 347, 356, 91 N.W.2d 794, 801 (1958).

³ *Kryzer v. Champlin American Legion No. 600*, 494 N.W.2d 35, 36 (Minn. 1992).

relationship between the intoxication and the injury is required.”⁴ Minnesota courts use the “substantial factor” test advocated by the Restatement Second, Torts § 431 (1965) to determine whether a cause is “direct.” As set forth in Minnesota’s pattern jury instructions, “A ‘direct cause’ is a cause that had a substantial part in bringing about the (collision) (accident) (event) (harm) (injury).”⁵ Thus under current Minnesota law, the question that must be answered in this case is whether Michael Riley’s intoxication was a substantial factor in bringing about his death. Accepting as true the stipulated fact that Riley’s act of jumping off the bridge was an attempt to escape arrest, undertaken in light of his mistaken belief that he could swim safely to shore, the answer to the “direct cause” question would appear to be yes. Focusing on Riley’s behavior rather than his intent, the irrationality and faulty judgment known to accompany intoxication is plainly evident in his fateful plunge. So how did the district court and the Court of Appeals arrive at the conclusion that “the undisputed facts do not support a proximate-causal relationship between the decedent’s intoxication and his drowning” as a matter of law? This amicus suggests that the lower courts erred in their analysis because they did not recognize that the historic relationship between negligence and direct cause has evolved into a relationship between fault and direct cause. Fault is a broader concept than negligence.

⁴ *Id.* at 36.

⁵ CIVJIG 27.10.

The proximate or direct cause test required for the imposition of dram shop liability has its roots in negligence. In stating that the requisite causal standard for dram shop cases is proximate cause, the court in *Kryzer v. Champlin American Legion No. 600*⁶ court cited *Nelson v. Chicago, M. & St. P. Ry*⁷ as the basis for the distinction between the occasion (“but for”) and the cause (proximate or direct cause) of an injury. *Nelson* sounds in negligence, though involving a statutory standard. The direct cause jury instruction used in a dram shop case today is identical to the direct cause jury instruction used in a negligence action.⁸

As a general rule, a superseding cause instruction must be given immediately after the definition of direct cause “in all cases where the facts present an issue of an intervening cause that may be a superseding cause.”⁹ The Court of Appeals has held that the superseding cause instruction should not be given in a dram shop case, since the concept of superseding cause is premised on negligence, and “the Dram Shop Act provides for a strict liability action without regard to ‘fault in the sense of any wrongful intent or negligent conduct.’”¹⁰ This court has not directly addressed that

⁶ 494 N.W.2d 35 (Minn. 1992).

⁷ 30 Minn. 74, 14 N.W. 360 (1882).

⁸ CIVJIG 45.10 states “Give CIVJIG 27.10.”

⁹ CIVJIG 27.20 use note; see also CIVJIG 27.10 use note.

¹⁰ *Fette v. Peterson*, 404 N.W.2d 862, 864 (Minn. App. 1987).

question, but should in the context of this case. To do so will place *Kryzer* and its progeny into proper context while clarifying the law.

*Kryzer*¹¹ represents the first of three cases the majority in the Court of Appeals decision relied upon to hold that the proximate cause standard was not met as a matter of law in this case. Yet as the dissent points out, all three cases relied upon by the majority have a common “uniform plot.”¹² In all three cases, the acts of a third person who is outside the direct link between the illegal sale and the AIP’s intoxicated conduct engaged in an act that meets the proximate/direct cause definition. In *Kryzer* the plaintiff was the husband of the AIP. The AIP was tossed out of the bar by a bouncer, who injured her wrist in the process. The bouncer’s acts clearly meet the direct cause requirement, but they are completely outside the chain between the illegal sale and the AIP’s intoxicated conduct. Likewise in *Kunza v. Pantze*¹³ the illegally served AIP was both driving and abusing his wife, who chose to jump out of the moving car to avoid his abuse. The wife’s act of jumping out of a moving car clearly meets the direct cause requirement, but is outside the chain between the illegal sale and the AIP’s intoxicated conduct. In *Crea v. Bly*¹⁴ the plaintiff was attacked and injured not by the AIP, but by a third person who was “egged on”

¹¹ 494 N.W.2d 35 (Minn. 1992).

¹² *Osborne v. Twin Town Bowl, Inc.*, 730 N.W.2d 307,313 (Minn. App. 2007).

¹³ 527 N.W.2d 846, *rev’d* 531 N.W.2d 839 (Minn. 1995).

¹⁴ 298 N.W.2d 66 (Minn. 1980).

by the AIP. The attacker's actions were outside the direct chain between the illegal sale and the AIP's intoxicated conduct. In all of these cases, the presence of the third person whose conduct meets the direct cause standard would, in the world of negligence, raise the question of whether the third person's acts constitute a superseding cause.

In *Fette v. Peterson*¹⁵ the Court of Appeals rejected the idea that superseding cause can be properly invoked in a dram shop claim to defeat the liability imposed upon the illegal seller of alcohol because "the Dram Shop Act provides for a strict liability action."¹⁶ The citation to strict liability, however, refers to this court's decision in *Dahl v. Northwestern National Bank of Minneapolis*¹⁷ in which the issue before the court was whether a dram shop claim survives the death of the license holder so as to be one "arising out of an injury to the person" within the meaning of the survival statute. The statement about strict liability was written in the context of distinguishing the dram shop act, which is primarily compensatory in nature, from a related statute governing the dram shop bonding requirement. The latter is a matter of contract, whereas the former sounds in tort, the purpose of which is "to allow recovery by one injured as a result of a violation of the liquor laws enacted to protect the public."¹⁸ The

¹⁵ 404 N.W.2d 862 (Minn. App. 1987).

¹⁶ *Fette v. Peterson*, 404 N.W.2d 862, 864 (Minn. App. 1987).

¹⁷ 265 Minn. 216, 121 N.W.2d 321 (1963).

¹⁸ *Id.* at 220, 121 N.W. 2d at 324.

reference to strict liability in *Dahl* was made to distinguish a dram shop action from a contract action.

In the years since *Dahl* tort law has evolved. Contributory negligence is no longer a bar to recovery in tort. Contributory negligence gave way to comparative negligence, which in turn gave way to comparative fault. Fault is a concept that is broader than negligence. It incorporates strict liability, and is utilized in dram shop cases. Proximate cause/direct cause is used with the concept of "fault" on a regular basis.

The *Fette* court's second reason for declining to recognize that there are circumstances in which superseding cause has a place in dram shop litigation is that "if the driving conduct of [the AIP] after he left the bar was a superseding cause of the accident, then every bar would have superseding cause as a defense, and the Dram Shop Act would be rendered ineffective."¹⁹ The *Fette* scenario, however, is significantly different than the "uniform plot" found in *Kryzer*, *Kunza*, and *Crea*. In these three cases the potentially superseding cause is premised upon the fault of an actor outside the chain between the illegal sale and the AIP's intoxicated conduct. It was the conduct of the bouncer, the wife and the third party attacker that was at issue. In each of these cases, the scenario is a classic example of superseding cause – or at least a scenario in which the superseding cause instruction should have been given to the jury. *Fette* involved an entirely different factual scenario. *Fette* involved a two car accident in which the bar that made the illegal sale attempted to gain relief

¹⁹ *Fette*, 404 N.W.2d at 865.

from its own tortious conduct by pinning it on the AIP under the guise of superseding cause. As a matter of public policy and common sense the intoxicated conduct of the AIP, which is both foreseeable and flows directly from the illegal sale, is not a superseding cause.

This case falls between *Kryzer* and *Fette*. The plaintiffs argue that the conduct of the AIP, Michael Riley, was a direct cause of his mistaken belief that he could safely swim to shore if he jumped off the bridge to escape arrest. Riley's intoxicated conduct cannot be a superseding cause that allows Jerry Dutler Bowl to escape liability for the intoxication caused by its illegal sale. Although Riley's act of jumping off the bridge happened after the illegal sale, it flows directly from his intoxication, which in turn flows directly from the illegal sale. Furthermore, it is a given that intoxication leads people to make poor decisions based on the bad or completely absent judgment that accompanies intoxication. Despite the fact that the majority below clearly did not believe that Riley's jump was the product of his intoxication, with a blood alcohol of nearly twice the legal limit and the stipulated facts that eliminate suicide from consideration, the majority was bound to accept it.

The real issue here is what part the acts of the trooper play in the chain of events. The trooper is a third party in the same sense that the bouncer, wife and assaulter were third parties in *Kryzer*, *Kunza*, and *Crea*. His conduct is outside the chain connecting the illegal sale and the AIP's intoxicated behavior. Was it sufficient to break the causal chain as a superseding cause?

Proximate cause is nearly always a jury issue. It can be resolved on summary judgment only "where reasonable minds can arrive at

only one conclusion.”²⁰ Superseding cause is subject to the same rules. When a defendant presents evidence that supports each of the four elements of superceding cause²¹ but reasonable minds can differ about whether those elements have been met, then the superseding cause instruction should be read to the jury. Rarely is superseding cause an issue for court resolution as a matter of law.

Applied to the trooper’s actions in this case, the plaintiffs have an excellent argument that the trooper’s conduct was part of the natural course of events, and that Jerry Dutler Bowl could reasonably anticipate that Riley would be pulled over and placed under arrest for drunk driving. It is to be expected that an intoxicated person will drive too fast. It is to be expected that a trooper will notice fast driving and pull the driver over. It is to be expected that speeding drunk drivers smelling of alcohol will fail sobriety tests and be placed under arrest. In the end the question of whether the trooper’s conduct in pulling Riley over, arresting him, but failing to put him in handcuffs was a superseding cause of Riley’s death and thus the plaintiffs’ loss is a jury question.

²⁰*Lubbers v. Anderson*, 539 N.W2d 398, 402 (Minn. 1995).

²¹ A cause is a superseding cause if (1) it happened after the original fault, (2) it did not happen because of the original fault [in a dram shop case, as argued above this element is met if it is the conduct of a third party], (3) it changed the natural course of events by making the result different from what it would have been, and (4) the original wrongdoer could not have reasonably anticipated this event. See CIVJIG 27.20 and associated cases.

CONCLUSION

A claim premised on violation of Minnesota's dram shop statute is tortious in nature. This court has consistently held that a claimant must prove direct or proximate cause between the AIP's intoxicated conduct and the claimant's loss. Proximate or direct cause is used in all manner of tort claims, and encompasses the broader concept of fault, not just negligence. Where the conduct of a third person outside of the direct chain between the illegal sale and the AIP's intoxicated conduct is also a direct cause of the plaintiff's loss, the concept of superseding cause is appropriately applied. Under the facts of this case, the question of whether the trooper's conduct constitutes a superseding cause sufficient to eliminate the bar's liability for its illegal sale, turning that illegal sale into the "mere occasion" of Riley's death and of the plaintiffs' loss, is a question for the jury.

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,757 words. This brief was prepared using Microsoft Word 2000.

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