
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' REPLY BRIEF AND APPENDIX

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

Attorney for Appellants

TOMSCHE, SONNESYN
& TOMSCHE, P.A.
Steven E. Tomsche, Esq. (#190561)
610 Ottawa Avenue North
Minneapolis, Minnesota 55422
(763) 521-4499

Attorney for Respondent

SCHWEBEL, GOETZ & SIEBEN, P.A.
Sharon L. Van Dyck, Esq. (#183799)
5120 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402-2246
(612) 377-7777

Attorney for Amicus Minnesota Association for Justice

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).

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Legal Issues 1

Argument..... 1

 1. The mechanism of causation is not based upon speculation.2

 a. The conduct between Riley’s departure from Twin Town Bowl and his arrest is not relevant to the proximate cause inquiry where the undisputed evidence shows Riley was still intoxicated at the time.2

 b. This Court need not inquire into other possible causes of Riley’s decision at this stage of the proceedings given the issues addressed by the lower courts and the undisputed effects of alcohol.3

 2. The concept of intervening cause has no application in this case..... 5

 a. Intervening cause has no application to dram shop cases.5

 b. Intervening cause has no application here as a matter of law8

 3. This Court should decline the invitation to impose a higher standard of proof in this case, although, even if it did so, summary judgment is inappropriate..9

Conclusion.....10

TABLE OF AUTHORITIES

MINNESOTA DECISIONS

<u>Crea v. Bly</u> , 298 N.W.2d 66 (Minn. 1980)	7
<u>Flom v. Flom</u> , 291 N.W.2d 914 (Minn. 1980).....	4, 10
<u>Kryzer v. Champlin America Legion No. 600</u> , 494 N.W.2d 35 (Minn. 1992).....	1, 4, 6, 7, 10
<u>Kunza v. Pantze</u> , 531 N.W.2d 839 (Minn. 1995)	6, 7
<u>Lewellin v. Huber</u> , 465 N.W.2d 62 (Minn. 1991)	1, 10
<u>Osborne v. Twin Town Bowl, Inc.</u> , 730 N.W.2d 307 (Minn. App. 2007)	2
<u>Regan v. Stomberg</u> , 285 N.W.2d 97 (Minn. 1979).....	1, 5
<u>Stringer v. Minnesota Vikings Football Club</u> , 705 N.W.2d 746 (Minn. 2005).....	9
<u>Thiele v. Stich</u> , 425 N.W.2d 580 (Minn. 1988)	4, 9
<u>Weber v. Au</u> , 512 N.W.2d 348 (Minn. App. 1994)	7

MINNESOTA UNPUBLISHED DECISIONS

<u>Brockman v. Beacon Sports Bar & Grill</u> , 2002 WL 31012602 (Minn. App. Sept. 10, 2002).....	9
---	---

MINNESOTA STATUTES

Minn. Stat. § 347.22 (2002)	9
-----------------------------------	---

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: Kryzer v. Champlin Am. Legion No. 600, 494 N.W.2d 35 (Minn. 1992); Lewellin v. Huber, 465 N.W.2d 62 (Minn. 1991); Regan v. Stomberg, 285 N.W.2d 97 (Minn. 1979).

ARGUMENT

The Respondent's Brief flows from a fundamental premise which demonstrates the flaw in the entire argument. Twin Town Bowl refuses to acknowledge that the excessive consumption of alcohol impacts decision-making and the thought process which goes to decision-making, despite acknowledging that the effects of alcohol are commonly understood. Instead of recognizing this basic and well-recognized fact, Twin Town Bowl sets forth on a litany of other possible "causes" of Riley's decision to attempt to escape from the police officer and uses his conduct in the time between his last drink and the decision to jump as events which break the causation chain. As a result, its entire brief is founded on a premise which lacks support in this record or in the common understanding of the effects of alcohol. The impact on this case is that the issue can now be stated as simply as – will this court recognize that an obviously intoxicated person's decision making is affected by the excessive consumption of alcohol? The answer is "yes", thereby establishing proximate cause under the dram shop statute.

1. The mechanism of causation is not based upon speculation.

In its Brief, Respondent raises two challenges to the proof of proximate cause in this case. Neither argument, however, is sufficient to warrant affirming the majority opinion from the Court of Appeals.

- a. The conduct between Riley's departure from Twin Town Bowl and his arrest is not relevant to the proximate cause inquiry where the undisputed evidence shows Riley was still intoxicated at the time.

The Respondent's Brief relies primarily upon the events between the time Riley left Twin Town Bowl and the time of his arrest by the Trooper. As a result of those events, it argues, the "actions constitute breaks in the chain of causation between Riley's intoxication and the injury." (Respondent's Brief, pages 12-13). The court of appeals majority reached a similar conclusion. Osborne v. Twin Town Bowl, Inc., 730 N.W.2d 307, 311 (Minn. App. 2007). This analysis suffers from two fundamental errors.

First, the issue in any dram shop case is not the conduct of the intoxicated person throughout the series of events from the last drink to the injury causing event. Neither this Court nor the court of appeals has ever examined the conduct of a motor vehicle driver, served while obviously intoxicated, from the time of leaving the bar until the accident causing harm to a third party. The reason is quite simple – a dram shop case is not about the conduct of the driver leading to the accident, but rather about the conduct at the time of the accident and whether intoxication played a role in that accident. In almost every case, "proper" conduct could be found in the intervening time. As a result, the dram shop action would be rendered a virtual nullity.

In effect, what the Respondent and Court of Appeals majority have done is to take facts which might be significant to whether the intoxicated person was served while obviously intoxicated, the first and second elements of a dram shop claim, and used them to distort the analysis of the proximate cause element. Such a blending of the elements results in the erroneous analysis contained in the Respondent's Brief regarding Riley's actions leading up to his fateful jump from the bridge. The proximate cause issue is, quite simply, whether his state of intoxication contributed to the decision to jump, not whether Riley was able to perform other tasks without exhibiting signs of intoxication between the last drink served and the decision to jump.

Second, the argument, in effect, brings the concept of intervening cause into the analysis, with the conduct of the intoxicated person serving as the intervening cause. Neither the Respondent nor the Court of Appeals majority pointed to any authority for such a proposition. As discussed in the Appellant' Brief, and addressed more fully below, the nature of the dram shop case and the facts of this case preclude application of an intervening cause analysis.

This Court, therefore, should reverse the Court of Appeals and remand this case for trial on the merits.

- b. This Court need not inquire into other possible causes of Riley's decision at this stage of the proceedings given the issues addressed by the lower courts and the undisputed effects of alcohol.

In its Brief, Twin Town Bowl posits a number of other possible explanations for Riley's decision to jump, describing a "myriad of possible reasons aside from or including intoxication that could have been a substantial factor in Riley's decision to

jump from the bridge to avoid arrest.” (Respondent’s Brief, page 14). This argument fails for several reasons.¹

First, as the argument itself recognizes these other possible causes “includ[e] intoxication” as a cause. The definition of “cause” requires only that the alleged cause be a “substantial contributing factor.” 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). Thus, even if other factors contributed, Respondent acknowledges that alcohol may be one of those factors.

Second, the issue is not whether other factors played a role in the decision, but whether alcohol was a substantial factor. As to each of the other explanations, they may exist without the presence of alcohol in Riley’s system – he may have sought to escape regardless, or may have wanted a story to tell friends, or may have sought notoriety. That is not different, however, from the driver in a dram shop action who kills a third party because of speeding – the driver may have a long record of speeding or other improper driving. The issue, however, is whether the consumption of alcohol contributed to the conduct on this occasion. As it does throughout its Brief, Twin Town Bowl seeks to have this Court ignore the common understandings of the effects of alcohol on mental and physical capabilities, as well as the expert opinion in this case, and either assume that Riley was not intoxicated or that his inebriated state played no role in his conduct. Given those common understandings, the issue of whether alcohol consumption and its effects

¹ Respondent has not raised this issue in the lower courts. As a result, it should not be considered by this Court on appeal. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988).

were a substantial contributing factor to his Riley's jump from the bridge is a quintessential jury issue.

This Court, therefore, should reject the Respondent's efforts to ignore the well-known and recognized, and focus on the sole issue in this case – was Riley's intoxicated state a substantial contributing factor to his decision to jump from the bridge. Focus on that issue shows that a jury question exists and this case should be remanded for trial.

2. The concept of intervening cause has no application in this case.

The Amicus brief suggests that this Court adopt concepts of intervening cause in dram shop actions, suggesting that the decisions which have rejected dram shop liability on proximate cause grounds are really intervening cause cases. That is, the intervention of a third person acted to break the causation chain, the intervening cause defense. In their Brief, the Plaintiffs have demonstrated factual explanations for each of those decisions, and distinctions for each from this case, which this Court should adopt instead.

a. Intervening cause has no application to dram shop cases.

From a legal perspective, the application of an intervening cause is unlikely to occur in dram shop cases. Proof of an intervening cause requires proof of four elements: “(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). The claim by its nature arises after the claimed illegal sale has occurred. The second or third element, however, will not be

present. 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, the nature of a dram shop claim precludes application of the intervening cause defense.

Applying the analysis to the leading cases demonstrates the flaw in the application. 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 bouncer’s conduct thus arguably is the intervening cause. The interaction occurred after the illegal sale. However, the injury was not brought about by the illegal sale. In fact, this Court based the decision on the failure of the complaint to allege “any causal connection between the intoxication and the injury.” Kryzer, 494 N.W.2d at 38. Thus, the second element of intervening cause is missing and that theory could not form the basis for the decision.

Similarly, in Kunza v. Pantze, 531 N.W.2d 839 (Minn. 1995), the plaintiff was injured when she jumped from a moving vehicle to escape the assault by her intoxicated husband. Her conduct forms the alleged intervening cause. The third element is absent there – the intoxication did not bring about a result which would not have followed from the original fault. Kunza sought to recover only for the injuries sustained when she jumped from the vehicle, injuries which would have occurred had she jumped from a

moving vehicle for any reason. An intervening cause analysis could not form the basis for the opinion.

In Crea v. Bly, 298 N.W.2d 66 (Minn. 1980), the plaintiff sought to recover because the intoxicated person encouraged the assault. The intervening cause presumably was the assault by the person who was not intoxicated. As with Kunza the third element is missing – the injuries from the assault would have followed regardless of the presence of the intoxicated person. Once again, an intervening cause analysis could not form the basis for the opinion.

Weber v. Au, 512 N.W.2d 348 (Minn. App. 1994), represents another application of the same missing element as in Kryzer. Since the minor was the person with whom the bar interacted, the police officer who chased that youth must be considered to be the intervening individual. The officer was hurt during that pursuit. “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. Also, the officer would have sustained the same injury in the pursuit regardless of the triggering conduct for that pursuit. The second and third elements of an intervening cause were missing as a matter of law, and thus could not have been the basis for the decision.

Thus, the notion of an intervening cause has no application in a dram shop setting. The elements of such a defense are legally inapplicable to a dram shop claim. Such a

defense does not explain the decisions of this Court or the court of appeals in addressing proximate cause. Instead, the focus has properly been on the facts alleged in the complaint, or in the record, and whether those facts show that the intoxication was a substantial contributing factor to the injury. This Court, therefore, should reject the invitation of the Amicus to apply intervening cause law to dram shop actions.

b. Intervening cause has no application here as a matter of law.

If the Court is inclined to adopt a rule allowing for an intervening cause defense, it has no application here. Both the Amicus and Respondent suggest that the State Trooper may be the intervening cause here. Consideration of the elements of the defense given the undisputed facts of this case demonstrates it has no application.

As to the first element, the Trooper's actions occurred after the illegal sale.

As to the second element, the harmful effects of the Trooper's conduct were brought about by the original fault. The original fault was the sale to an obviously intoxicated person. The Trooper stopped Riley for speeding, which would have resulted in nothing more than the issuance of a warning or ticket, without Riley ever exiting the vehicle. It was the original fault of the illegal sale which converted the stop into a driving under the influence stop, resulting in Riley being asked to exit the vehicle, undergo field sobriety and PBT examinations, and finally being placed under arrest. The illegal sale thus brought about the harmful effect of Riley being left to jump from the bridge.

As to the third element, the conduct of the Trooper did cause a result which would not have otherwise occurred. Nothing in the record suggests Riley would have jumped from the bridge had he not been stopped by the State Trooper.

As to the fourth element, it was entirely foreseeable by Twin Town Bowl. It certainly is not unexpected by a bar that its patrons, if served to excess, will engage in bad driving conduct. As a result of that conduct, it is certainly foreseeable that the police may become involved. And, it is certainly foreseeable that the intoxicated person may attempt to flee from the police.

Even if this Court were to consider the application of intervening cause in a dram shop setting, therefore, it has no application here. The Court of Appeals majority should be reversed and the case remanded for trial.

3. This Court should decline the invitation to impose a higher standard of proof in this case, although, even if it did so, summary judgment is inappropriate.

In its brief, the Respondent invites this Court to consider the causation rule applicable to the absolute liability setting of the dog bite statute, Minn. Stat. § 347.22 (2002). In the narrow setting presented here, the dram shop statute is an absolute liability statute – the only party whose fault is considered is that of the bar. If the plaintiffs can prove each of the four elements, they recover. This Court, however, should reject such an invitation for several reasons.

First, this issue has not been raised before, even though it was raised and rejected by the court of appeals in Brockman v. Beacon Sports Bar & Grill, 2002 WL 31012602 *3 (Minn. App. Sept. 10, 2002). As a result, it cannot be raised here for the first time. Thiele, 425 N.W.2d at 582.

Second, the interpretation of a statute is presumed to be confirmed by the Legislature where it remains silent following the interpretation by this Court. Stringer v.

Minnesota Vikings Football Club, 705 N.W.2d 746, 759-60 (Minn. 2005). This Court has consistently applied the negligence definition of proximate cause to dram shop cases at least since 1992 in Kryzer. Given the lack of legislative activity, no justification exists for changing the proof necessary.

Third, even if this Court applied the rule, it makes no material difference here. In interpreting the dog bite statute, this Court required proof that the injury was the direct and immediate result of the dog's actions. Lewellin v. Huber, 465 N.W.2d 62, 65 (Minn. 1991). This causation requires that the dog's actions be directed at the injured party. Lewellin, 465 N.W.2d at 66.

Here, the conduct of Twin Town Bowl was directed at Riley. Twin Town Bowl served Riley the intoxicated beverages; Twin Town Bowl served Riley those beverages while he was obviously intoxicated. Riley's conduct on the bridge was a direct and immediate result of that intoxication. Thus, even if this Court were to accept the invitation to change the proximate cause definition in this type of dram shop case, the result is the same – the trial court erred in granting summary judgment and the case should be reversed for trial on the merits.

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 proximate 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 28 day of Sept., 2007.



Kenneth R. White, No. 141525
LAW OFFICE OF KENNETH R. WHITE, P.C.
Attorney for Appellants
325 South Broad Street, Suite 203
Mankato MN 56001
507/345-8811