

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

ESTATE OF MARTIN R. STOTT, by its Personal  
Representative, NATHAN A. STOTT,

UNPUBLISHED  
March 22, 2011

Plaintiff-Appellant,

v

No. 292595  
Ingham Circuit Court  
LC No. 07-001015-NI

DENNIS LEE BROWN, JR., ANGELA BROWN,  
DONNA DEVEREAUX, JAMES DEVEREAUX,  
and PENNY FOWLER, a/k/a PENNY PEIFFER,

Defendants,

and

OAKWOOD LOUNGE, INC., and MICHAEL P.  
FOWLER,

Defendants-Appellees.

---

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order that granted summary disposition to defendants Oakwood Lounge and Michael P. Fowler in this dramshop action. We reverse.

Defendant Dennis Lee Brown, Jr., the allegedly intoxicated person, spent the day of December 2, 2005, consuming several alcoholic beverages at various establishments. He arrived at defendant Oakwood Lounge sometime in the early afternoon and consumed more alcohol. Several witnesses, including waitresses from both the lunch and dinner shifts and patrons, observed Brown that afternoon. They stated that while observing him he did not slur his speech, have bloodshot eyes, or have trouble with balance or walking, although he did become loud. When asked to quiet down by the bartender two or three times, Brown failed to comply. At that point, the bartender took away Brown's drink and did not serve him any more alcohol. Brown became angry when his drink was taken away. Brown was also asked to leave, though he did not immediately comply.

That evening, after Brown left the Oakwood Lounge in his car, he hit Martin R. Stott, who was working as a flagman at a road construction site. Stott died as a result of the accident. There was testimony that Brown also went to a different bar that night, but it is unclear whether he went there before or after the accident.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005) (citation omitted). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition should be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Roberson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). When deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120. The court must grant the nonmoving party the benefit of reasonable doubt and determine whether a genuine factual dispute exists to warrant a trial. *Porter v Royal Oak*, 214 Mich App 478, 484; 542 NW2d 905 (1995).

The Dramshop Act, MCL 436.1801 *et seq.*, governs the tort liability of liquor licensees resulting from the furnishing of alcohol to a minor or a visibly intoxicated person. MCL 436.1801(3) provides as follows:

An individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, shall have the rights of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death.

In *Walling v Allstate Ins Co*, 183 Mich App 731, 738-739; 455 NW2d 170 (1985), this Court described the elements of a dramshop action as follows:

In order to recover under the dramshop act, plaintiffs must prove that (1) decedent was injured by the wrongful or tortious conduct of an intoxicated person, (2) the intoxication of that person was the sole or contributing cause of decedent's injuries, and (3) defendants sold, gave or furnished to the alleged intoxicated person the alcoholic beverage which caused or contributed to that person's intoxication. *McKnight v Carter*, 144 Mich App 623, 629; 376 NW2d 170, *lv den* 424 Mich 859 (1985).

## VISIBLE INTOXICATION

Regarding visible intoxication, “[t]he relevant inquiry . . . is whether the combination of circumstantial evidence and the permissible inference drawn therefrom . . . permits a finding that [the allegedly intoxicated person (AIP)] was visibly intoxicated when he was last served alcohol.” *Heyler v Dixon*, 160 Mich App 130, 146; 408 NW2d 121 (1987). “A plaintiff fails to sustain this burden when the evidence is insufficient and leaves the jury to speculation and conjecture.” *Villa v Golich*, 42 Mich App 86, 88; 201 NW2d 349 (1972). “The mere fact that the alleged intoxicated person drank alcoholic beverages is not sufficient to establish that he was visibly intoxicated,” as he had to have been served *while* he was visibly intoxicated. *Heyler*, 160 Mich App at 145; *Reed v Breton*, 475 Mich 531, 541; 718 NW2d 770 (2006). The Supreme Court provided the following explanation of the standard in the Dramshop Act:

“[V]isible intoxication” focuses on the objective manifestations of intoxication. While circumstantial evidence may suffice to establish this element, it must be actual evidence of the *visible* intoxication of the allegedly intoxicated person. Other circumstantial evidence, such as blood alcohol levels, time spent drinking, or the condition of other drinkers, cannot, as a predicate for expert testimony, alone demonstrate that a person was *visibly* intoxicated because it does not show what behavior, if any, the person *actually manifested* to a reasonable observer. These other indicia—amount consumed, blood alcohol content, and so forth—can, if otherwise admissible, reinforce the finding of visible intoxication, but they cannot substitute for showing visible intoxication in the first instance. While circumstantial evidence retains its value, such (and any other type of) evidence must demonstrate the elements required by § 801(3), including “visible intoxication.” [*Reed*, 475 Mich at 542-543 (citation and footnotes omitted).]

There is no dispute that Brown was served alcohol at the Oakwood Lounge. But there remains a question whether Brown was visibly intoxicated while he was served alcohol at the Oakwood Lounge. Witnesses stated that Brown was loud, but that he did not exhibit strange behavior, did not have blood-shot eyes, slur his speech, or have trouble walking or balancing. The bartender testified he asked Brown to quiet down and he failed to comply, the bartender took away his drink and did not serve him any more alcohol. Brown was asked to leave the Oakwood Lounge and became angry when his drink was taken away.

There is conflicting testimony and while the trial court may not make credibility determinations when deciding motions for summary disposition, *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998), a reasonable observer could have viewed Brown’s actions as visible intoxication and summary disposition was not proper.

Defendant argued that Brown lacked the personal knowledge to testify as to his state of mind during the evening in question and his testimony should not be used to determine whether he was visibly intoxicated.

MRE 602 provides in pertinent part:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the

matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

During his deposition, Brown said, "I don't recall a lot of what happened the rest of that evening, I mean, in all honesty" and that his memory was "blank" for the most part for a period of time. Brown went on to state that his memory from the time of his second drink at the Oakwood Lounge until he was sitting at the hospital with a police officer was "[f]ragmented at best." When asked what he remembered from that night, Brown responded:

The more I—if I said—believe me, in the two and half years since this has happened, I've spent nights thinking about it. Things come into my mind. I don't know if I'm remembering it—I can't say if I'm remembering it or if it's what I think might have happened. I can't say that hundred percent.

Brown said that his eyes may have been blood-shot and that he could not say for sure if his speech was slurred. Even if Brown lacked the personal knowledge to testify under MRE 602, the remaining witnesses provided sufficient facts for a reasonable observer to believe Brown was visibly intoxicated. Additionally, there is evidence that Brown was served alcoholic beverages by multiple waitresses and bartenders. An individual waitress may have only observed him for a short period of time without noticing signs of visible intoxication, but a single observer over the entire time period may have noticed those signs. Taking all of the witness testimony together, a reasonable observer could find that Brown was visibly intoxicated while he was still being served. Summary disposition was not proper because there is a genuine issue of material fact.

#### LAST BAR PRESUMPTION

The record is not entirely clear whether Brown arrived at a different bar and was served alcohol before or after the car accident.

MCL 436.1801(8) provides as follows:

There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or the visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (3).

The presumption is rebutted by creating a prima facie showing of the elements required under the Dramshop Act by clear and convincing evidence, a higher standard than the preponderance of evidence required by MCL 436.1801(3) for the last bar to furnish liquor to an AIP. *Reed*, 475 Mich at 541.

[I]n a lawsuit against a retail licensee that has the benefit of the presumption, plaintiffs must not only make out a prima face case under § 801(3) (among other things, that the drinker was visibly intoxicated), but must also rebut with additional evidence the presumption available to second-to-the-last (and earlier) establishments under § 801(8). [*Reed*, 475 Mich at 540.]

If it is determined that Oakwood Lounge was not the last bar to serve Brown before the accident, plaintiff must meet the higher standard of clear and convincing evidence that Brown was visibly intoxicated when served at defendant Oakwood Lounge to overcome the presumption of non-liability under MCL 436.1801(8) for bars that were not the last to serve Brown.

Reversed.

/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald  
/s/ Henry William Saad