



IN THE COURT OF APPEALS OF IOWA

Filed February 21, 1984

LAURA MAE CHRISTNER,)
Plaintiff-Appellant,)
vs.)
VERONICA W. THOMAS, d/b/a)
BENNY'S PLACE,)
Defendant-Appellee.)

4-29
83-790

Appeal from the Iowa District Court for Scott County—J. Hobart Darbyshire and Margaret S. Briles, Judges.

Plaintiff appeals from the grant of a motion to dismiss division II of her petition and from a summary judgment against her on division I in this dram shop case. AFFIRMED.

Anthony Jamison of Braud, Warner, Nepple & Westenzee, Ltd., Davenport, for plaintiff-appellant.

Patricia Rhodes Cepican of McDonald, Stonebraker & Cepican, P.C., Davenport, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson and Snell, Judges.

Plaintiff, Laura Mae Christner, brought an action against defendant, as a tavernkeeper, for breaching defendant's duty to serve alcohol to Christner, as a minor and intoxicated person. Christner, who was seventeen at the time of the accident, admittedly became intoxicated at a Scott County tavern. A male friend of hers, Ed Bunyard, also a minor, decided to drive his motorcycle back to his house, get a car, and return to the tavern. Christner decided to accompany him. The motorcycle was pursued by police and crashed, causing severe injuries to Christner, some permanent, including a skull fracture and other fractures, bruises, contusions, and lacerations. The district court granted defendant's motion to dismiss one of Christner's claims, holding that there is not a "common law cause of action for an injured inebriate, even though the injured inebriate may have been a minor." The court subsequently granted summary judgment to defendant on Christner's other claim against the tavern, which challenged the tavern's actions in having served Bunyard, the motorcycle driver, on the ground that Christner's assumption of risk was proved as a matter of law. We affirm.

L Motion to Dismiss

We will sustain a motion to dismiss for failure to state a claim upon which relief can be granted only when it appears to a certainty that the pleader has stated no claim which would entitle her to relief under any state of facts which could be proved in support of the claim. Gartin v. Jefferson Co., 281 N.W.2d 25, 29 (Iowa Ct. App. 1979).

In division II of her petition, Christner sought damages at common law against the tavern and owner, alleging that she was served intoxicating liquids until she became intoxicated and subsequently sustained injury. We agree with defendant that there is not a common law cause of action for an injured inebriate,

even if the injured person is a minor. Because Christner's division II presented only a common law claim, we must agree that the granting of the motion to dismiss was proper. Suits against liquor licensees must be brought under the dram shop act. See Snyder v. Davenport, 323 N.W.2d 225, 228 (Iowa 1982). Iowa Code section 123.92 provides the exclusive remedy to the plaintiff precluding a common law action. Id. at 226.

II. Summary Judgment

Christner challenges the trial court's grant of defendant's motion for summary judgment on the ground that Christner's assumption of risk was proved as a matter of law. Summary judgment is properly granted only when there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. Froning & Deppe v. South Story Bank & Trust, 327 N.W.2d 214, 215 (Iowa 1982).

Assumption of risk is an available defense under the dram shop act. Berge v. Harris, 170 N.W.2d 621, 625 (Iowa 1969). It is an affirmative defense which defendant Thomas is obliged to prove. See Six v. Freshour, 231 N.W.2d 588, 591 (Iowa 1975). In order to prove assumption of risk, the defendant must show: (1) the driver was intoxicated; (2) the plaintiff was aware of the intoxication and of the danger to herself from it; (3) the plaintiff had an alternative of subjecting or not subjecting herself to the danger of the intoxication; (4) the plaintiff voluntarily chose to accept the risk; and (5) the intoxication was the proximate cause of the plaintiff's harm. See Rippel v. J.H.M. of Waterloo, Inc., 328 N.W.2d 499, 500 (Iowa 1983); see also King v. Barrett, 185 N.W.2d 210, 213 (Iowa 1971).

In the instant case, Christner stated during deposition that she had been around Bunyard on previous occasions when he had been drinking. She testified that "when he gets drunk, he starts acting stupid." Christner stated that she knew that both she and Bunyard were intoxicated. Furthermore, there is ample

evidence from other witnesses supporting this claim. See Bessman v. Harding, 176 N.W.2d 129, 132 (Iowa 1970). Therefore, we find that it is undisputed that the driver, Bunyard, was intoxicated and that plaintiff Christner knew him to be so. This satisfies the first two elements of the Rippel test.

As far as the third element of the test, there is no doubt but that there were other alternative courses available to Christner. Christner was not dependent on Bunyard for transportation, nor was the purpose of the ride to provide Christner with transportation to some specific destination. Christner's brother testified that he knew both Christner and Bunyard were drunk and that he told his sister she was not going to get on the motorcycle. Notwithstanding this warning, she did get on the motorcycle and leave with Bunyard.

It also appears that the intoxication was the proximate cause of Christner's injury, satisfying the fifth element of the Rippel test. The police tried to stop Bunyard on the motorcycle for a taillight violation, but Bunyard knew he had been drinking and decided to try to outrun the police car. In his ill-fated effort to do so, the motorcycle jumped a curb and hit a telephone pole, causing Christner's injuries.

The remaining element that the defendant is required to show under the Rippel test for assumption of risk is that Christner voluntarily chose to accept the risk. Plaintiff's counsel argues that even though Christner may have assumed some sort of risk by getting on the motorcycle with Bunyard, knowing that he was intoxicated, she did not assume the risk of a high-speed chase. He stresses the fact that she was intoxicated, a minor, and had been illegally served in the tavern. However, her own intoxication does not excuse her from recognizing the nature and extent of the danger to which she subjected herself. Rippel at 501. Furthermore, Christner was seventeen years of age; she was not a newcomer to

the bar scene. Christner testified that on the day of the accident she was drinking beer, straight shots, schnapps and whiskey sours. Accordingly, we do not agree that her minority relieves her from being aware of the danger to which she was subjecting herself.

For the foregoing reasons, we find that there was no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. See Christopherson v. Christiansen, 258 Iowa 648, 140 N.W.2d 146 and Reeves v. Beekman, 256 Iowa 263, 127 N.W.2d 95 for cases where it was held that assumption of risk was established as a matter of law.

AFFIRMED.