STATE OF MICHIGAN

COURT OF APPEALS

JUDY STEMPIEN, Personal Representative of the Estate of WILLIAM HALL, Deceased, JOYCE LARSON, CONNIE STEMPIEN, and LARRY HALL,

Plaintiffs-Appellees/Cross-Appellants,

v

MARK WAJDA,

Defendant/Cross-Defendant-Cross-Appellee,

and

MANSOUR, INC., d/b/a JOSEPH'S MARKET,

Defendant/Cross-Plaintiff-Appellant/Cross-Appellee.

UNPUBLISHED
July 27, 2006

No. 263472
Wayne Circuit Court
LC No. 04-407920-NS

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant Mansour, Inc.,[1] appeals by leave granted from the trial court order denying its motion for summary disposition. Plaintiffs cross appeal by leave granted, challenging the trial court's order denying their motion to compel defendant Mark Wajda to testify at deposition. We reverse in part and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

[1] For clarity and ease of reference, this opinion refers to defendant Mansour, Inc., as simply "defendant."

I

This case arises from a fatal automobile accident on November 2, 2002, at 6:09 a.m., when Wadja was driving to work and rear-ended a vehicle occupied by the deceased, William Hall and his wife, both of whom died as a result of the accident. A blood sample drawn from Wadja at 8:40 a.m. indicated his blood alcohol content (BAC) was 0.33. At 10:35 a.m., his BAC was 0.28. According to statements made by Wadja at the accident scene, he left work on Friday at 2:27 p.m., went home, and had three drinks of vodka and Vernors on Friday evening between 8:00 p.m. and 10:00 p.m., which was most of a pint of Mohawk vodka (80% proof). He went to bed at 11:00 p.m., woke up at 4:00 a.m. to go to work, and had nothing to drink on Saturday morning. Wadja pleaded nolo contendere[2] to two charges of second-degree murder, is currently serving prison sentences, and has made no further statements about the accident, invoking his Fifth Amendment right against self-incrimination.

Wadja's wife testified in her deposition that she arrived home from work on Friday between approximately 5:30 p.m. and 6:00 p.m., and Wadja was already home. After starting dinner, they went to Joseph's Market, arriving sometime before 7:00 p.m. She and Wadja picked out several items, including Vernors and a pint of vodka; they went to the sales counter together, and she made out a check for the purchase. At that time Wadja was not slurring his words or stumbling. They later returned home, and Wadja did not leave the house the rest of the evening. Before she went to bed, she saw that the vodka bottle was empty, and presumed that he had "finished it off." There was no other alcohol in the house, and Wadja told her several times that he had nothing to drink on Saturday, November 2, 2002.

Defendant and Joseph's Market, are owned by Mahmoud Mansour. Mansour testified in his deposition that the Wadjas came into his store two or three times a week. He rarely spoke to Wadja and did not remember the purchase on November 1, 2002.

Plaintiff's dramshop action was based on a number of inferences, piecing together limited circumstantial evidence of Wadja's consumption of alcohol. Beginning with the fact that Wadja's BAC was 0.33 after the accident, and inferences that Wadja consumed only the pint of vodka from Joseph's Market Friday evening, plaintiff reasoned, based on expert testimony, that Wadja's BAC must have been 0.46 on Friday before he went to Joseph's Market, and, therefore, he must have been visibly intoxicated at the time the pint of vodka was purchased at the store, and therefore, defendant was liable under the dramshop act for injuries from the Saturday accident. The trial court apparently accepted this theory as viable and concluded that the evidence established a genuine issue of material fact precluding summary disposition. The court denied plaintiff's motion to compel discovery in which plaintiffs sought to depose Wadja, holding that Wadja was entitled to claim his privilege against self-incrimination.

[2] The record contains conflicting statements regarding whether Wadja pleaded guilty or nolo contendere. Because the parties do not argue that any distinction in this regard affects the substantive issues on appeal, this opinion refers generally to the "guilty plea."

II

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id*. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions, and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party. *Kefgen, supra.* Summary disposition is appropriate if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

A

The dramshop act prohibits a retail licensee from directly or indirectly selling, furnishing, or giving alcohol to a visibly intoxicated person. MCL 436.1801(2). The elements of a claim under the dramshop act are (1) the plaintiff was injured by the wrongful or tortious conduct of an intoxicated person, (2) that person's intoxication was the sole or contributing cause of the plaintiff's injuries, (3) the defendant sold, gave, or furnished alcohol to the person when he was visibly intoxicated, and (4) the defendant's conduct caused or contributed to the person's intoxication and, therefore, was a proximate cause of the plaintiff's injuries. *Id*.; *Walling v Allstate Ins Co*, 183 Mich App 731, 738-739; 455 NW2d 736 (1990); *Heyler v Dixon*, 160 Mich App 130, 143, 145; 408 NW2d 121 (1987).

The mere fact that the tortfeasor consumed alcohol "is not sufficient to establish that he was visibly intoxicated." *McKnight v Carter*, 144 Mich App 623, 629; 376 NW2d 170 (1985). Rather, the plaintiff must show that the tortfeasor's intoxication would be apparent to an ordinary observer. *Miller v Ochampaugh*, 191 Mich App 48, 60; 477 NW2d 105 (1991). Visible intoxication may be proved by circumstantial evidence and permissible inferences drawn therefrom. *Heyler, supra* at 146. Such circumstantial evidence would include the number of drinks consumed, the intoxicated person's appearance and conduct, and his blood alcohol level. *McKnight, supra* at 630; *Dines v Henning*, 184 Mich App 534, 540-541; 459 NW2d 305 (1990) (Kelly, J., dissenting), rev'd for the reasons stated in the dissent 437 Mich 920 (1991).

B

Defendant contends that there is no evidence that Wadja was visibly intoxicated at the time of the sale. We agree that plaintiff failed to establish a triable issue of fact on this element of a dramshop claim.

The parties do not dispute that Wajda and his wife went to Joseph's Market on Friday evening, November 1, 2000, at approximately 7:00 p.m., and obtained a pint of vodka. While the two were at the counter, Mrs. Wajda wrote a check for several items purchased, including the vodka. There is also no dispute that the two later returned home, and that Mrs. Wajda did not drink any of the vodka. According to Wadja, he had three drinks before going to bed at 11:30 p.m. According to Mrs. Wadja, the vodka bottle was empty before she went to bed. There is no further evidence that Wadja drank any alcohol on Friday, November 1, 2000, or on Saturday morning, November 2, 2000, before the fatal accident. However, the expert testimony, premised

on the limited evidence of Wadja's alcohol consumption, concluded that he consumed a significant amount of additional alcohol, i.e., at least another pint of vodka, during that time.

The parties' experts agreed that the consumption of one pint of 80-proof vodka during the evening of Friday, November 1, could not result in a 0.33 blood alcohol level the following morning. When Wadja consumed the additional alcohol is unknown.

Plaintiffs' expert toxicologist, Roy Aston, testified that if Wajda had consumed the additional alcohol before going to the market, his blood alcohol level would have been 0.46. And because there was evidence that Wajda's "eyes were dilated, he was unsteady on his feet and that he was slightly slurring his speech, unable to speak properly" when his blood alcohol level was 0.33, one could infer that the signs of intoxication would have been more pronounced with a blood alcohol level of 0.46, and thus Wajda would have appeared visibly intoxicated at the time the vodka was purchased at Joseph's Market.

Aston prepared a timeline of events and facts for the dates of November 1 and 2, 2002, which he recited: Wadja began work at 6:00 a.m., left work at 2:27 p.m., wife arrived home at 5:45 p.m., purchased alcohol at 6:45 p.m., arrived home at 8:45 p.m., and consumed three regular glasses of vodka and Vernors between 8:45 p.m. and 11:30 p.m., awoke for work at 4:00 a.m., accident at 6:09 a.m., 0.33 BAC at 8:40 a.m., and 0.28 BAC at 10:35 a.m.

Aston opined that given Wajda's BAC at 8:40 a.m. on November 2, Wajda must have consumed more than one pint of vodka during the evening on Friday. Aston then stated that, assuming vodka was "his drink of choice," there are two possible scenarios: either he had another pint after midnight, when his wife was asleep, or before meeting his wife when she arrived home at 5:30 p.m. Assuming that Wajda was drinking before his wife arrived at home and working backwards from the 0.33 BAC measured on Saturday morning and Wajda's rate of elimination, Aston calculated that Wajda's blood alcohol level at 6:45 p.m. would have had to have been 0.46 in order for it to be 0.33 at the time of the accident. Aston stated that a normal person might be approaching a coma, at this level, and "would be showing signs of extreme intoxication . . . approaching unconsciousness."

Aston was asked if he had calculated how much vodka Wajda would have had to have drunk, if he began drinking alcohol at 8:45 p.m., to which Ashton responded that Wajda would have had to consume another one and one-half pint of similar vodka. Aston was also asked the following:

> *Q*. Isn't it true there's no way for you to calculate as to when or where he had been drinking in order to come up with the numbers you've come up with, is that correct?
>
> *A*. Well, the number that I came up with, I don't know where, but drinking presumably in that period of time in which he was unobserved by his wife from the time he left work until the time he met her, that would be the window of opportunity, as it were, in buying additional vodka.
>
> *Q*. There would be other windows of opportunities too, would there not?

A. Yes.

Q. From the time that the Mrs. went to sleep until the time of the accident, that's a window of opportunity?

A. There's a window of opportunity, yes.

Q. So we have to speculate as to when he had more alcohol to drink?

A. Well, we know he had more alcohol to drink, there's no question about that, as to when, well, I think you pay your money and take your chance, right, one can postulate any number of scenarios resulting in a .33 and also no evidence really to – that appears in any of the documentation that I've viewed to suggest that he was sober at 6:45 because if he were an alcoholic, as he must have been to function as well as he did with that high blood alcohol level, and that's seen in alcoholics of course, some alcoholics go fully into a hospital at .4 or a .45 and people don't even know they have had anything to drink, they're very good at concealing the fact that they're drunk as well as the fact that they have the tolerance built up, so I think to suggest that he drank prior to 6:45 and was intoxicated at that point is adamantly reasonable as any.

Aston stated that if Wajda's BAC was at 0.46 when he walked into the market, and assuming he was an alcoholic, there was a possibility, but not the likeliest, that he was not showing visible signs of intoxication, since he was showing visible signs of intoxication at the scene of the accident, when his BAC was lower. Aston stated that the odds were miniscule that Wajda may not have been showing signs of intoxication. Aston was then asked:

Q. We're dealing with everything that's possible in terms of your opinions here today because we really don't have enough facts to tell us at what point in time someone drank, especially [Wajda], is that correct?

A. Yes, we don't have information to specifically determine at what point he began drinking.

During examination by plaintiff's counsel, Aston acknowledged that he prepared a report, by letter dated February 14, 2005, in which he stated that Wajda would have been exhibiting objective signs of intoxication at 6:45 p.m. on November 1, 2002. The letter stated, in relevant part:

> I have assumed that Mrs. Wajda's testimony is an accurate reflection of the events on the evening of 11/01/02 (including Mr. Wajda's ingestion of a "pint" of vodka). This assumption, taken together with the finding by the Michigan State Police toxicology laboratory that Mr. Wajda had a blood alcohol concentration (BAC) of 0.33 gram% at about 8:40 AM on 11/02/02, make it mandatory, on the best scientific principles, to conclude that Mr. Wajda had a BAC, at the the [sic] time of purchase of a bottle of vodka at about 6:45 PM on 11/02/02, sufficiently high to have caused him to exhibit objective signs of alcoholic ingestion.

Based on Aston's opinion, plaintiff's theory is that because (1) Wadja told police that he had consumed no alcohol on Saturday morning before the accident, and (2) because Mrs. Wadja stated in her deposition that there was no other alcohol in the Wajda home and that it was unlikely that Wadja would bother to go out and purchase alcohol on his own after she went to bed on Friday evening, then by a process of elimination, Wadja must have consumed the additional pint of alcohol before going to the store on Friday evening. We find the link plaintiff's make between the pint of alcohol sold at the store at approximately 7:00 p.m. Friday evening and the accident on Saturday morning, too far attenuated to support the dramshop action on the facts provided. We agree with defendant that Aston's letter and deposition testimony is purely speculative given the fact that he was unable to determine at what point during the evening Wajda consumed the extra alcohol.

Mrs. Wadja testified that Wadja was not drinking when she arrived home from work and that he was not visibly intoxicated when they went to Joseph's Market. She also testified that Wajda was not stumbling or slurring his words while they were inside the market. This suggests that Wajda was not visibly intoxicated at the time the vodka was purchased.

Aston's opinion regarding whether Wajda was visibly intoxicated is based on speculation, i.e., that Wajda drank before the purchase at the store. It is not a reasonable inference that Wajda would have a BAC of 0.46 at the time the vodka was purchased from defendant, since most people would be unconscious or dead at this level. Wajda may have consumed more than one pint of vodka, but evidence is lacking concerning how much more, and when he drank the additional alcohol.

Although, in deciding a motion under MCR 2.116(C)(10), a court must view the facts in a light most favorable to plaintiffs and draw all reasonable inferences, a court is not obligated to exceed the bounds of reason in finding a triable issue of fact. The thin circumstantial evidence in this case does not reasonably support a claim of dramshop liability. However, because we resolve the cross appeal in plaintiffs' favor, as discussed in Part IV of this opinion, and find that the court erred in denying plaintiffs' motion for further discovery, we conclude that this case must be remanded for further proceedings. Absent the development of additional evidentiary support for plaintiffs' dramshop claim from the deposition of Wadja, defendant is entitled to summary disposition.[3]

IV

On cross appeal, plaintiffs challenge the trial court's order denying their motion to compel Wajda to testify at deposition concerning the events of November 1, 2002 and November 2, 2002, without asserting his Fifth Amendment right against self-incrimination. We agree that the court erred in denying plaintiffs' motion.

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[3] Defendant Mansour, Inc., also claims that there is no evidence that "defendant" knew the vodka was being purchased by Mrs. Wadja for her husband, and further, that there is no evidence the sale caused the accident. Given our resolution of the issue of visible intoxication, we need not address these additional bases for reversal of summary disposition.

A

The trial court's decision to grant or deny discovery is reviewed for an abuse of discretion. *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 224; 663 NW2d 481 (2003). However, the preliminary issue whether information is privileged is a question of law that is reviewed de novo. *Id.*; *Koster v June's Trucking, Inc*, 244 Mich App 162, 166; 625 NW2d 82 (2000).

Parties to a civil proceeding may obtain discovery on any relevant matter that is not privileged. MCR 2.302(B)(1). A person cannot be compelled in any criminal case to be a witness against himself. US Const, Am V; Const 1963, art 1, § 17. "The privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also permits him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Phillips v Deihm*, 213 Mich App 389, 399-400; 541 NW2d 566 (1995). "The privilege against self-incrimination may be invoked only when the testimony sought to be elicited will in fact tend to incriminate the witness." *Larrabee v Sachs*, 201 Mich App 107, 110; 506 NW2d 2 (1993). Any testimony "having even a possible tendency to incriminate is protected against compelled disclosure." *People v Lawton*, 196 Mich App 341, 346; 492 NW2d 810 (1992). The privilege may be invoked even when criminal proceedings have not been instituted or planned. *People v Guy*, 121 Mich App 592, 609-610; 329 NW2d 435 (1982).

B

In this case, criminal proceedings were instituted and concluded by Wajda's guilty plea and subsequent sentencing. Generally, once a criminal defendant has been convicted and sentenced and the sentence has become final, there is no basis for assertion of the privilege. *Mitchell v United States*, 526 US 314, 326; 119 S Ct 1307; 143 L Ed 2d 424 (1999). "If no adverse consequences can be visited upon the convicted person by reason of further testimony, then there is no further incrimination to be feared." *Id.* If the sentence is subject to appeal or has been appealed, it does not become final until the right to appeal has expired or the appeal has been concluded. *People v Den Uyl*, 318 Mich 645, 649, 655; 29 NW2d 284 (1947); *People v Lindsay*, 69 Mich App 720, 723; 245 NW2d 343, (1976).

Wajda was sentenced in the criminal matter in April 2003. Because Wajda was convicted by plea, he did not have a right to appeal his conviction, Const 1963, art 1, § 20, and his right to seek leave to appeal expired in April 2004, without Wadja taking any action to withdraw his plea. See former MCR 6.311(A) and (C) [now MCR 6.310(C) and (D)]; MCR 7.205(F). Therefore, there was no basis for Wajda's assertion of the privilege against self-incrimination in January 2005. *Mitchell, supra.* Although Wadja continues to assert his intention of pursuing an appeal of his convictions, he provides no evidence to support this assertion. Accordingly, the trial erred to the extent that it accepted Wajda's assertion of the privilege and abused its discretion in denying plaintiffs' motion to compel discovery.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Brian K. Zahra