STATE OF MICHIGAN

COURT OF APPEALS

BARBARA LYNN SALT, Personal Representative of the Estate of ALYSHA LYNN SALT, Deceased,

Plaintiff-Appellee,

v

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, PIXIE, INC., d/b/a BENNIGAN'S, and MASON JAR PUB & GRUB,

Defendants,

and

QUALITY DAIRY COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 21, 2009

No. 277391
Ingham Circuit Court
LC No. 05-000060-NS

JOSEPH BOLANOWSKI, Personal Representative of the Estate of ROBERT M. BOLANOWSKI, Deceased, BRENDA J. BOLANOWSKI, and TERRANCE D. HALL,

Plaintiffs-Appellees,

v

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB, and SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendants,

and

QUALITY DAIRY COMPANY,

Defendant-Appellant.

No. 277392
Ingham Circuit Court
LC No. 05-000161-NI

STEPHEN ANCONA,

Plaintiff-Appellee,

v

No. 277393
Ingham Circuit Court
LC No. 05-000297-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB, and SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendants,

and

QUALITY DAIRY COMPANY,

Defendant-Appellant.

BARBARA LYNN SALT, Personal Representative of the Estate of ALYSHA LYNN SALT, Deceased,

Plaintiff-Appellee,

v

No. 277400
Ingham Circuit Court
LC No. 05-000060-NS

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, MASON JAR PUB & GRUB, and QUALITY DAIRY COMPANY,

Defendants,

and

PIXIE, INC., d/b/a BENNIGAN'S,

Defendant-Appellant.

JOSEPH BOLANOWSKI, Personal Representative of the Estate of ROBERT M. BOLANOWSKI, Deceased, BRENDA J. BOLANOWSKI, and TERRANCE D. HALL,

Plaintiffs-Appellees,

v

No. 277402
Ingham Circuit Court
LC No. 05-000161-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB, and QUALITY DAIRY COMPANY,

Defendants,

and

SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendant-Appellant.

STEPHEN ANCONA,

Plaintiff-Appellee,

v

No. 277404
Ingham Circuit Court
LC No. 05-000297-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB, and QUALITY DAIRY COMPANY,

Defendants,

and

SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendant-Appellant.

BARBARA LYNN SALT, Personal Representative of the Estate of ALYSHA LYNN SALT, Deceased,

Plaintiff-Appellee,

v

No. 277434
Ingham Circuit Court
LC No. 05-000060-NS

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, PIXIE, INC., d/b/a BENNIGAN'S, and

QUALITY DAIRY COMPANY,

Defendants,

and

RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB,

Defendant-Appellant.

JOSEPH BOLANOWSKI, Personal Representative of the Estate of ROBERT M. BOLANOWSKI, Deceased, BRENDA J. BOLANOWSKI, and TERRANCE D. HALL,

Plaintiffs-Appellees,

v

No. 277435
Ingham Circuit Court
LC No. 05-000161-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, QUALITY DAIRY COMPANY, and SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendants,

and

RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB,

Defendant-Appellant.

STEPHEN ANCONA,

Plaintiff-Appellee,

v

No. 277436
Ingham Circuit Court
LC No. 05-000297-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, QUALITY DAIRY COMPANY, and SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendants,

and

RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB,

Defendant-Appellant.

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

These consolidated appeals are before this Court pursuant to the Michigan Supreme Court's order remanding the cases to this Court for consideration as on leave granted.[1] All nine appeals in this dramshop action[2] arise from a drunk driving accident that killed two people and injured four others. In Docket Nos. 277391, 277392, and 277393, defendant Quality Dairy Company appeals the trial court's order denying Quality Dairy's motion for summary disposition under MCR 2.116(C)(10). With respect to those appeals, we affirm in part, reverse in part, and remand for further proceedings. In Docket Nos. 277400, 277402, and 277404, defendant Pixie, Inc., d/b/a Bennigan's, and Sweet Onion, Inc., d/b/a Bennigan's (collectively, Bennigan's) appeals the trial court's order denying its motion for summary disposition under MCR 2.116(C)(10). With respect to those appeals, we reverse. Finally, in Docket Nos. 277434, 277435, and 277436, defendant Ronald Sheele Enterprises, L.L.C., d/b/a Mason Jar Pub & Grub (the Mason Jar), appeals the trial court's order denying its motion for summary disposition under MCR 2.116(C)(10). And, with respect to those appeals, we reverse.

I. Basic Facts And Procedural History

It is undisputed that at approximately 11:00 p.m. on August 23, 2004, defendant Andrew C. Gillespie was driving southbound on Hagadorn Road in East Lansing. His blood alcohol level was 0.15 grams per 100 milliliters, and he was also under the influence of prescription anxiety medication. He was driving a vehicle owned by his mother, defendant Geraldine Irvine. Gillespie's vehicle crossed the centerline of Hagadorn Road and struck Travis Wedley's vehicle, which was heading northbound. Inside Wedley's vehicle were Alysha Lynn Salt, Robert Bolanowski, plaintiff Terrance Hall, plaintiff Stephen Ancona, and Lauren Joss. Salt and Bolanowski were killed in the collision. All occupants of Wedley's vehicle were under 20 years of age. As a result of the accident, Gillespie pleaded guilty to two counts of second-degree murder and four counts of operating a motor vehicle while intoxicated causing serious injury.

According to Gillespie, he was at home most of the day on August 23, 2004. He did not recall what time he left his home that day, and although admitting that he was an alcoholic, he

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[1] *Salt v Gillespie*, 481 Mich 886; 749 NW2d 252 (2008).

[2] MCL 436.1801 *et seq*.

maintained that he did not consume any alcohol before he left the house. He recalled taking Klonopin and Paxil, both prescription medications, that morning. He also remembered putting at least one Klonopin pill in his pocket so that he could take the medication later that night, but had no memory of taking more Klonopin after he left his house. According to Gillespie's then wife (they divorced after he was incarcerated following his guilty plea.), Kasey Gillespie, Gillespie left their home on the afternoon of August 23, 2004, at approximately 4:00 p.m. Kasey Gillespie testified that Gillespie appeared sober at that time.

Gillespie recalled going directly to the Mason Jar after leaving his home. He denied stopping anywhere else. However, Irvine testified that she saw Gillespie at approximately 4:00 p.m. or 5:00 p.m. on August 23, 2004, and although he did not appear intoxicated, when she kissed him, she could smell alcohol on him.

Gillespie recalled walking into the Mason Jar and sitting at the bar. He recalled a female bartender serving him a drink, but he did not recall ordering a drink. He testified that he normally drinks vodka with orange juice, but he did not recall what type of drink he was served that day. He also did not recall consuming the drink or being served a second drink. Gillespie did not recall how long he stayed at the Mason Jar, but remembered talking to another patron, a Native American man. He recalled giving the man a 1910 Indian coin that his father had given him. His father, with whom he did not have a very good relationship, had recently passed away. Gillespie maintained that he gave the man the coin because he was drunk. He recalled drinking vodka with orange juice while talking to the man. (Notably, Gillespie's testimony in this regard contradicts his earlier testimony that he did not remember what type of drink he consumed at the Mason Jar. Indeed, much of Gillespie's testimony is contradictory.) When asked why he would have been drunk when he did not recall having more than one drink, Gillespie testified that he believed it was an effect of the Klonopin he had taken. He also testified that he believed he was intoxicated while at the Mason Jar because some reports generated after the accident indicated that people saw him staggering. He did not recall having a conversation with anyone else at the Mason Jar, how long he stayed there, or when he left, and he had no memory of walking out of the Mason Jar.

Deborah Bassler, a bartender at the Mason Jar, estimated that she first saw Gillespie at the Mason Jar on the evening of the accident at approximately 6:30 p.m. However, Bassler testified that the bar clock was on "bar time," so it was set 20 minutes faster than the actual time. For example, if Bassler arrived to work at 4:40 p.m. real time, the bar clock would read 5:00 p.m. Bassler stated that Gillespie had a seat on a stool at the bar, and he ordered vodka with orange juice. Bassler served Gillespie the drink, and she saw him drink it, but she was not sure if he finished it. Bassler, who, as a bartender, was trained in detecting intoxication, testified that Gillespie did not appear intoxicated: his eyes were not red, and he had no difficulties with his speech. Another customer, Merrill Pittman, testified that he arrived at the Mason Jar around 6:00 p.m. and sat down next to Gillespie at the bar. Although Gillespie already had a drink, Pittman offered to buy Gillespie another, and Gillespie declined. They discussed the mortgage business. While Bassler was taking her break, Gillespie ordered another vodka and orange juice from Valerie Derosia, another bartender at the Mason Jar, who was also trained in intoxication detection. Derosia estimated that she served Gillespie the drink sometime between 7:30 p.m. and when she punched out at 7:43 p.m. Derosia did not notice anything unusual about Gillespie's appearance or behavior, and he did not appear intoxicated. Pittman confirmed that he saw

Gillespie drink two vodka and orange juice drinks during the approximately 1-½ to 2 hours that Gillespie was there. Pittman left at approximately 7:30 p.m. or 8:00 p.m., after Gillespie had already left. According to Pittman, Gillespie did not appear intoxicated that night.

Christie English (who, coincidentally is the cousin of Travis Wedley, the driver of the car that Gillespie struck) testified that she was at the Mason Jar on the night of the accident. She arrived shortly before 8:00 p.m. and left at 9:00 or 9:30 p.m. She previously worked at the bar when it was known as McClure's, before it became the Mason Jar, and she recognized Gillespie as a former customer of McClure's. According to English, Gillespie was not there when she arrived, but he arrived later, at approximately 8:30 p.m. She estimated that Gillespie stayed at the bar approximately 30 or 45 minutes and then left. When he arrived, he did not appear intoxicated. He ordered a vodka with orange juice. He then ordered a second vodka with orange juice and left 10 or 15 minutes later. Until the time that Gillespie left the bar, English did not see him do anything that would indicate that he was intoxicated. But as he was leaving the bar, he stumbled as he walked through a narrow pathway between two tables. English testified, "I don't know whether it was because of the pathway or if he tripped on a chair leg, but he stumbled going through to—on the path to the front door." Gillespie grabbed onto a chair and caught himself. Bassler testified that the tables and chairs in the bar were "rather close to one another" and she had sometimes tripped over the chairs while she was working. As a former bartender, English had training in detecting intoxication. She testified that if she were serving Gillespie that night and noticed him stumble, it would have made her think twice before serving him again and look for other signs of intoxication. Her recollection was refreshed with a police report indicating that she told police officers that Gillespie's eyes were red as he was leaving the Mason Jar. But she did not see Gillespie do anything that would indicate that he was intoxicated before he was served his last drink.

Carl Mennare, Sr., testified that he met Gillespie at the Mason Jar at some point before August 23, 2004. Indeed, Mennare maintained that he did not go to the Mason Jar on August 23, 2004, and neither Pittman nor Bassler recalled Mennare being at the Mason Jar on the night of the accident. According to Mennare, at approximately 7:00 p.m. on an evening a few days before the accident, he and another patron were discussing their experiences serving in the Vietnam War when Gillespie approached him. Gillespie thanked him for his service and gave him an Indian head gold coin that he was wearing on a chain around his neck. Mennare thanked Gillespie, and Gillespie returned to his seat at a table near the bar where he was sitting with a male and a female. Mennare and Gillespie had no further discussion. According to Mennare, Gillespie did not appear intoxicated, did not smell of alcohol, did not slur his speech, and had no trouble walking.

Others told Gillespie after the fact that he went across the street to Quality Dairy after he left the Mason Jar. He initially testified that he had no recollection of doing so and did not recall walking into the store or purchasing alcohol there. He then recanted and maintained that he remembered going across the street to Quality Dairy, but he did not remember whether he walked or drove. He recalled being inside the store and purchasing a half pint of vodka. He initially testified that he did not recall what brand of vodka he purchased, but then testified that he purchased Popov vodka. He did not recall purchasing anything to mix with the vodka. He testified that he purchased the vodka intending to drink it, but he did not recall drinking it. He also testified, however, that he drank the alcohol he purchased at Quality Dairy from a cup. He

maintained that it was his practice to mix vodka that he purchased at Quality Dairy with pop in a 44-ounce cup. He would then drink the mixture as he traveled to the next bar. He continued to maintain that he did not recall purchasing anything to mix with the vodka that day.

Jamie Bennett, a Quality Dairy employee, testified that she did not recognize Gillespie when she was shown a picture of him. Records of Quality Dairy liquor sales showed that a pint of Chaska vodka was sold at 7:35 p.m. to a person who refused to provide a birthdate when asked or who was obviously 21 years old or older such that the clerk did not need to ask for identification for the purchase. Quality Dairy records also showed a sale of Popov vodka at 5:12 p.m. to a person who refused to provide a birthdate when asked or was obviously older than 21.

Gillespie did not recall getting into his car after leaving Quality Dairy or driving home thereafter. He next recalled being at Bennigan's, but he did not remember driving there. He recalled walking into the restaurant, walking up to the bar, sitting at the bar, and ordering vodka with orange juice. But Gillespie later said that he did not recall ordering a drink at Bennigan's. Regardless, he did not recall a Bennigan's employee ever serving him a drink. He estimated that he may have been there for a couple of hours. He recalled being embarrassed when a person behind the bar told him to quiet down but did not recall having any conversations with anyone at Bennigan's. Gillespie's last memory of the evening was being at Bennigan's.

Andrew Hollembaek, a manager of Bennigan's on the date of the accident, testified that bartenders at Bennigan's were required to enter into a computer all of the liquor and mixers purchased at the restaurant. The records for the day of the accident indicated that Bennigan's sold no vodka and orange juice drinks during the entire day. Patrick Walsh, a Bennigan's employee who worked on the night of the accident, did not recognize Gillespie when shown his photo. Erin Brady, a bartender on the night of the accident, also did not recognize Gillespie when shown his picture. In addition, David Gannon, a restaurant manager, averred that he did not see Gillespie at the Bennigan's restaurant on the day of the accident.

Kasey Gillespie testified that Gillespie came home at approximately 8:30 p.m. She could tell that he had been drinking because she could smell alcohol on him, and he was "maybe slightly" slurring his words. He was walking normally and was not stumbling, but he was off balance when she grabbed his keys away from him, and his eyes were bloodshot. Kasey Gillespie then called the police to take Gillespie to the Community Mental Health facility, but while she was on the phone, Gillespie left. Police records indicated that she called at 9:36 p.m. She next saw Gillespie in the hospital after the accident.

Irvine went to bed at approximately 8:30 or 9:00 p.m., and at some point later that evening, Gillespie took her car from her driveway. When she awoke at approximately 10:30 p.m., she noticed that there was a message on her answering machine. The message was from Gillespie's ex-wife, Cameron Gillespie, saying that Gillespie had just been to her house, that he was drinking, and that he was driving Irvine's car. The next day, Irvine saw a bicycle near her driveway with a Quality Dairy or Speedway cup lying next to it. The cup smelled of alcohol. Gillespie later admitted to Irvine that he had ridden the bike to her house and taken her car.

A McDonald's employee, Chad Hatfield, testified that he saw a man urinating on the side of the McDonald's building at approximately 10:30 p.m. When the man got back into his car and pulled up to the drive-through window, Hatfield noticed that the man appeared intoxicated.

Hatfield left the window to call the police, and the man struck the side of the building with his car. Shortly thereafter, Hatfield observed the car in one of the parking spaces and saw the man walking in the parking lot without any shoes. It is undisputed that the man whom Hatfield saw was Gillespie. Hatfield went back inside the building and then noticed that the car was gone. Police officers arrived and took a statement from Hatfield, but left soon afterward because of another incident—apparently, the accident giving rise to these appeals. Gillespie did not recall urinating on the wall of a McDonald's restaurant or driving his mother's car into the side of the McDonald's building.

During the week after the accident, Kasey Gillespie found a brown paper bag containing an empty vodka bottle in her trash. Gillespie told Kasey Gillespie that he was at the Mason Jar and Bennigan's before the accident and that he had given away his Indian coin to a man at the Mason Jar. Gillespie also told her that he drank alcohol purchased at Quality Dairy while he was driving. She testified that it was Gillespie's practice to purchase a large drink in a to-go cup from Speedway and mix vodka purchased from Quality Dairy into the Pepsi in the cup.

In January 2005, plaintiff Barbara Lynn Salt, personal representative of the estate of Alysha Lynn Salt, filed a complaint against Gillespie, Irvine, Bennigan's, the Mason Jar, and Quality Dairy. In February 2005, plaintiff Joseph Bolanowski (Robert Bolanowki's father and personal representative of Robert's estate), Brenda Bolanowski (Robert Bolanowki's mother), and Terrance Hall, filed a complaint against the same five defendants. In March 2005, Stephen Ancona filed a complaint against the same five defendants. Thereafter, in June 2005, the trial court entered an order consolidating all three cases. The three dramshop defendants each then moved for summary disposition.

The Mason Jar moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that, because it was the first establishment to serve Gillespie alcohol on the day of the accident, it is entitled to a presumption of nonliability under the dramshop act pursuant to MCL 436.1801(8). Therefore, the Mason Jar argued, plaintiffs were required to rebut the presumption of nonliability by clear and convincing evidence. And the Mason Jar contended that plaintiffs were unable to so establish by clear and convincing evidence that it served Gillespie alcohol while he was visibly intoxicated. According to the Mason Jar, at least five individuals testified that Gillespie never exhibited any signs of intoxication at the time that he was served alcohol at the Mason Jar. The Mason Jar argued that Gillespie's own testimony that he felt drunk did not establish visible intoxication, and his testimony that he gave an Indian coin to another patron similarly did not constitute evidence of visible intoxication. The Mason Jar argued that Kasey Gillespie testified that although Gillespie had alcohol on his breath after he came home from the bar, he did not appear visibly intoxicated. Further, according to the Mason Jar, Christie English saw Gillespie stumble and noticed that his eyes were slightly red only as he was leaving the bar. Thus, the Mason Jar argued, the overwhelming evidence indicated that Gillespie was not served while he was visibly intoxicated. Further, the Mason Jar argued that even if it was not entitled to the presumption of nonliability, it was nevertheless entitled to summary disposition because plaintiffs could not establish that Gillespie was served alcohol at the Mason Jar while he exhibited signs of visible intoxication.

Bennigan's also moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that no evidence existed that it sold alcohol to Gillespie and that Gillespie himself was the only person who recalled his presence at Bennigan's on the night of the accident. Bennigan's argued

that Gillespie's testimony regarding his alleged presence at Bennigan's that night was mere speculation and conjecture, and simply based on his estimation of "what he must have done" rather than on his memory. Bennigan's argued that Gillespie was unable to succinctly state during his deposition that a Bennigan's employee served him alcohol. Bennigan's further contended that no evidence existed that Gillespie was visibly intoxicated while at Bennigan's, if he was there at all.

And, finally, Quality Dairy moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that only Gillespie's unreliable testimony showed that he purchased vodka at Quality Dairy on the day of the accident. Quality Dairy contended that plaintiffs could produce no other witnesses claiming that Gillespie purchased vodka at the store, and the store's records indicated no sales of any vodka during the timeframe that Gillespie could have possibly been at the store. Further, Quality Dairy argued that, even if Gillespie did purchase vodka at the store, no evidence indicated that he was visibly intoxicated at the time of the alleged purchase. Finally, Quality Dairy argued that no evidence existed that Gillespie consumed the vodka allegedly purchased at the store.

After considering the motions, the trial court entered an order denying all three motions for summary disposition. Regarding Bennigan's, the trial court determined that plaintiffs proved by a preponderance of the evidence that Bennigan's was the last establishment to serve Gillespie alcohol while he was visibly intoxicated and, therefore, Bennigan's was not entitled to a presumption of nonliability. In so ruling, the trial court relied on the deposition testimony of Kasey Gillespie, Cameron Gillespie, Hatfield, and Gillespie himself as establishing evidence of visible intoxication. With respect to Quality Dairy and the Mason Jar, the trial court determined that they were not the last-in-time to serve Gillespie and that plaintiffs produced clear and convincing evidence to rebut the presumption of nonliability. Regarding Quality Dairy, the trial court relied on Gillespie's testimony that he purchased a half pint of vodka there, Kasey Gillespie's testimony that she discovered an empty vodka bottle in the trash during the week following the accident, and English's testimony that Gillespie appeared intoxicated when he left the Mason Jar. The trial court determined that the Mason Jar was the first establishment to serve Gillespie alcohol on the day of the accident. And in denying the Mason Jar's motion for summary disposition, the trial court relied on the testimony of English, Gillespie, and Irvine.

Thereafter, all three defendants filed applications for leave to appeal with this Court in each of the three cases, which this Court denied.[3] The Michigan Supreme Court remanded these cases to this Court for consideration as on leave granted in all nine appeals.[4] This Court then entered three separate orders consolidating Quality Dairy's appeals (Docket Nos. 277391;

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[3] *Salt v Gillespie*, unpublished order of the Court of Appeals, entered November 2, 2007 (Docket Nos. 277391; 277400; 277434); *Bolanowski v Gillespie*, unpublished order of the Court of Appeals, entered November 2, 2007 (Docket Nos. 277392; 277402; 277435); *Ancona v Gillespie*, unpublished order of the Court of Appeals, entered November 2, 2007 (Docket Nos. 277393; 277404; 277436).

[4] *Salt v Gillespie*, 481 Mich 886; 749 NW2d 252 (2008).

277392; 277393),[5] Bennigan's appeals (Docket No. 277400; 277402; 277404),[6] and the Mason Jar Pub's appeals (Docket Nos. 277434; 277435; 277436).[7] The appeals were then submitted together before this Court for oral arguments on April 8, 2009, and, following oral arguments, this Court consolidated all nine appeals in the interest of judicial economy.[8]

II. Motions For Summary Disposition

A. Standard Of Review

We review de novo a trial court's decision on a motion for summary disposition.[9] A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law.[10] In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party.[11] The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial.[12]

B. Legal Standards

The dramshop act prohibits the sale or furnishing of alcohol to a visibly intoxicated person. Specifically, the act provides, in relevant part:

> (2) . . . A retail licensee shall not directly or indirectly, individually or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a person who is visibly intoxicated.
>
> (3) Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a . . . visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the . . . 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

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[5] *Salt v Gillespie*, unpublished order of the Court of Appeals, entered June 16, 2008 (Docket Nos. 277391; 277392; 277393).

[6] *Salt v Gillespie*, unpublished order of the Court of Appeals, entered June 16, 2008 (Docket Nos. 277400; 277402; 277404).

[7] *Salt v Gillespie*, unpublished order of the Court of Appeals, entered June 16, 2008 (Docket Nos. 277434; 277435; 277436).

[8] *Salt v Gillespie*, unpublished order of the Court of Appeals, entered April 20, 2009 (Docket Nos. 277391; 277392; 277393; 277400; 277402; 277404; 277434; 277435; 277436).

[9] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[10] *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002).

[11] *Id*. at 30-31.

[12] *Id*. at 31.

> individual, shall have a right 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.[13]

Therefore, to recover under the dramshop act, plaintiffs must prove that:

> (1) [the deceased or injured person] 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.[14]

However, "MCL 436.1801(8) creates a rebuttable presumption of nonliability for all but the last retail licensee that serves alcohol to a visibly intoxicated person."[15] Specifically, MCL 436.1801(8) provides:

> 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 visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (3).

"Thus, all establishments but the last to serve the person have the benefit of a rebuttable presumption that no unlawful service occurred."[16] In accordance with this presumption, "a plaintiff, in addition to making out a prima facie case proven by a preponderance of the evidence under § 801(3), must also, when a defendant is not the last establishment to serve the allegedly intoxicated person, present clear and convincing evidence to rebut and thus overcome the presumption of § 801(8)."[17]

C. Bennigan's Appeals (Docket Nos. 277400; 277402; 277404)

The trial court determined that plaintiffs proved by a preponderance of the evidence that Bennigan's was the last establishment to serve Gillespie alcohol while he was visibly intoxicated and, therefore, Bennigan's was not entitled to a presumption of nonliability. But Bennigan's argues that the trial court erred by denying its motion for summary disposition because plaintiffs failed to show that Gillespie was at Bennigan's on the night of the accident, that he was served alcohol there, that he was visibly intoxicated when Bennigan's served him alcohol, or that he consumed the alcohol. We agree.

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[13] MCL 436.1801(2) and (3).

[14] *Walling v Allstate Ins Co*, 183 Mich App 731, 738-739; 455 NW2d 736 (1990).

[15] *Reed v Breton*, 475 Mich 531, 533; 718 NW2d 770 (2006).

[16] *Id*. at 538.

[17] *Id*. at 541.

Gillespie vaguely recalled being at Bennigan's on the night of the accident. But Gillespie's recollection is contrary to that of the Bennigan's employees who worked on the night of the accident and maintained that Gillespie was not there that night. Moreover, the sequence of events on the night of the accident made it unlikely that he was at Bennigan's that night. Gillespie stated that he visited the Mason Jar first and Valeria Derosia estimated that he did not leave the Mason Jar until 7:30 p.m., at the earliest. Thereafter, he may have stopped at Quality Dairy to purchase vodka. He arrived home sometime after 8:00 p.m. and was home for at least 45 minutes before Kasey Gillespie called the police at 9:36 p.m. Gillespie then rode a bicycle to Irvine's house and, from there, drove Irvine's car to Cameron Gillespie's residence, arriving at approximately 10:00 p.m. He stayed there for approximately 20 minutes and was next seen urinating on the side of a McDonald's building at approximately 10:30 p.m. The accident occurred at approximately 11:00 p.m.

Even assuming that Gillespie was at Bennigan's at some point on the night of the accident, however, plaintiffs cannot show that he was served alcohol there or that he consumed any alcohol that may have been furnished to him. Gillespie testified as follows:

> *Q*. Okay. You don't have any recollection of being served a drink there, do you?
>
> *A*. I'm sure I would have ordered a vodka and orange juice.
>
> *Q*. But you don't have any recollection of the server giving that to you, do you?
>
> *A*. Yeah, he would have gave it to me. I don't see why he wouldn't have.
>
> *Q*. I'm not asking you what people might have done. I'm saying, you, as you're sitting here today, don't have any recollection of someone at Bennigan's putting a drink in front of you, do you?
>
> *A*. No, sir.
>
> *Q*. And you don't have any recollection, as you sit here today, of consuming any alcohol at Bennigan's, do you?
>
> *A*. I must have if I was there a couple hours.
>
> *Q*. I understand what you must have done. But as you sit here today, you don't have any memory of that, do you?
>
> *MR. MURRAY*: Do you remember?
>
> *THE WITNESS*: The only thing I remember from Bennigan's is somebody telling me that I was being loud.
>
> *BY MR. DAVIDSON*:

Q. Okay. And, a hypothetical, could have been a situation that you walked into Bennigan's, you tried to get a drink, somebody told you that you were loud and they weren't going to serve you; that could have happened, correct?

A. I don't think so.

Q. Could have happened, correct?

A. It could have.

Thus, Gillespie's testimony confirmed that he did not affirmatively recall being served a drink at Bennigan's or consuming a drink there. Bennigan's sales records also indicated that no vodka and orange juice drinks were sold at Bennigan's that entire day.

Accordingly, plaintiffs failed to present evidence that Bennigan's furnished Gillespie alcohol while he was visibly intoxicated.[18] To defeat the motion for summary disposition, plaintiffs were required to produce such evidence and could not rely on mere speculation or conjecture that Gillespie was served and consumed alcohol at Bennigan's.[19] Because plaintiffs failed to show that Bennigan's served Gillespie alcohol that proximately caused the injuries giving rise to these appeals, there can be no liability under MCL 436.1801(3). Therefore, we conclude that the trial court erred by denying Bennigan's motion for summary disposition. Accordingly, with respect to Bennigan's appeals, we reverse and remand for entry of an order dismissing plaintiffs' complaints against Bennigan's.

D. Quality Dairy's Appeals (Docket Nos. 277391; 277392; 377393)

The trial court determined that Quality Dairy was entitled to the presumption of nonliability because it was not the last, but rather the second-to-last, establishment that sold Gillespie alcohol on the day of the accident. However, with respect to Bennigan's appeals (Docket Nos. 277400; 277402; 277404), we have concluded that plaintiffs failed to present evidence that Bennigan's served Gillespie alcohol. Therefore, because plaintiffs failed to create a question of fact regarding whether Bennigan's was the last establishment to serve Gillespie alcohol, Quality Dairy would presumably become the last establishment to have served Gillespie and would not be entitled to the presumption of nonliability under MCL 436.1801(8).

Quality Dairy nevertheless argues that it was still entitled to summary disposition because plaintiffs failed to show that Gillespie purchased vodka at its store, that he consumed the vodka, or that he was visibly intoxicated when he purchased the vodka. We disagree and conclude that questions of fact exist regarding these issues. Although Gillespie's testimony was inconsistent in many respects, he stated that he went to the Quality Dairy store across the street immediately after leaving the Mason Jar. He testified that he purchased a half pint of vodka and, after initially

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[18] MCL 436.1801(2).

[19] *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

claiming that he did not remember the brand, maintained that he purchased Popov vodka. He also initially claimed not to remember drinking the vodka, but thereafter testified that he mixed it with pop and drank it from a Speedway cup.

Further, Quality Dairy sales records show the purchase of a bottle of Chaska vodka at 7:35 p.m., near the time that Gillespie purportedly left the Mason Jar. Valerie Derosia, the bartender who served Gillespie his second drink at the Mason Jar, estimated that she served him the drink between 7:30 and 7:43 p.m., when she punched out and left. She was unsure whether Gillespie was still at the bar when she left. Moreover, Deborah Bassler, the bartender who served Gillespie his first drink at the Mason Jar, did not notice when Gillespie left. The evidence therefore showed that Gillespie left the Mason Jar close to the time of the Chaska vodka purchase, and Gillespie's testimony was equivocal regarding which brand of vodka he purchased. Moreover, Quality Dairy records indicated that the vodka was sold to a person who refused to provide a birthdate or who was obviously 21 years of age or older. And when shown Gillespie's picture, Jamie Bennett, a Quality Dairy employee, testified that she would not have asked for Gillespie's identification if he had attempted to make a purchase. Therefore, we conclude that a question of fact exists regarding whether Gillespie purchased the Chaska vodka.

Quality Dairy also argues that, even if Gillespie did purchase alcohol at its store, there exists no evidence that Gillespie was visibly intoxicated at that time. In *Reed v Breton*,[20] the Michigan Supreme Court stated that the "standard of 'visible intoxication' focuses on the objective manifestations of intoxication" and the behavior that the allegedly intoxicated person "*actually manifested* to a reasonable observer." Further, a plaintiff must show that the allegedly intoxicated person exhibited such objective manifestations of intoxication at the time that he was served.[21] Although plaintiffs correctly argue that *Reed* does not require that eyewitness observations of intoxication be made simultaneously with the serving of alcohol, MCL 436.1801(2) does require that a person be visibly intoxicated when served for liability to ensue. The statute clearly prohibits the furnishing or sale of alcohol "to a person who is visibly intoxicated."[22]

Bennett, the Quality Dairy employee, did not recall selling alcohol to Gillespie on the night of the accident, and there exists no eyewitness testimony regarding the purported vodka sale at Quality Dairy. Christie English's showed, however, that Gillespie started to exhibit signs of visible intoxication as he was walking out of the Mason Jar, immediately before he claims to have purchased vodka at Quality Dairy. Thus, a genuine issue of material fact existed regarding whether Quality Dairy sold alcohol to Gillespie while he was visibly intoxicated.

Quality Dairy contends that, regardless, no evidence existed that Gillespie drank the vodka purportedly purchased at its store. We disagree. Although Gillespie's testimony is contradictory in this regard, he stated that he drank the vodka after mixing it with pop in a

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[20] *Reed v Breton*, 475 Mich 531, 542-543; 718 NW2d 770 (2006) (emphasis in original).

[21] *Id*. at 543.

[22] MCL 436.1801(2).

Speedway cup. Additionally, during the week following the accident, Kasey Gillespie found an empty vodka bottle in the trash after her father cleaned out the vehicle that Gillespie drove to the Mason Jar on the night of the accident. Moreover, on the day after the accident, Gillespie's mother found either a Quality Dairy or Speedway cup that smelled of alcohol lying next to the bicycle that Gillespie rode to her house the night before. Therefore, a question of fact existed regarding whether Gillespie drank the alcohol that he purportedly purchased from Quality Dairy.

In sum, we conclude that the trial court properly denied Quality Dairy's motion for summary disposition. Accordingly, with respect to Quality Dairy's appeals, we affirm in part, reverse in part, and remand for further proceedings.

E. The Mason Jar Appeals (Docket Nos. 277434; 277435; 277436)

The trial court determined that the Mason Jar was entitled to the presumption of nonliability because the evidence indicated that it was the first establishment that sold Gillespie alcohol on the day of the accident. Plaintiffs argue that the trial court's determination was erroneous because there was a genuine issue of material fact regarding whether the Mason Jar was actually the last establishment to serve Gillespie alcohol. We need not resolve this issue, however, because even if the Mason Jar is not entitled to the presumption and the lower "preponderance of the evidence" standard applied in lieu of the higher "clear and convincing evidence" standard, plaintiffs still failed to present sufficient evidence to overcome the Mason Jar's motion for summary disposition.

MCL 436.1801(2) prohibits the furnishing or sale of alcohol "to a person who is visibly intoxicated." The "standard of 'visible intoxication' focuses on the objective manifestations of intoxication" and the behavior that the allegedly intoxicated person "*actually manifested* to a reasonable observer."[23] Thus, if a person is not visibly intoxicated until after he is furnished alcohol, there is no liability under the dramshop act.

Here, the evidence showed, at most, that Gillespie exhibited signs of visible intoxication only after he was served two drinks at the Mason Jar and was exiting the bar. Deborah Bassler and Valerie Derosia, the bartenders who served Gillespie at the Mason Jar, testified that he did not appear intoxicated. His eyes were not red, he had no difficulty with his speech, he was not argumentative, and his voice level was appropriate. In addition, Merrill Pittman, a fellow patron with whom Gillespie discussed mortgages, testified that Gillespie's face was not flushed, his eyes were not bloodshot, and his speech was clear and coherent. According to Pittman, Gillespie did not appear intoxicated. Only as Gillespie was leaving the Mason Jar did he allegedly start to exhibit possible signs of intoxication, as evidenced by Christie English's testimony regarding Gillespie's brief stumble and red eyes as he exited the bar. But even English testified that Gillespie's eyes were not bloodshot earlier in the evening and that she did not see Gillespie do anything that would indicate that he was intoxicated before he was served his second and last drink at the Mason Jar. English's testimony shows that Gillespie exhibited signs of visible intoxication only after he was served alcohol at the Mason Jar.

[23] *Reed*, *supra* at 542-543 (emphasis in original).

Plaintiffs rely on Irvine's testimony that she smelled alcohol on him when she kissed him at approximately 4:00 or 5:00 p.m. on the day of the accident, which was before he arrived at the Mason Jar. However, Irvine also maintained that Gillespie did not appear intoxicated at that time. Thus, Irvine's testimony does not support that Gillespie was visibly intoxicated when he was served alcohol at the Mason Jar.

Finally, plaintiffs rely on Gillespie's assertion that he only gave the Indian head coin that he received from his late father to a fellow patron at the Mason Jar because he was intoxicated. However, the evidence tended to show that Gillespie actually gave the coin away on a date other than August 23, 2004. The recipient of the coin, Carl Mennare, Sr., testified that Gillespie gave him the coin at least a few days before the accident occurred. Further, all witnesses present at the Mason Jar on the night of the accident testified that Gillespie sat on a stool at the bar that night, whereas Mennare testified that Gillespie was sitting at a table near the bar with another male and a female on the day that he gave Mennare the coin. Regardless, even assuming that Gillespie gave Mennare the coin on the night of the accident, Mennare maintained that Gillespie gave him the coin to thank him for his service in the Vietnam War and that Gillespie did not appear intoxicated at the time. He did not smell of alcohol, did not slur his speech, and had no difficulty walking. Thus, the evidence did not demonstrate that Gillespie was visibly intoxicated when he gave the coin to Mennare. And although Gillespie maintains that he gave away the coin only because he was intoxicated, his internal motivation for giving away the coin did not establish visible intoxication, that is, behavior "*actually manifested* to a reasonable observer."[24]

In sum, our review of the record shows that plaintiffs failed to present evidence that Gillespie was served alcohol at the Mason Jar while he was visibly intoxicated. As such, they have not established a genuine issue of material fact for trial, and the trial court erroneously denied the Mason Jar's motion for summary disposition. Accordingly, with respect to the Mason Jar's appeals, we reverse and remand for entry of an order dismissing plaintiffs' complaints against the Mason Jar.

III. Conclusion

With respect to Bennigan's and the Mason Jar's appeals, we reverse and remand for entry of an order dismissing plaintiffs' complaints against those defendants. With respect to Quality Dairy's appeals, we affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck

[24] *Id*. at 543 (emphasis in original).

STATE OF MICHIGAN

COURT OF APPEALS

BARBARA LYNN SALT, Personal Representative of the Estate of ALYSHA LYNN SALT, Deceased,

Plaintiff-Appellee,

v

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, PIXIE, INC., d/b/a BENNIGAN'S, and MASON JAR PUB & GRUB,

Defendants,

and

QUALITY DAIRY COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 21, 2009

No. 277391
Ingham Circuit Court
LC No. 05-000060-NS

JOSEPH BOLANOWSKI, Personal Representative of the Estate of ROBERT M. BOLANOWSKI, Deceased, BRENDA J. BOLANOWSKI, and TERRANCE D. HALL,

Plaintiffs-Appellees,

v

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB, and SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendants,

and

QUALITY DAIRY COMPANY,

Defendant-Appellant.

No. 277392
Ingham Circuit Court
LC No. 05-000161-NI

STEPHEN ANCONA,

Plaintiff-Appellee,

v

No. 277393
Ingham Circuit Court
LC No. 05-000297-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB, and SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendants,

and

QUALITY DAIRY COMPANY,

Defendant-Appellant.

BARBARA LYNN SALT, Personal Representative of the Estate of ALYSHA LYNN SALT, Deceased,

Plaintiff-Appellee,

v

No. 277400
Ingham Circuit Court
LC No. 05-000060-NS

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, MASON JAR PUB & GRUB, and QUALITY DAIRY COMPANY,

Defendants,

and

PIXIE, INC., d/b/a BENNIGAN'S,

Defendant-Appellant.

JOSEPH BOLANOWSKI, Personal Representative of the Estate of ROBERT M. BOLANOWSKI, Deceased, BRENDA J. BOLANOWSKI, and TERRANCE D. HALL,

Plaintiffs-Appellees,

v

No. 277402
Ingham Circuit Court
LC No. 05-000161-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB, and QUALITY DAIRY COMPANY,

Defendants,

and

SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendant-Appellant.

STEPHEN ANCONA,

Plaintiff-Appellee,

v

No. 277404
Ingham Circuit Court
LC No. 05-000297-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB, and QUALITY DAIRY COMPANY,

Defendants,

and

SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendant-Appellant.

BARBARA LYNN SALT, Personal Representative of the Estate of ALYSHA LYNN SALT, Deceased,

Plaintiff-Appellee,

v

No. 277434
Ingham Circuit Court
LC No. 05-000060-NS

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, PIXIE, INC., d/b/a BENNIGAN'S, and

QUALITY DAIRY COMPANY,

Defendants,

and

RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB,

Defendant-Appellant.

JOSEPH BOLANOWSKI, Personal Representative of the Estate of ROBERT M. BOLANOWSKI, Deceased, BRENDA J. BOLANOWSKI, and TERRANCE D. HALL,

Plaintiffs-Appellees,

v

No. 277435
Ingham Circuit Court
LC No. 05-000161-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, QUALITY DAIRY COMPANY, and SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendants,

and

RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB,

Defendant-Appellant.

STEPHEN ANCONA,

Plaintiff-Appellee,

v

No. 277436
Ingham Circuit Court
LC No. 05-000297-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, QUALITY DAIRY COMPANY, and SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendants,

and

RONALD SHEELE ENTERPRISES, L.L.C., d/b/a
MASON JAR PUB & GRUB,

Defendant-Appellant.

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur with the majority's reversal of the lower court's denial of summary disposition as to the Mason Jar. I agree that a trier of fact could not reasonably conclude that Gillespie, the striking driver, was visibly intoxicated when he was served at that establishment. Multiple witnesses stated that they observed Gillespie at the Mason Jar and that he did not appear intoxicated prior to being served. Most important, the sole witness who did observe signs of Gillespie's intoxication as he departed the bar, and whose testimony might have created a question of material fact, also testified that she saw Gillespie prior to service and that he did not appear visibly intoxicated at that time. A witness's observation of the allegedly intoxicated person shortly after service is relevant to the inquiry as it constitutes circumstantial evidence of visible intoxication prior to service. Further, such evidence of contemporaneous observations may be used as a basis for expert toxicological testimony. However, given that in this case the very same witness testified that she personally observed Gillespie prior to service and that he did not appear intoxicated at that time, I do not believe that her testimony concerning his later appearance is sufficient to allow for a reasonable conclusion that Gillespie was visibly intoxicated at the time of service.

As to Quality Dairy, given the majority's holding, as a matter of law, that Gillespie was not served at Bennigan's on the evening in question, I agree with its conclusion that upon remand, Quality Dairy is not entitled to the presumption of non-liability under MCL 436.1801(8).[1] I also concur that there is a question of material fact as to whether Quality Dairy served Gillespie at a time he was visibly intoxicated.

I dissent, however, from the majority's acceptance of the trial court's conclusion that a fact-finder could not reasonably conclude that Gillespie was served at Bennigan's when he was visibly intoxicated. To find such a reasonable conclusion would require a question of material fact (created by evidence or reasonable inferences derived therefrom) that: (a) Gillespie was

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[1] The requirement of clear and convincing evidence to overcome the statutory presumption set forth in MCL 436.1801(8) was adopted by our Supreme Court in *Reed v Breton*, 475 Mich 531; 718 NW2d 770 (2006). Despite the fact that the statute's plain language contains no reference to the clear and convincing standard, the *Reed* Court recognized the Legislature's underlying intent and went beyond the statute's literal text to define a rational judicial mechanism that would be consistent with that intent.

present at Bennigan's; (b) while there he was visibly intoxicated; and (c) he was served a drink while in that state. Based on the record, I would conclude that such a reasonable conclusion exists.

The first requirement, i.e., that there be a reasonable question of material fact that Gillespie was present at Bennigan's that evening, is straightforward. Although the majority attempts to cast doubt on the issue, there is clearly a question of fact. First, Bennigan's conceded, for purposes of its motion for summary disposition and for this appeal, that there is a reasonable question of material fact on this issue. Even if this were not the case, Gillespie's testimony clearly creates such a question. Gillespie testified in his deposition that he specifically recalled walking in the front door of Bennigan's after he stopped at the Quality Dairy and that he recalled sitting on a stool at the bar in Bennigan's, remaining there for as much as two hours, ordering at least one drink while there and being told while there that he was being too loud. The majority seems to equivocate on this issue, noting that his presence at Bennigan's is inconsistent with the chronology constructed by Bennigan's counsel and characterizing his testimony as "vague." However, the chronologies put forward by other parties allow for Gillespie's presence at Bennigan's and the majority's view of the relevant testimony as "vague" is both incorrect and irrelevant. Gillespie's recollection of being at Bennigan's is clear.[2] More important, it is not for this Court to determine the credibility of a witness. The "vagueness" of testimony, unless it is devoid of foundation, goes to the weight, not the admissibility of the testimony and it is not for this Court to determine what weight to give it. That is the most essential role of the finder of fact. For a court to grant summary disposition because it does not find a particular witness convincing undercuts the core role of the fact-finder. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) ("It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences"). In any event, as already noted, Bennigan's has conceded, at least at this time, that there is a reasonable basis for a jury to find that Gillespie was there that night.

The second requirement, i.e., that there be a reasonable question of material fact that Gillespie was visibly intoxicated while at Bennigan's, is also straightforward. As noted by the majority in its discussion concerning Quality Dairy, a reasonable trier of fact could conclude that Gillespie was visibly intoxicated following his alcohol consumption at the Mason Jar. This would include the time at which he is alleged to have been at Bennigan's. In addition, the Bennigan's stop is alleged to have occurred after the consumption of at least some of the Quality Dairy liquor. Finally, Gillespie testified that while at Bennigan's he was told that he was being too loud and to quiet down. Thus, there is a question of fact whether Gillespie was visibly intoxicated at the time he claimed to have been at Bennigan's.

The last requirement, i.e., that there be a reasonable question of material fact that Gillespie was served alcohol at Bennigan's, is also met. First, defendant Bennigan's concedes for purposes of its summary disposition motion that Gillespie did order a drink. Second, Gillespie testified that he ordered a drink and when asked if the bartender served him he

[2] It is also consistent with subsequent statements he made to his wife, although no determination has yet has been made as to the admissibility of those statements.

answered, "Yeah, he would have given it to me." He was also asked whether it was true that "he have no recollection of consuming alcohol at Bennigan's," to which he responded that it was not true. He was then asked by counsel for Bennigan's if it was possible that, given that he was loud, the bartender might have refused him service and he answered, "I don't think so." When asked the same question again, he did concede that such a scenario was possible.

If a fact-finder chose to believe Gillespie's testimony, it could conclude, based on direct evidence that he was served at Bennigan's. Moreover, even if a jury doubted some of Gillespie's testimony, it could reasonably infer that an individual who sits at a bar and orders a drink will be served. There certainly is no evidence to suggest that anyone at Bennigan's that evening was denied service at the bar. None of the Bennigan's employees testified to such an event and Bennigan's manager conceded that such an "out of the ordinary occurrence" would typically be noted in the shift log and that no such notation was made. If a jury accepts Gillespie's testimony that he ordered a drink at Bennigan's and there is no evidence that anyone was refused a drink that evening, it is a reasonable inference that Gillespie was served.[3]

This is not to say that plaintiffs should or will prevail against Bennigan's at trial. There are sharp questions of fact, which a jury may very well resolve in favor of Bennigan's, and there are good reasons to question whether a jury will accept Gillespie's testimony.[4] However, the role of this Court, and of the trial court in a (C)(10) motion, is clearly circumscribed.

Under MCR 2.116(C)(10), plaintiffs, as the nonmoving party, are not only entitled to have all conflicting evidence viewed in their favor, but also "reasonable inferences" as well. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 488; 618 NW2d 1 (2000). I believe that the majority has wrongly blurred the line between a "reasonable inference" and "mere speculation or conjecture." It would have been mere conjecture and Bennigan's would have been entitled to summary disposition if Gillespie had testified simply that it was "possible" that he went Bennigan's and consumed alcohol there. But that is not his testimony. He testified that he went to Bennigan's, that he sat at the bar, that he ordered a drink, and that he remained there for two hours. Moreover, there is no evidence that anyone was refused service that evening at Bennigan's. A conclusion that he was served is not mere speculation or conjecture but instead "a reasonable inference" based upon the evidence taken in light most favorable to plaintiff.

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[3] Although this is a negative inference, it is still sufficient to create a question of fact to overcome summary disposition. See *Chiles v Machine Shop, Inc*, 238 Mich App 462, 476; 606 NW2d 398 (1999) (concluding that a negative inference created by a witness's testimony was sufficient, when viewed in the light most favorable to the plaintiff, to support the conclusion that the defendant questioned whether the plaintiff had a physical impairment even after work restrictions were lifted).

[4] For example, Gillespie testified that he ordered a vodka and orange juice while the bar records show that no such drink was poured at the bar that night. This testimony weighs in favor of Bennigan's. However, contrary to the majority's view, it is not dispositive for two reasons. First, a jury may choose to believe part of a witness's testimony and not others. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Second, Gillespie also testified that he did not always order vodka and orange juice and that instead he sometimes ordered beer.

The majority seems to suggest that absent someone actually witnessing the service, no reasonable juror could find it occurred. In my view, this negates the principle that reasonable inferences as well as disputed evidence is to be taken in the light most favorable to the non-moving party. Ironically, the majority appears to rely on Gillespie's testimony that being refused service was something that "could [have] happen[ed]," ignoring his immediately preceding statement that he did not think that was what actually happened. Relying on a statement that something "could have happened" is exactly the type of speculation and conjecture which the majority criticizes, yet it is what it relies upon here.

For these reasons, I respectfully dissent from the majority's affirmance of the grant of summary disposition as to Bennigan's. In all other respects, I concur with the majority.

/s/ Douglas B. Shapiro