Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-479

MAY TERM, 2004

Sarah Jackson, Stephen J. Jackson and Robin Jackson	}	APPEALED FROM:
v.	}	Addison Superior Court
Dean Powers, Ronald Powers, Honoree Fleming and Shawn Pomainville	}	DOCKET No. 115-6-01 Ancv
	}	Trial Judge: Hon. Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Plaintiffs appeal from the trial court' s order granting summary judgment for defendant Shawn Pomainville in this negligence case. They argue that the trial court erred in granting summary judgment because genuine disputes of material fact exist. We affirm.

The following facts are undisputed. In June 2001, Shawn Pomainville invited members of his softball team, all of whom were over twenty-one, to his home after a game. Plaintiff Sarah Jackson, a minor, showed up at Pomainville' s home with Dean Powers, also a minor. Pomainville did not know Jackson or Powers, nor did he invite them to the party. Neither Powers nor Jackson knew Pomainville. After arriving at the party, Powers asked two individuals, neither of whom matched Pomainville' s description, to buy him beer at a nearby market. The individuals bought Powers a twelve-pack of Budweiser beer, and Powers recalled drinking only Budweiser that evening. Powers kept his beer either outside in the garage or in his physical possession all night. While at the party, Powers stayed outside or in the garage, although he once went inside to look for his friend so that they could leave the premises. Pomainville stayed inside his home all evening. After leaving the party, Powers lost control of his vehicle, and Jackson, who was a passenger, suffered serious injuries as a result.

Plaintiff Jackson and her parents filed a complaint against Powers, his parents, and Shawn Pomainville. Plaintiffs alleged that Pomainville had A negligently furnished, or caused to furnish or make available, alcohol to Defendant Dean Powers, a minor, whom Defendant Shawn Pomainville knew and whom he should have known was a minor.@ The complaint also alleged that it A was foreseeable to Defendant Shawn Pomainville that Defendant Dean Powers would drive a motor vehicle after consuming alcohol and Defendant Shawn Pomainville knew or should have known that Defendant Dean Powers was intoxicated by the use of the alcohol.@ Pomainville filed a motion for summary judgment, which the court granted. The court concluded that the undisputed material facts established that social host liability did not extend to Pomainville because he had not A furnished@ alcohol to Powers on the night of the accident. The court found no evidence that Pomainville A possessed@ or had A control@ over the alcohol that Powers consumed. The court therefore granted summary judgment for Pomainville on plaintiffs' claim. Plaintiffs filed a motion for reconsideration, which the court denied. This appeal followed.

On appeal, plaintiffs maintain that summary judgment should not have been granted because disputed questions of material fact remain. Plaintiffs assert that they established, through deposition testimony, that the party had been planned hours in advance, that there were no limitations placed on the bringing and consuming of alcohol, and that Pomainville knew or should have known that numerous underage drinkers were in attendance. Plaintiffs argue that because these facts are disputed and material, summary judgment was inappropriately granted.

Our standard of review is familiar:

> When reviewing a motion for summary judgment, we apply the same standard as the trial court: summary judgment is appropriate when the record clearly indicates there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, we regard as true all allegations of the nonmoving party supported by admissible evidence, and we give the nonmoving party the benefit of all reasonable doubts and inferences.

Lane v. Town of Grafton, 166 Vt. 148, 150 (1997) (internal quotation marks and citations omitted); see also V.R.C.P. 56(c).

To establish that Pomainville owed a legal duty to protect Jackson from an unreasonable risk of harm, plaintiffs needed to show that he was a A social host@ who A furnished@ alcohol to Powers. Knight v. Rower, 170 Vt. 96, 101 (1999). To establish that Pomainville A furnished@ alcohol to Powers, plaintiffs needed to demonstrate that Pomainville had either A possession or control@ over the alcohol that Powers consumed; they must show that he engaged in A some affirmative act or active part in the provision of alcohol@ to Powers. Id.

In Knight, the parents of a minor who was killed in a drunk driving accident sued the owners of the property where the drinking had occurred; the owners were not present when the drinking occurred. We concluded that plaintiffs had not stated a claim for social host liability because they had not shown that defendants had A furnished@ alcohol to the minor who caused the injury. Id. at 102. As we explained, there was no allegation that defendants possessed the alcohol that had been consumed by the minor, nor was there an allegation that defendants had control over the alcohol that had been consumed. Id. We rejected the argument that control over land is synonymous with control over alcohol that is consumed. We cited cases from other jurisdictions holding that to establish A control,@ one must not only control access to land, but must have had actual control over the alcohol consumed by the individual in some way. Id. As we explained, A [g]iven that defendants were not present, had not supplied the alcohol, nor arranged the parties, it is difficult to see how defendants could have obtained control over the alcohol.@ Id. at 101-02. We therefore concluded that the trial court had properly dismissed plaintiffs' negligence claim against defendants.

As in Knight, plaintiffs here have failed to put forth any facts that would show that Pomainville furnished Powers with alcohol. The disputed facts they allege are immaterial to their claim. Regardless of whether the party was planned in advance, whether limitations were placed on the bringing and consuming of alcohol, and whether Pomainville knew or should have known that numerous underage drinkers were in attendance, there is no evidence that Pomainville had either possession or control over the alcohol that Powers consumed. The undisputed facts show that Powers secured and drank his own alcohol on the evening in question. He was not invited to Pomainville' s home, and Pomainville did not provide him with any alcohol. Neither party knew the other, and there is no evidence that Pomainville ever saw Powers that evening, let alone that he knew Powers was underage. During the party, Powers remained outside while Pomainville stayed inside.

Plaintiffs rely heavily on a trial court opinion, Porter v. Barrows, 1 Vt. Tr. Ct. Rep. 166 (Feb. 24, 1997), to support their argument that summary judgment was improperly granted. That case, which preceded our opinion in Knight, is not binding on this Court, and we do not address it. Plaintiff' s reliance on MacLeary v. Hines, 817 F.2d 1081 (3d Cir. 1987) (interpreting Pennsylvania law), is equally misplaced. In Hines, 817 F.2d at 1081, the court held that a defendant who knowingly and intentionally allowed premises over which she had control to be used for the purpose of consumption of alcohol by minors created an unreasonable risk of intoxication of the minor guests, and she could be held liable for injuries resulting therefrom if a jury found that the use of the premises was a substantial factor in bringing about the intoxication of the minor guest. The Pennsylvania Supreme Court construed Hines as restating its position that to be held liable for negligence, A a social host must have > knowingly furnished' alcoholic beverages to a minor.@ Alumni Ass' n v. Sullivan, 572 A.2d 1209, 1212 (Pa. 1990) (A knowingly furnished@ standard requires actual knowledge on the part of the social host as opposed to imputed knowledge imposed as a result of the relationship). Even under the standard enunciated above, plaintiffs' evidence does not show that Pomainville A knowingly furnished@ alcohol to Powers. More importantly, as previously noted, our case law requires that to be held liable for A furnishing@ alcohol, one must have taken some affirmative act or active part in the provision of alcohol to the individual who later caused

injury. Knight, 170 Vt. at 101. Because plaintiffs failed to present evidence that would satisfy this standard, summary judgment was properly granted for Pomainville.

Affirmed.

BY THE COURT:

_____

John A. Dooley, Associate Justice

_____

Denise R. Johnson, Associate Justice

_____

Marilyn S. Skoglund, Associate Justice