SUMMARY
February 23, 2023

2023COA18

No. 19CA0984, *Mitton v. Danimaxx of Colo.* — Regulation of Activities — Alcohol Beverages — Colorado Dram Shop Act — Civil Liability

In this civil action under the Colorado Dram Shop Act, § 44-3-801(3)(a), C.R.S. 2022, to recover for losses caused by a drunk driver, the division considers whether a vendor can be liable where it sold alcohol to the already-intoxicated driver, but the driver did not consume that alcohol before the accident.

Relying on the plain language of section 44-3-801(3)(a) ("No licensee is civilly liable to any injured individual or his or her estate for any injury to the individual . . . suffered because of the intoxication of any person due to the sale or service of any alcohol beverage to the person . . ."), the division concludes that the statute unambiguously requires that there be a causal connection between

the alcohol sold by the vendor and the intoxication of the purchaser. Thus, the vendor is not liable in the circumstances presented here. In so holding, the division rejects the plaintiffs' argument that the statutory language can support a contrary conclusion, as well as the plaintiffs' reliance on public policy, legislative history, and case law from other jurisdictions.

COLORADO COURT OF APPEALS **2023COA18**

Court of Appeals No. 21CA0984
Summit County District Court No. 20CV30048
Honorable Karen A. Romeo, Judge

Jasper Mitton, surviving son of Benjamin Mitton, Deceased; Thomas Wood, surviving spouse of Nichole Gough, Deceased; Devin Wood, surviving son of Nichole Gough, Deceased; and Michael Wood, surviving son of Nichole Gough, Deceased,

Plaintiffs-Appellants,

v.

Danimaxx of Colorado, Inc., d/b/a Breckenridge Market & Liquor,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE VOGT*
Tow and Schutz, JJ., concur

Announced February 23, 2023

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 Plaintiffs, Jasper Mitton, Thomas Wood, Devin Wood, and Michael Wood, are the surviving family members of two individuals killed in a car accident in which the driver of the other car had purchased, but not consumed, alcohol from defendant, Danimaxx of Colorado, Inc., d/b/a Breckenridge Market & Liquor (the Market). The district court entered summary judgment on plaintiffs' claim under the Colorado Dram Shop Act (the Act), § 44-3-801(3)(a), C.R.S. 2022, concluding that the Market could not be liable because there was no causal connection between the alcohol it sold and the driver's intoxication. We agree and therefore affirm.

I. Factual and Procedural History

¶ 2 The relevant facts are undisputed.

¶ 3 On the day of the accident, the driver of the other car, Lindsey Ward, had consumed multiple alcohol beverages at the Clubhouse Restaurant in Breckenridge, Colorado. While intoxicated, Ward drove to the Market, where she purchased a twelve-pack of beer and a bottle of tequila. Market employees saw that Ward appeared intoxicated and was having trouble with her balance and coordination. One or more of the employees offered Ward a ride home, but she refused.

¶ 4 Ward drove off from the Market with her newly purchased alcohol, lost control of her car, and struck another vehicle, killing Benjamin Mitton and Nichole Gough. The liquor purchased at the Market was found unopened in Ward's car. Ward was convicted of multiple crimes and is currently serving a prison sentence. Two Market employees were convicted of the offense of selling alcohol to a visibly intoxicated person, in violation of section 44-3-901(1)(a), C.R.S. 2022.

¶ 5 The victims' surviving family members brought this civil action, asserting wrongful death claims against Ward and claims under the Act against the Clubhouse Restaurant and the Market. Plaintiffs resolved their claims against Ward and the restaurant, leaving the Market as the only defendant.

¶ 6 Plaintiffs filed a C.R.C.P. 56(h) motion for determination of a question of law, in which they asked the district court to rule that the Market could be found liable for damages under the Act even though Ward did not consume the alcohol it sold to her. The Market moved for summary judgment, asserting that it could not be liable under the Act because, as Ward did not consume any portion of the alcohol purchased at the Market, her intoxication was not,

and could not have been, "due to the sale of the alcohol by" the Market. *See* § 44-3-801(3)(a).

¶ 7 The district court addressed both motions in a detailed order. According to the court, the parties agreed that (1) the Act, which abolished any common law cause of action against "dram shops"[1] by injured persons, provided the sole basis for potential civil liability on the part of the Market; (2) the Market was a "licensee" under section 44-3-801(2) of the Act and thus subject to its terms; and (3) Ward neither opened nor consumed the alcohol she purchased from the Market on the day in question. Observing that the parties' entire dispute came down to how to interpret section 44-3-801(3)(a) of the Act, the court concluded that the Market's interpretation — namely, that it was not liable for injuries caused by Ward's intoxication because Ward's intoxication was not "due to" the Market's sale of alcohol to her — was correct. It accordingly

[1] As noted by the district court, "dram shop" is an antiquated term referring to vendors who sell liquor by the "dram," which is an apothecary measurement for approximately 1/8 of an ounce of fluid. *See* Merriam-Webster Dictionary, https://perma.cc/MU6E-85WU.

determined the question of law in favor of the Market and granted the Market's summary judgment motion.

¶ 8 On appeal, the single disputed issue is whether section 44-3-801(3)(a) requires proof that Ward's intoxication could be attributed to the Market's sale of alcohol to her. As set forth below, we conclude that it does.

II. Standard of Review and Relevant Law

¶ 9 C.R.C.P. 56(h) allows parties to move for determination of a question of law at any time after the last pleading is filed, and it states that the district court may decide the question if "there is no genuine issue of any material fact necessary for [its] determination." Under C.R.C.P. 56(c), a party may move for, and a court may enter, summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. We review orders under both rules de novo, applying the same standards as the district court. *Bill Barrett Corp. v. Lembke*, 2020 CO 73, ¶ 11; *In re Estate of Davies*, 2022 COA 90, ¶ 11.

¶ 10 We also review questions of statutory interpretation de novo. *Build It & They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 304 (Colo. 2011). Our primary goal in interpreting a statute is to give effect to

the General Assembly's intent. *Id.* In doing so, we first look to the language of the statute, affording words their plain and ordinary meanings as we seek to give consistent and harmonious effect to all the statutory language. *Bill Barrett*, ¶ 14. If that language is clear and unambiguous, we look no further, and we apply the statute as written. *Id.*

¶ 11 The Act abolished any common law cause of action against vendors of alcohol beverages for injuries to third parties caused by the vendors' intoxicated patrons, leaving a statutory cause of action as the exclusive remedy in such circumstances. *See* § 44-3-801(1); *see also Strauch*, 253 P.3d at 305. The cause of action is set forth in section 44-3-801(3)(a), which states:

> No licensee is civilly liable to any injured individual or his or her estate for any injury to the individual or damage to any property suffered because of the intoxication of any person due to the sale or service of any alcohol beverage to the person, except when:
>
> (I) It is proven that the licensee willfully and knowingly sold or served any alcohol beverage to the person who was under the age of twenty-one years or who was visibly intoxicated; and
>
> (II) The civil action is commenced within one year after the sale or service.

III. Application

¶ 12 It is undisputed that the Market "willfully and knowingly" sold alcohol to Ward while she was visibly intoxicated, and that the action was commenced within one year after that sale. Thus, the prerequisites to pursuing the statutory civil action, set forth in subparagraphs (I) and (II) of section 44-3-801(3)(a), are satisfied. We accordingly turn our attention to the language of section 44-3-801(3)(a) without further discussing the subparagraphs.

¶ 13 The issue in dispute here— whether a vendor can be liable for injuries caused by a patron who purchased, but did not consume, alcohol from the vendor — has not been the subject of any reported decision from Colorado courts. Giving the words and phrases of the statute their plain meanings and applying basic principles of statutory construction, we conclude that the vendor is not liable in situations where its patron did not consume the purchased alcohol.

¶ 14 Plaintiffs argue on appeal, as they did in the district court, that section 44-3-801(3)(a) is ambiguous and that, for reasons of public policy and based on analogous case law from other states, the "only requirements for application of the [Act] are that: (1) the claimant is suing the vendor of alcoholic beverages; (2) the claimant

was injured by an intoxicated person; and (3) the defendant-vendor provided the intoxicated person with one or more alcoholic beverages."

¶ 15 We disagree because we conclude that the statutory language is unambiguous and that it requires a showing that the driver who caused the injury could have become intoxicated due to the vendor's sale of alcohol to her.

¶ 16 The statute states: "No licensee is civilly liable to any injured individual or his or her estate for any injury to the individual . . . suffered because of *the intoxication of any person due to the sale or service of any alcohol beverage to the person* . . . ." (Emphasis added.) The words themselves are unambiguous; resolution of the dispute turns on how the words are arranged in the sentence. *See Dep't of Transp. v. Amerco Real Est. Co.*, 2016 CO 62, ¶ 12 ("[T]here can be little question that the meaning of words or phrases cannot be separated from the broader context in which they are used and the function they serve, according to accepted rules of grammar and syntax, in the very sentence in which they appear.").

¶ 17 Considering the structure of the sentence, we note first that the legislature chose to use "individual" in the first part of the

sentence, referring to the one who could be liable, and "person" in the second portion, referring to the one who is intoxicated. We may assume that the legislature intentionally chose to differentiate between the two parties by using two different, though otherwise essentially synonymous, terms.

¶ 18 Moreover, both portions of the sentence use the definite article "the" before a noun to refer back to a specific party who has been previously referred to with the same designation. Compare "[n]o licensee is civilly liable to any injured *individual* . . . for any injury to *the individual"* with "the intoxication of any *person* due to the sale . . . of any alcohol beverage to *the person*." § 44-3-801(3)(a) (emphasis added). Again, we presume that this syntax was chosen intentionally. *See, e.g.*, *Brannberg v. Colo. State Bd. of Educ.*, 2021 COA 132, ¶ 28 (citing the "familiar principle of statutory construction . . . that 'the use of the definite article particularizes the subject which it precedes,'" and applying that principle to conclude that "the decision" in the statute at issue refers only to decisions made under the subsection in which it occurs (quoting *Coffey v. Colo. Sch. of Mines*, 870 P.2d 608, 610 (Colo. App. 1993))) (*cert. granted* Sept. 6, 2022).

¶ 19 Under the plain language of the statute, then, a vendor's civil liability requires a showing that the intoxication of the person causing injury was "due to the sale . . . of any alcohol beverage to the person." Thus, because Ward's intoxication could not have been due to the Market's sale of alcohol to her, the Market was not subject to civil liability under the Act. The contrary conclusion urged by plaintiffs, which would require only that the claimant was injured by an intoxicated person and the vendor had provided the intoxicated person with alcohol that was never consumed, would in our view effectively rewrite the language of section 44-3-801(3)(a). This we may not do. *See Bill Barrett*, ¶ 14.

¶ 20 We are not persuaded by plaintiffs' reliance on cases from states whose dram shop statutes are worded differently than Colorado's.[2] Nor do we agree that *Strauch* supports a different

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[2] *See Pierce v. Albanese*, 129 A.2d 606, 610 (Conn. 1957) (interpreting statute now codified at Conn. Gen. Stat. Ann. § 30-102 (West 2022), which states: "If any person . . . sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages"); *Kavorkian v. Tommy's Elbow Room, Inc.*, 711 P.2d 521, 523 (Alaska 1985) (interpreting Alaska Stat. Ann. § 04.21.020(a)(2) (West 2022), which provides that "a person who provides alcoholic beverages to another person may not be held civilly liable for injuries resulting from the

conclusion. While the case discussed liability under the Act, there was no question that the bar patron's intoxication was due to the alcohol served to him by the defendant; rather, the issue before the court was whether the Act required the injury-causing event to have been foreseeable. *Strauch*, 253 P.3d at 303. Further, because we read the language of the statute as unambiguous, we likewise do not address the parties' arguments regarding legislative history, public policy, or constitutional concerns. *See Ortega v. Colo. Permanente Grp., P.C.*, 265 P.3d 444, 448 (Colo. 2011).

¶ 21 Finally, we point out that, in affirming the district court's judgment here, we are not addressing situations in which an intoxicated driver has consumed alcohol from more than one source. Although this issue was discussed at oral argument, this case does not involve such a situation; and we therefore leave resolution of the issue for another day. In sum, because it is

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intoxication of that person unless the person who provides the alcoholic beverages holds a license . . . [and] the alcoholic beverages are provided to a drunken person"); *Walton v. Stokes*, 270 N.W.2d 627, 628-29 (Iowa 1978) (interpreting Iowa Code Ann. § 123.92 (West 2022), which provides that there is a cause of action against any licensed seller of alcohol "who sold and served any alcoholic beverage directly to the intoxicated person, provided that the person was visibly intoxicated at the time of the sale or service").

undisputed that Ward's intoxication could not have been attributed to the Market's sale of alcohol to her, the district court properly entered summary judgment and determined the question of law in favor of the Market.

IV. Disposition

¶ 22 The judgment is affirmed.

JUDGE TOW and JUDGE SCHUTZ concur.