**IN THE COURT OF APPEALS OF IOWA**

No. 2-782 / 12-0387
Filed October 3, 2012

**KALEB STEBENS,**
Plaintiff-Appellant,

**vs.**

**FARMHOUSE FRATERNITY, KYLE G. PENNEY, and JOSEPH BAYE,**
Defendants-Appellees.

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Appeal from the Iowa District Court for Story County, Michael J. Moon (summary judgment) and Timothy J. Finn (summary judgment), Judges.

Kaleb Stebens appeals from summary judgments entered for defendants. **AFFIRMED.**

Jeffrey K. McGinness and James E. Shipman of Simmons Perrine Moyer Bergman, P.L.C., Cedar Rapids, for appellant.

Maureen Roach Tobin and S. Luke Craven of Whitfield & Eddy, P.L.C., Des Moines, for appellee FarmHouse Fraternity.

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for appellee Penney.

Mark S. Brownlee of Kersten Brownlee Hendricks L.L.P., Fort Dodge, for appellee Baye.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

**POTTERFIELD, J.**

Kaleb Stebens appeals from rulings granting summary judgment to Kyle Penney, Joseph Baye, and FarmHouse Fraternity.[1] Stebens contends he has stated a viable case of premises liability against FarmHouse Fraternity, and issues of fact remain with respect to his claims against Penney and Baye. We affirm.

**I. Standard of Review.**

We review the entry of summary judgment for the correction of errors at law. *Merriam v. Farm Bureau Ins.*, 793 N.W.2d 520, 522 (Iowa 2011). "To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law." *Id.*; *see also* Iowa R. Civ. P. 1.981(3). Under our review, we view the facts in the light most favorable to the nonmoving party. *Merriam*, 793 N.W.2d at 522.

**II. Background Facts and Proceedings.**

The following undisputed facts appear in the record. Beginning in August of 2008, and including the time of the incident giving rise to this lawsuit, Kaleb Stebens was a pledge and resident of the FarmHouse Fraternity Chapter located at 311 Ash Avenue in Ames, Iowa. At the time Stebens moved into the fraternity

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[1] This party is variously capitalized as Farmhouse Fraternity and FarmHouse Fraternity. We will use FarmHouse Fraternity, as used in the appellee's brief. Stebens sued both FarmHouse Fraternity, Inc.—the international organization of FarmHouse Fraternity—and the Iowa State University chapter of FarmHouse Fraternity—an unincorporated association. This appeal involves only the ISU chapter of FarmHouse Fraternity.

The owner of the fraternity house is not a party to this litigation.

house, he selected a bunk bed located next to a third-story window.[2] Stebens was instructed that the window in his room must stay open at all times. Stebens did not think there was any reason why he would not be able to sleep safely in the third-floor room.

On September 6, 2008, Stebens attended the Iowa State versus Kent State football game before returning to the FarmHouse Fraternity house. Stebens asked Kyle Penney, a FarmHouse Fraternity member, to purchase alcohol for Stebens' consumption. Penney knew that his purchase of alcohol for Stebens was illegal, as he knew Stebens was under the legal age to consume alcohol. Stebens used his own money to purchase the alcohol. Stebens specified for Penney the exact types of alcohol to purchase—Captain Morgan rum and a twelve-pack of Keystone Ice beer.

At or around 11:00 p.m. on September 6, 2008, Joseph Baye, along with his three roommates,[3] held a party at their apartment located at 119 Stanton Avenue # 507, Ames, Iowa. All four occupants of the apartment were FarmHouse Fraternity members. Stebens attended the party. Stebens took his own alcohol for his personal consumption and to share with others. Stebens drank his own alcohol and played drinking games with other unidentified individuals at the party. Stebens believes he drank a beer or two (Natural Ice) from the apartment refrigerator, but cannot identify who gave him permission to do so. Stebens "guesses" that he drank vodka taken to the party by "some girls."

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[2] This is a double hung window, but one portion of the window is always open. If the window pane is pulled down, the upper portion is open. The window pane can be pushed up and then the lower portion is open.

[3] The original petition included claims against Baye's three roommates. Those claims were dismissed.

Stebens cannot state that any of the occupants of the apartment served him alcohol. No one forced Stebens to drink alcohol.

Stebens left the party and returned to the fraternity house. Stebens microwaved and consumed a hamburger before going to bed. Sometime between 3:00 and 4:00 a.m., Stebens got out of bed and fell out of the window. As a result of the fall, Stebens suffered injuries.

Stebens brought negligence actions against Penney and Baye, as well as the FarmHouse Fraternity organization. In addition to the general facts surrounding the incident, the district court found the following facts relevant to the defendants' respective motions for summary judgment:

Stebens has a brain injury from a 1998 accident. One of the side effects from that accident is a tendency to sleepwalk. Stebens testified sleepwalking caused his fall out the window. Stebens has no actual memory of the fall. Stebens had slept-walked in the past without drinking any alcohol.

Baye admits to hosting the party at the apartment on Stanton Avenue and participating in drinking games. Baye saw Stebens at the party, but never spoke with him and never observed him drinking alcohol. The only beer or alcohol that Baye possessed at the apartment was Bud Light beer, which Baye removed from the refrigerator and moved to his bedroom prior to Stebens' arrival on September 6, 2008. Baye received a municipal citation for hosting a "nuisance party," to which he pled guilty and paid a fine. City of Ames Ordinance 17.30 (the section under which Baye was cited) contemplates a variety of circumstances that constitute a violation; Baye's citation referenced only his hosting a party where underage individuals were consuming alcohol and making no attempt to stop it.

Stebens does not recall Baye serving him any alcohol. Stebens does not even remember Baye being present at the party.

Penney received a criminal citation for supplying alcohol to a person under legal age—Stebens—in violation of Iowa Code section 123.47(a) (2007). Penney pled guilty to the citation.

Stebens does not believe that the consumption of alcohol had anything to do with his fall from the window.

FarmHouse maintained a "FarmHouse Fraternity Alcohol and Drug Policy." The policy specifically prohibits both underage drinking and the purchase of alcohol for minors. All recruitment activities associated with any chapter must be "dry" (no alcohol present). The policy further states:

> Although discouraged, alcoholic beverages may be present or consumed at chapter functions off FarmHouse property only if approved by a 3/4 vote of the chapter. Chapter function is defined as any event an individual would associate with the Fraternity, where five or more chapter members are present. Each proposed function must be voted on separately by the chapter.

The FarmHouse newsletter features "FarmHouse Questions of the Week" in which it answers questions regarding FarmHouse policies. The following excerpt describes the above-quoted "rule of five":

> When the chapter catches wind of an event, whether planned or impromptu at an out of house members' house, any type of pre-party, etc., the chapter should call a special meeting to vote on the event (requires 3/4 vote) . . . . Once the event has been publicized through the chapter house, over a chapter email list, announced at a chapter meeting, at dinner, a sign posted, or spread through word of mouth to the chapter, it becomes an event that an outsider might consider a FarmHouse event.

With respect to this incident, no alcohol was provided by or consumed in the fraternity house. Stebens did not consume alcohol as part of a FarmHouse ritual or ceremony.

The fraternity house located at 311 Ash Avenue in Ames is not owned by Farmhouse Fraternity but is owned by Iowa State FarmHouse Association, Inc., which is not a party to this litigation.

*A. Summary Judgment in Favor of FarmHouse Fraternity*. The district court granted summary judgment in favor of FarmHouse Fraternity. It observed:

> Counts I and II of Plaintiff's Petition against Defendant FarmHouse Fraternity are based on theories of premises liability. These counts are not viable against this Defendant because:
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> 1. The Plaintiff was a "pledge" to the fraternity and as such was a "tenant member." As a tenant member, Stebens was a member of the fraternity and he exercised control. Therefore, no duty is owed to Stebens by FarmHouse Fraternity;
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> 2. Even if there were a duty, such a duty was not breached because the incident which caused the damage was not foreseeable nor is there any credible evidence to show that FarmHouse Fraternity knew of the alleged condition; and
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> 3. Even if the alleged condition was known by FarmHouse Fraternity, it would also have to have been known by Stebens as a tenant who slept next to the alleged condition, an open window.
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> Count III of the Petition alleges negligence against FarmHouse Fraternity. It is undisputed that FarmHouse did not sell, give, or otherwise supply alcohol, liquor, wine or beer to the Plaintiff. Plaintiff stated he purchased the alcohol with his own money through an individual and not through FarmHouse Fraternity. Likewise, FarmHouse owed no duty to Stebens to control the conduct of a third party (the other named defendants). As a general rule, the law imposes no duty upon an individual to act for the protection of others. *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 652 (Iowa 2000).

*B. Summary Judgment in Favor of Penney*. Stebens asserted Penney was negligent in supplying him alcohol, which was a proximate cause of Stebens's injuries. He based his claims on common law negligence and Iowa

Code section 123.92. The district court granted summary judgment in favor of Penney because Stebens had failed to come forward with evidence that his fall was caused by Penney supplying him with alcohol.

*C. Summary Judgment in Favor of Baye*. Stebens's claims against Baye are grounded upon social host liability. The district court granted summary judgment in favor of Baye because there was no evidence that Baye knowingly and affirmatively delivered alcohol to Stebens.

Stebens appeals all summary judgment rulings.

**III. Discussion.**

Stebens contends the district court erred in granting the defendants summary judgment. We must begin this discussion with the observation that the only attributed cause of Stebens's fall in this record is his sleep-walking. There is no evidence in the record that Stebens's consumption of alcohol was a contributing factor in the fall. The open window was obvious and its existence was known to Stebens. The placement and size of the window were not such that a person of Stebens' size would normally have "fallen" out. Stebens himself testified, "I believe that I slept walked out of the window."

*A. FarmHouse Fraternity*. With respect to FarmHouse Fraternity, Stebens disagrees with the district court's ruling that FarmHouse Fraternity did not owe him a duty of care. He contends the fraternity "retained control" of the window such that his premises liability claim should proceed, citing *Van Essen v. Farmers Cooperative Exchange*, 599 N.W.2d 716, 713 (Iowa 1999) (stating possessor of land owes a duty to use reasonable care to keep the premises in a reasonably safe condition for business invitees).

An actionable negligence claim requires "the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages." *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) (citation and internal quotation marks omitted). "Whether a duty arises out of a given relationship is a matter of law for the court's determination." *Id.* In *Van Essen*, the supreme court affirmed the grant of summary judgment to the defendant landlord upon a determination that the landlord did not retain sufficient control over the day-to-day operation of the grain bin in which the plaintiff was injured. 599 N.W.2d at 721. In *McCormick v. Nikkel Assocs., Inc.*, 819 N.W.2d 368, 371 (Iowa 2012), the supreme court emphasized that the existence of a duty is matter of law for the court, and that liability is premised on control. "In short, a lack of duty may be found if either the relationship between the parties or public considerations warrants such a conclusion." *McCormick*, 819 N.W.2d at 371. "Simply put, the cases involving parties that turn over control of premises to another party are 'a category of cases' where 'an articulated countervailing principle or policy' applies." *Id.* at 371 (quoting *Thompson*, 774 N.W.2d at 835). Here, the fraternity members had the day-to-day control of the premises. The district court noted that Stebens was a member of the fraternity and it was illogical to find that Stebens, in essence, could sue himself for negligence. *See Foster v. Purdue Univ. Chapter, The Beta Mu of Beta Theta Pi*, 567 N.W.2d 865, 870 (Ind. Ct. App. 1991) ("Foster admits the existence of a general rule in Indiana that a member of an unincorporated association cannot sue the association for the tortious conduct of another member. As the members are engaged in a joint enterprise, each member has a

right to exercise control over the operations of the association.") Stebens has no response to this argument.

We note, too, the district court's ruling appears to be consistent with Iowa Code section 562A.5(3), which specifically exempts from the Uniform Residential Landlord and Tenant Act "[o]ccupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization." And we note that the court in *Garofalo* rejected the plaintiffs' claim that the local chapter of a fraternity had a special relationship with its members that would give rise to a heightened duty of care and protection. 616 N.W.2d at 653. We affirm summary judgment in favor of the local FarmHouse Fraternity.

*B. Baye*. As to Baye, Stebens asserts social host liability is supported by the undisputed facts. We disagree. In *De More ex Rel. De More v. Dieters*, 334 N.W.2d 734, 738 (Iowa 1983), the supreme court answered "no" to the certified question of whether the granting of permission to minors to have a beer party on the owner's property constitutes "otherwise supplying" beer as such is proscribed in section 123.47. In *Brenneman v. Stuelke*, 654 N.W.2d 507, 508-09 (Iowa 2002), our supreme court noted:

> We are aware of a trilogy of cases recognizing social-host liability for the furnishing of liquor to persons not of legal age to consume alcoholic beverages. *See Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 653 (Iowa 2000); *Sage v. Johnson*, 437 N.W.2d 582, 584-85 (Iowa 1989);[4] *Blesz v. Weisbrod*, 424 N.W.2d 451, 452 (Iowa 1988). However, liability in those cases

[4] In *Sage*, 437 N.W.2d at 584-85, the court held "a minor injured as the result of consuming alcoholic beverages furnished in violation of Iowa Code section 123.47 is not necessarily precluded from pursuing a claim against the person furnishing the alcohol, but that such a claim is subject to the comparative fault provisions of chapter 668."

> was predicated on the violation of statutory law in the furnishing of liquor to underage persons.

In *Garofalo*, 616 N.W.2d at 653, the court stated:

> To prevail on such a cause of action, however, a plaintiff must prove the defendant's *knowing* and *affirmative delivery* of the [alcoholic beverage] to the underage person." *Fullmer v. Tague*, 500 N.W.2d 432, 434 (Iowa 1993) (emphasis added). "The statutory term 'otherwise supply' means more than merely permitting or allowing beer to be consumed on a defendant's premises." *Id*. (citing *DeMore*, 334 N.W.2d at 737); *accord Snyder v. Fish*, 539 N.W.2d 197, 199 (Iowa Ct. App. 1995).

This record does not establish any means of concluding Baye did anything more than permit alcohol to be consumed on his premises: there is nothing to show he affirmatively delivered alcohol to Stebens. Summary judgment was appropriate.

*C. Penney*. With respect to Penney, Stebens seeks to evade summary judgment on grounds causation is a question for the jury except in "very exceptional cases." *See Thompson*, 774 N.W.2d at 336. Where, as here, the only cause supported in the record is Stebens' sleepwalking, he cannot as a matter of law prevail in his claim against Penney.

**AFFIRMED.**