

IN THE COURT OF APPEALS OF IOWA

No. 6-1041 / 06-1178
Filed January 31, 2007

BENJAMIN KARL SPENCER,
Plaintiff-Appellant,

vs.

TRURO TAVERN, INC.,
Defendant-Appellee,

TIMOTHY FRANCES HOOVER, RHETT BRYAN WICKETT,
and RYAN MATTHEW MORRIS,
Defendants.

Appeal from the Iowa District Court for Madison County, Dale B. Hagen,
Judge.

Plaintiff appeals the district court's grant of summary judgment to Truro
Tavern in this dramshop action. **AFFIRMED.**

Robert G. Tully of Anderson & Tully, P.C., West Des Moines, Gordon K.
Darling, Jr. of Darling & Darling, Winterset, and Richard H. Doyle of Galligan,
Doyle & Reid, P.C., Des Moines, for appellant.

Kristi A. Traynor of Dickinson, Mackaman, Tyler & Hagen, P.C., Des
Moines, for appellee.

Considered by Sackett, C.J., and Zimmer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ROBINSON, S.J.**I. Background Facts & Proceedings**

On the evening of August 2, 2003, Benjamin Spencer went to the Truro Tavern. As he was leaving, at about 1:30 a.m. on August 3, Spencer was assaulted outside the bar by three other patrons of the bar, Timothy Hoover, Rhett Wickett, and Ryan Morris. Spencer suffered injuries from the assault. He was in the hospital until August 8 or 9, and testified that while he was in the hospital police officers informed him of the identity of his assailants.

On August 3, 2004, Spencer filed a petition seeking relief against Truro Tavern under the dramshop act, Iowa Code section 123.92 (2003). Spencer also made tort claims against Hoover, Wickett, and Morris.¹ On the same date the petition was filed, Spencer sent notice to Truro Tavern of his intent to file a dramshop action. This notice was not sent within six months of the occurrence of the injury, as required by section 123.93.²

Truro Tavern filed a motion for summary judgment, claiming Spencer's notice was untimely, and the dramshop action should be dismissed. Spencer filed a resistance which argued: (1) written notice under section 123.93 is not a jurisdictional prerequisite for a dramshop action; (2) the six-month notice provision of section 123.93 violates the Equal Protection clause of the United States and Iowa Constitutions; and (3) Truro Tavern had actual and sufficient notice of his intent to file a dramshop action.

¹ Spencer subsequently settled his claims against Hoover and Morris, and obtained a confession of judgment from Wickett.

² Spencer has not raised a claim that the six-month period should be extended for any of the reasons set forth in section 123.93.

The district court granted Truro Tavern's motion for summary judgment. The court found timely notice under section 123.93 was a jurisdictional prerequisite to bringing a dramshop action. The court also found application of section 123.93 did not violate Spencer's equal protection rights. Finally, the court determined Truro Tavern did not have actual notice Spencer intended to file a dramshop action. Spencer appeals the grant of summary judgment.

II. Standard of Review

We review a ruling on a motion for summary judgment for a correction of errors at law. Iowa R. App. P. 6.4. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006). A court should view the record in the light most favorable to the nonmoving party. *Eggiman v. Self-Insured Servs. Co.*, 718 N.W.2d 754, 758 (Iowa 2006).

On constitutional issues, our review is de novo. *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 202 (Iowa 2000).

III. Merits

A. Spencer contends that failure to provide notice of his dramshop action does not bar him from maintaining his suit against Truro Tavern. In part, section 123.93 provides, "Within six months of the occurrence of an injury, the injured person shall give written notice to the licensee . . . of the person's intention to bring an action under this section" Spencer asserts that the notice required by section 123.93 is not a jurisdictional prerequisite to filing a

dramshop action. He argues the statute does not specifically state that if timely notice is not given, a dramshop action is thereafter barred.

This issue was addressed in *Grovijohn*, 643 N.W.2d at 204, where the supreme court stated:

When a statute supplies a specific notice requirement as a condition precedent to suit, any claims under that statute are barred when notice has not been timely given. Since *Grovijohn* failed to give notice to Virjon within six months from the date of the accident, we find the court properly granted Virjon's motion for summary judgment.

We conclude a failure to provide timely notice under section 123.93 is a bar to bringing a dramshop action under section 123.92. We affirm the district court on this issue.

B. Spencer claims Iowa's dramshop notice provision violates his federal and State equal protection rights. He states that statute creates two classes of personal injury plaintiffs, (1) those injured in a manner where the dramshop act may apply, making the six-month notice provision applicable, and (2) those wrongfully injured by others, where there is no notice requirement.³ Spencer asserts there is no rational basis for treating dramshop plaintiffs differently than other wrongfully injured persons.

Under the Federal and State constitutions, the equal protection clause means similarly situated persons must receive similar treatment under the law.

³ Under section 123.92, a dramshop action may be brought by a person injured by an intoxicated person against a licensee or permittee who sold and served any beer, wine, or intoxicating liquor to the intoxicated person when the licensee or permittee knew or should have known the person was intoxicated, or who sold to and served the person to a point where the licensee or permittee knew or should have known the person would become intoxicated.

Kuta v. Newberg, 600 N.W.2d 280, 288 (Iowa 1999). This means the equal protection clause is not violated when a person with one legal status is treated differently than a person with a different legal status. See *Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341, 347-48 (Iowa 1991).

Dramshop plaintiffs are considered to be “a class of plaintiffs uniquely created by the legislature and, as such, are different from personal injury claimants generally.” *Grovijohn*, 643 N.W.2d at 204. The dramshop act creates “a carefully limited class of persons to whom recovery rights were given.” *Fuhrman v. Total Petroleum, Inc.*, 398 N.W.2d 807, 810 (Iowa 1987); see also *Ballard v. Hazel’s Blue Sky*, 653 N.W.2d 609, 611 (Iowa 2002) (“[T]he legislature can limit recovery for alcohol-related claims against liquor licensees to a specified list of claimants.”). Dramshop plaintiffs are a unique class. *Grovijohn*, 643 N.W.2d at 204. Spencer has not shown two classes of similarly situated plaintiffs were given differential treatment.

In an alternative argument, Spencer asserts that even if the class of plaintiffs were limited to those injured by the wrongful furnishing of alcohol, dramshop plaintiffs are treated differently than those not injured by a licensee or permittee. See Iowa Code § 123.92 (providing for an action against a licensee or permittee who sold and served alcohol to an intoxicated person). As noted above, dramshop plaintiffs are a unique class, and may be treated differently, including the imposition of the six-month notice provision. See *Grovijohn*, 642 N.W.2d at 204.

We affirm the district court's conclusion that Spencer failed to show his equal protection rights were violated.

C. Spencer claims Truro Tavern had actual notice he intended to file a dramshop action. He states an employee of the bar witnessed the assault, and this should have given the bar notice he intended to file a dramshop action.

Section 123.93 specifically provides for written notice, which was not given here. Additionally, personal knowledge of the assault by an employee of Truro Tavern would not serve to supply all the informational elements which section 123.93 requires. See *Arnold v. Lang*, 259 N.W.2d 749, 752 (Iowa 1977). Spencer has not shown Truro Tavern had actual notice of his intent to file a dramshop action. We affirm the district court on this issue.

We conclude the district court properly granted summary judgment to Truro Tavern. We affirm the decision of the district court.

AFFIRMED.