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## As 2017 Comes to a Close, Minnesota's Appellate Courts Continue to Grapple with the Issue of Foreseeability in Tort Cases

In 2017, the Minnesota Supreme Court has grappled with the issue of foreseeability in a variety of tort cases. In particular, the supreme court has been asked in product- and premises-liability cases to determine whether the issue of foreseeability should be decided by the court as a matter of law or submitted to the jury. While acknowledging that if clear the issue of foreseeability should be decided by the court as a matter of law, the supreme court has consistently favored submitting foreseeability issues to the jury in recent cases, citing misleading "close case" language from the court's foreseeability jurisprudence.

In *Montemayor v. Sebright Products, Inc.*, 898 N.W.2d 623 (2017) (previously discussed here ), a product-liability case, the Minnesota Supreme Court held that there was a genuine issue of material fact as to whether it was reasonably foreseeable to the manufacturer of a high-density food extruder that a person would physically enter the extruder while another person activated it from the control panel, making the issue of foreseeability "close" and thus an issue for the jury. The dissenting justices in *Montemayor* rightfully took issue with the "inartful" "close case" language applied by the majority, noting that it was inconsistent with the court's well-established summary judgment standard. Nevertheless, the supreme court concluded a few months later that the issue of foreseeability was again "close" and thus an issue for the jury in *Senogles v. Carlson*, 902 N.W.2d 38 (2017) , a premises-liability case in which a premises owner argued that it was unforeseeable that a four year old would enter a river to swim unaccompanied by an adult. Together, the court's decisions in *Montemayor* and *Senogles* signal a shift in the court's approach to foreseeability issues in tort cases in favor of submitting foreseeability issues to a jury for determination.

And it is likely the trend will continue as the supreme court has accepted further review of the court of appeals' determination that an automobile accident was unforeseeable in *Fenrich v. Blake Sch.* , 901 N.W.2d 223 (2017). In *Fenrich* , the court of appeals conceded that in "close cases" the issue of foreseeability should be submitted to the jury but concluded that the case before it was not a "close case." Specifically, the court concluded that a school did not assume a duty of reasonable care to the general public by agreeing that one of its students could drive himself and other students to an out-of-town, extra-curricular activity in his family's vehicle because the risk of an automobile accident was not foreseeable. In petitioning for further review (Petition available here), the appellant relied heavily on the supreme court's decisions in *Montemayor* and *Senogles* , suggesting that the supreme court may be poised to continue the trend of deferring foreseeability issues to the jury in "close cases."

As it closes out 2017, the court of appeals again grappled with the issue of foreseeability in a published decision in *Cashman v. Uptown Drink*, \_\_\_ N.W.2d \_\_\_ (2017)

, a dram-shop case. The supreme court may thus have a second opportunity in 2018, in addition to Fenrich , to further solidify its recent approach to the issue of foreseeability.

In Cashman , co-trustees for the estate of a bar patron sued the bar after the decedent fell and fatally hit his head while helping an employee of the bar escort another patron out of the bar following a fight. The co-trustees claimed the bar was negligent and violated Minnesota's dram-shop statute— Minn. Stat. § 340A.502 —by providing liquor to an obviously intoxicated person. The bar moved for summary judgment, and the district court dismissed the co-trustees' claims, concluding that the negligence claim was barred by the decedent's primary assumption of the risk and the dram-shop claim was barred because the intoxication of the patron the decedent was escorting out of the bar was not the proximate cause of the decedent's injuries.

The court of appeals reversed. With respect to the negligence claim, the court determined that the foreseeability of the decedent's injuries and applicability of primary assumption of the risk presented questions of fact that precluded the court from resolving such issues as a matter of law. Following the supreme court's lead, the Cashman court employed “close case” language in discussing the issue of foreseeability and determined the issue of foreseeability was an issue for the jury. In terms of primary assumption of the risk, the court observed that application of the doctrine is uncommon and concluded that genuine issues of material fact existed as to whether the decedent had actual knowledge of the particular risks or dangers of assisting with another patron's removal from the bar and also whether the bar's conduct enlarged the inherent risk assumed by the decedent, which would preclude application of primary assumption of the risk.

The court of appeals also reversed the district court's dismissal of the co-trustees' dram-shop claim, concluding that a genuine issue of material fact remained as to whether the intoxication of the patron the decedent was escorting out of the bar was a proximate cause of the decedent's injuries. Consistent with its reasoning as to the foreseeability of the decedent's injuries, the court of appeals determined that there was sufficient evidence of a direct link between the patron's intoxication and the decedent's injuries to submit the issue of proximate cause to the jury. In so holding, the court observed that the lack of proximate cause may be decided by the court as a matter of law in cases in which “intoxication is entirely unrelated to the injury”—i.e., cases in which the intoxicated party's impaired faculties could not have directly caused an injury because it resulted from the actions and choices of another person. The court further observed that there is no requirement that “intoxication must be the sole proximate cause of injury in the dram shop context” and that “a defendant is liable under the dram shop act when the allegation is that intoxication was only a contributing cause of the injury.” Quoting Osborne v. Twin Town Bowl, Inc. , 749 N.W.2d 367, 374-75 (Minn. 2008). “Intoxication need only be a substantial factor in bringing about the injury.” Citing id.

If the bar appeals and the supreme court grants further review, the supreme court will have another opportunity to further solidify its recent approach to the issue of foreseeability. But it will also have the opportunity to address the primary assumption of the risk and proximate cause issues that were the primary focus of the court of appeals' decision. Notably, if accepted by the supreme court, the Cashman case would join Buskey v. Am. Legion Post #270, 2016 WL 7338739 (Minn. App. 2016), rev. granted (Mar. 14, 2017) (previously discussed here ), a dram-shop case involving the 240-day notice-of-claim provision of Minn. Stat. § 340A.802 that is currently pending before the supreme court.

If you have questions regarding the Minnesota supreme court's recent handling of the issue of foreseeability, the dram-shop issues at play in Buskey and Cashman , or any other general or liquor liability issues, please contact Dale O. Thornsjo , Brian M. McSherry , Lance D. Meyer , or one of the other members of our Firm's General Liability and Liquor Liability Practice Groups at (952.831.6544).