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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1169**

Sean Rand,
Appellant,

vs.

Breezy Point Lodge Apartment Owners Association,
Respondent,

Breezy Point International, Inc. d/b/a Breezy Point Resort, et al.,
Respondents,

Bonita K. Haisman,
Respondent,

Brent J. Baskfield, et al.,
Respondents,

Vernon G. Menk,
Respondent.

**Filed April 20, 2020
Affirmed
Slieter, Judge**

Crow Wing County District Court
File No. 18-CV-16-1937

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and

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Considered and decided by Bjorkman, Presiding Judge; Johnson, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

SLIETER, Judge

This is an appeal from judgment following a jury trial related to a personal-injury claim resulting from Sean Rand suffering serious and life-changing injuries while staying at Breezy Point International, Inc. (Breezy Point Resort) when he dove into shallow water off a dock. Rand challenges the adverse jury verdict asserting that the district court erred by not instructing the jury that Breezy Point Resort violated Minn. Stat. § 340A.502 (2018) by serving him alcohol in an obviously intoxicated state. Because the district court did not abuse its discretion by denying such an instruction, we affirm.¹

¹ Rand submitted briefing on appeal challenging the district court's grant of summary judgment for three condominium owners, claiming that the district court erred by basing dismissal on immunity pursuant to Minn. Stat. § 515B.3-.111 (2018). During oral argument, Rand's counsel abandoned this claim. We therefore do not address that issue nor do we address the condominium owners' notices of related appeals.

FACTS

Breezy Point Resort is located on Pelican Lake in Crow Wing County. Breezy Point Resort possesses an innkeeper's license and a liquor license. One of the buildings near Breezy Point Resort is the Breezy Point Lodge, Breezy Point Lodge Apartment Owners Association operates the Breezy Point Lodge. Breezy Point Resort offers accommodations for guests to stay in certain rooms at the Breezy Point Lodge.

In 2012, Rand's employer booked an all-inclusive package for its employees over the Labor Day Weekend at Breezy Point Resort. The all-inclusive package included meals and alcohol. Breezy Point Resort assigned the group to units in the Breezy Point Lodge.

Rand golfed with his coworkers. Breezy Point Resort has a beverage cart on the golf course, which serves players one alcoholic drink or two beers each time the cart came to the players. Breezy Point Resort does not keep track of alcohol consumption, but it ends service at 1:00 a.m. and alcohol is provided only in designated locations at the resort. Rand's group cut Rand off from the alcohol service during the afternoon and sent him back to the Breezy Point Lodge.

At approximately 8:00 p.m., Rand walked to the end of an L-shaped dock located on the water abutting the shore outside the Breezy Point Lodge. Rand looked at the water for a couple of seconds, walked halfway back down the dock, turned around, took his shirt off, ran, and dove into the lake. Rand sustained severe injuries from striking the bottom of the lake, which rendered him quadriplegic. Blood work performed at a hospital after Rand sustained his injury showed that he had a blood alcohol concentration of 0.29.

Rand sued Breezy Point Resort, the Association, and the three condominium owners. Rand asserted negligence claims against each party alleging that they failed to keep the premises safe by warning guests of the dock system with the low water level on Pelican Lake.

Before trial, the district court granted Breezy Point Resort's "motion to exclude evidence, testimony, or *voir dire* regarding Breezy Point Resort's negligence/liability in their service of alcohol to [Rand]." Rand argued in opposition that his claim against Breezy Point Resort implicated Minn. Stat. § 340A.502, because Breezy Point Resort overserved Rand alcohol. The district court rejected this argument and precluded all such evidence and arguments during trial.

The case proceeded to a five-day jury trial on the sole issue of liability, resulting in a defense verdict. The jury found: (1) Breezy Point Resort was "negligent in the failure to warn of the shallow water," but that Breezy Point Resort's negligence was not the direct cause of the incident causing Rand's injuries; (2) the Association was not negligent in failing to warn of the shallow water; (3) Rand was "negligent in diving into the water;" and (4) Rand's negligence was the direct cause of his injuries. The district court accepted the jury's verdict on liability and dismissed with prejudice the claims against Breezy Point Resort and the Association.

Rand moved for posttrial relief pursuant to Minn. R. Civ. P. 50.02 and 59.01. The district court denied Rand's posttrial motions. This appeal follows.

DECISION

Rand asserts that the district court erred by refusing to instruct the jury on Minn. Stat. § 340A.502, because the defense raised the issue of voluntary intoxication. “The district court has broad discretion in determining jury instructions and [appellate courts] will not reverse in the absence of an abuse of discretion.” *See Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). “District courts are allowed considerable latitude in selecting language used in the jury charge and determining the propriety of a specific instruction.” *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002).

Rand specifically requested the district court to instruct the jury in accordance with Minn. Stat. § 340A.502. This statute provides, “No person may sell, give, furnish, or in any way procure for another alcoholic beverages for the use of an obviously intoxicated person.” Minn. Stat. § 340A.502. The district court granted Breezy Point Resort’s motion *in limine* and reasoned, *inter alia*, that the only basis for a claim against a commercial vendor for serving alcohol in Minnesota is based on the Minnesota Dram Shop Act, Minn. Stat. §§ 340A.801-.802 (2018), whereas Rand’s negligence claim is based solely on a failure to warn.

Though Rand concedes that he has no right to a claim pursuant to the Dram Shop Act, he asserts that the district court must instruct the jury on Minn. Stat. § 340A.502 in this context because Breezy Point Resort provided him alcohol and then defended against its liability based on his intoxicated state. We conclude the district court did not abuse its discretion by denying the instruction.

Rand requested the district court to instruct the jury that Minn. Stat. § 340.502 imposed a duty which it argued Breezy Point Resort violated. The Minnesota Civil Jury Instruction that Rand requested contains the following language:

A person has certain legal duties that are written into law as statutes.

If a person breaks the law, [except a traffic law,] he or she is negligent.

[This is true unless he or she has a valid excuse.]
I will read (a) (some) law(s) to you.

If I read a law, it does not automatically mean that this law has been broken. This decision is up to you.

[If a law has been broken, then you must decide if it was a direct cause of the accident.]

4 *Minnesota Practice*, CIVJIG 25.45 (2014) (emphasis omitted).

We are persuaded by our explanation in *Johnson v. St. Charles Mun. Liquor Store* in concluding that the district court properly denied Rand's requested instruction. 392 N.W.2d 909 (Minn. App. 1986). In *Johnson*, a patron of a liquor store consumed alcohol on the premises throughout the afternoon and evening. *Id.* at 910. Although Johnson was "visibly intoxicated," the bartender at the liquor store continued to provide liquor. *Id.* When Johnson eventually left the liquor store, he fell and crushed the ball joint in his hip. *Id.* Johnson sued for negligence and sought to introduce evidence that the bartender violated the predecessor statute to Minn. Stat. § 340A.502. *Id.* The district court precluded such evidence reasoning that Johnson lacked standing to sue based on the Dram Shop Act. *Id.* Johnson's appeal asserted that the district court erred because it allowed the

liquor store to assert his “voluntary intoxication as contributory negligence, while barring evidence that respondent’s negligence contributed to appellant’s intoxication.” *Id.* at 911. We acknowledged potential merit that the liquor store’s strategy may open the door to evidence about the bartender’s negligence, but the district court, before trial, ruled that “evidence of the bartender’s alleged negligence would be admissible so long as appellant did not claim that such actions were statutory violations and, hence, illegal or negligent as a matter of law.” *Id.* at 912. We concluded that because Johnson did not try to provide that evidence, he could not demonstrate prejudice. *Id.*

We are compelled to affirm the district court’s decision not to instruct the jury as requested by Rand and to exclude such evidence. Rand requested an instruction using language that would have identified a legal duty, pursuant to Minn. Stat. § 340A.502, to not serve an obviously intoxicated person. Although Rand casts this instruction as one to defend against assertions of his voluntary intoxication, the instruction as requested would have modified Breezy Point Resort’s duty from a failure to warn about conditions into a violation of a duty by providing alcohol to an obviously intoxicated person. Essentially, the proposed language that Rand requested would have created a separate cause of action based on the violation of a purported statutory duty that Rand never asserted in the complaint. This would have confused the issues for the jury by creating a separate legal duty based on the statute and modified the pleadings without a proper amendment. *See Roberge v. Cambridge Co-op Creamery Co.*, 67 N.W.2d 400, 403 (Minn. 1954) (“When a party fails to take advantage of [amending their complaint], he is bound by the pleadings unless the other issues are litigated by consent.”). Additionally, Rand failed to make an

offer of proof to the district court with evidence that he intended to offer about Breezy Point Resort overserving him alcohol. Consequently, there is no record for us to review whether the district court improperly excluded evidence. We therefore conclude that the district court did not abuse its discretion by denying Rand's proposed jury instruction.

Affirmed.