2015 IL App (5th) 140436-U

NO. 5-14-0436

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

GARETT WORTHEN and SANDRA PITCHFORD,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Jackson County.
	)	
v.	)	No. 13-L-131
	)	
POWER GAS STATION and DARJI ENTERPRISES, INC., Individually and d/b/a Power Gas Station,	)	Honorable
	)	Christy W. Solverson,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Stewart and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's dismissal of plaintiffs' complaint alleging common law causes of action for negligent retention after concluding plaintiffs' claims were preempted by the Dramshop Act.

¶ 2 Plaintiffs, Garett Worthen and Sandra Pitchford, filed an 18-count second amended complaint against defendants, Power Gas Station and Darji Enterprises, Inc., individually and d/b/a Power Gas Station, alleging defendants were liable for injuries sustained by Worthen in a motor vehicle accident that occurred after the underage Worthen consumed alcohol he purchased from defendants' convenience store.

Defendants filed a motion to dismiss plaintiffs' second amended complaint, asserting plaintiffs' causes of action were preempted by the Dramshop Act (235 ILCS 5/6-21 (West 2012)). The trial court granted defendants' motion to dismiss, and plaintiffs timely filed a notice of appeal. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendants owned and operated a convenience store in Murphysboro, Illinois. The following facts concerning this appeal were alleged by plaintiffs in their complaint.

¶ 5 Prior to October 31, 2012, Worthen purchased alcohol from defendants' convenience store while he was under the age of 21. After discovering Worthen had purchased alcohol from defendants' convenience store, Pitchford, who is Worthen's mother, went to defendants' store and informed the store manager that Worthen was underage. Pitchford advised the manager that it was illegal for the store to sell alcohol to her underage son and requested that the store stop doing so.

¶ 6 On October 31, 2012, Worthen, who was still under the age of 21, purchased alcohol at defendants' store from an employee who had previously sold him alcohol. Worthen consumed the alcohol and proceeded to drive a motor vehicle owned by his mother. Worthen crashed the vehicle and sustained serious injuries. Tests performed at the hospital confirmed that Worthen's blood-alcohol content exceeded 0.08.

¶ 7 On October 30, 2013, plaintiffs filed a 16-count complaint against defendants alleging 4 counts of negligent retention, 4 counts under the Dramshop Act, 4 counts of willful and wanton conduct, and 4 counts of negligent contribution to delinquency. On January 7, 2014, defendants filed a motion to dismiss and memorandum in support

seeking dismissal of every count of plaintiffs' complaint with the exception of two counts brought under the Dramshop Act, which defendants answered. The court granted defendants' motion to dismiss on March 4, 2014.

¶ 8 On March 31, 2014, plaintiffs timely filed a motion for leave to amend the complaint with a proposed amended complaint attached thereto. Defendants filed a response to plaintiffs' motion requesting that the court deny plaintiffs' leave to amend, asserting the amended complaint failed to cure the defects of the original complaint. The court denied plaintiffs' motion for leave to amend but granted plaintiffs additional time to file an amended complaint. On May 27, 2014, plaintiffs sought leave to file a second amended complaint, which the court granted.

¶ 9 On May 29, 2014, plaintiffs filed an 18-count second amended complaint. Similar to the original complaint, plaintiffs alleged four counts of negligent retention, four counts under the Dramshop Act, and four counts of willful and wanton conduct. Plaintiffs also alleged four new counts of civil conspiracy and two new counts of intentional infliction of emotional distress. Each count was based upon the same alleged facts in the original complaint.

¶ 10 On June 13, 2014, defendants moved to dismiss all counts of plaintiffs' second amended complaint with the exception of two counts brought individually by Pitchford under the Dramshop Act, which defendants answered. Defendants argued that no common law cause of action exists for plaintiffs' four counts of negligent retention, four counts of willful and wanton conduct, four counts of civil conspiracy, and two counts of intentional infliction of emotional distress, as these claims were based upon the sale of

alcohol to Worthen that resulted in his intoxication, accident, and damages. Defendants asserted that plaintiffs' exclusive remedy for such claims are causes of action brought under the Dramshop Act.

¶ 11 Defendants also moved to dismiss the remaining two counts brought under the Dramshop Act, as those counts were brought by Worthen individually. Defendants argued the Dramshop Act barred those claims because, as the individual who purchased and consumed the alcohol that resulted in his intoxication and accident, Worthen is prohibited from recovery under the Dramshop Act for his own injuries.

¶ 12 Defendants further argued that even assuming, *arguendo,* the four counts of willful and wanton conduct are not preempted by the Dramshop Act, those counts must be dismissed because section 2-604.1 of the Code of Civil Procedure prohibits plaintiffs from seeking punitive damages. 735 ILCS 5/2-604.1 (West 2012). Similarly, defendants argued that even assuming, *arguendo*, that the four counts of civil conspiracy are not preempted by the Dramshop Act, those counts must be dismissed for plaintiffs' failure to state a cause of action for civil conspiracy. Lastly, defendants argued that even assuming, *arguendo*, the two counts of intentional infliction of emotional distress are not preempted by the Dramshop Act, those counts must be dismissed because they failed to state a cause of action for intentional infliction of emotional distress.

¶ 13 On June 30, 2014, plaintiffs filed a memorandum of law in opposition to defendants' motion to dismiss their second amended complaint, arguing the Dramshop Act did not preempt their common law causes of action. Plaintiffs asserted that because their complaint is based on defendants' statutory violation of selling alcohol to a person

under the age of 21, it is not barred by the Dramshop Act. Concerning the two counts brought by Worthen individually under the Dramshop Act, plaintiffs argued a civil remedy is appropriate when there is a statutory violation.

¶ 14 On July 30, 2014, the court granted defendants' motion to dismiss. The court held that the Dramshop Act was the exclusive remedy for injuries arising from the sale or gift of alcohol and dismissed, with prejudice, plaintiffs' four counts of negligent retention, four counts of willful and wanton conduct, four counts of civil conspiracy, and two counts of intentional infliction of emotional distress. The court noted that it dismissed the four counts of willful and wanton conduct seeking punitive damages because such claims are barred by section 2-604.1 of the Code of Civil Procedure. 735 ILCS 5/2-604.1 (West 2012). The court also dismissed the two counts brought by Worthen individually under the Dramshop Act, finding the Dramshop Act precluded Worthen from recovery for injuries to himself.

¶ 15 On August 28, 2014, plaintiffs sought leave to voluntarily dismiss the remaining two counts brought by Pitchford individually under the Dramshop Act, which the court granted. That same day, plaintiffs timely filed a notice of appeal.

¶ 16 ANALYSIS

¶ 17 In their notice of appeal filed on August 28, 2014, plaintiffs indicate they are appealing the trial court's entire order which granted defendants' motion to dismiss. However, plaintiffs, in their brief and oral argument, challenge the trial court's order concerning their claims of negligent retention in their brief. Pursuant to Illinois Supreme Court Rule 341(h)(7), "[p]oints not argued [in the appellant's brief] are waived and shall

not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Accordingly, the issue raised on appeal is whether the Dramshop Act preempts plaintiffs' common law causes of action for negligent retention.

¶ 18 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. 735 ILCS 5/2-615 (West 2012); *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429, 856 N.E.2d 1048, 1053 (2006). Therefore, we review an order granting or denying a section 2-615 motion under a *de novo* standard of review. *Marshall*, 222 Ill. 2d at 429, 856 N.E.2d at 1053.

¶ 19 Plaintiffs allege their negligent retention causes of action are not preempted by the Dramshop Act and, therefore, the trial court erred in dismissing those claims. Defendants contend the trial court did not err in dismissing plaintiffs' claims of negligent retention, as it properly concluded those claims are preempted by the Dramshop Act. For the following reasons, we agree with defendants.

¶ 20 The supreme court in *Cunningham v. Brown*, 22 Ill. 2d 23, 174 N.E.2d 153 (1961), firmly established the rule of law that the General Assembly has preempted the entire field of alcohol-related liability through its passage and continual amendment of the Dramshop Act. In *Cunningham*, the plaintiffs filed suit against tavern operators who served intoxicants to their husband and father, who thereafter took his own life. The plaintiffs alleged the decedent became despondent as a result of intoxication.

¶ 21 In their complaint, plaintiffs alleged there exists one or both of the following remedies: (1) a civil action for violation of section 12 of article VI of the Liquor Control Act which prohibits the sale, gift, or delivery of alcoholic liquor "to any intoxicated

person or to any person known *** to be an habitual drunkard, spendthrift, insane, mentally ill, mentally deficient or in need of mental treatment"; and (2) a common law action against an operator of a tavern who supplies intoxicating liquor to a person when the supplier knows the consumer has no volition with regard to consuming the intoxicant, therefore causing his intoxication or further intoxication and resulting in injury to the consumer or a third party. *Cunningham*, 22 Ill. 2d at 24-25, 174 N.E.2d at 154.

¶ 22 The trial court dismissed the two counts of plaintiffs' complaint, and plaintiffs appealed. Plaintiffs argued a new cause of action should be recognized where a tavern operator sells liquor to an already intoxicated or insane individual. They argued that in these instances, the incapacity of the consumer to choose is known or should be known to the vendor, and, therefore, the sale and consumption of liquor are merged, becoming the act of the seller and proximate cause of the intoxication. *Cunningham*, 22 Ill. 2d at 30, 174 N.E.2d at 157.

¶ 23 The supreme court affirmed and refused to create any cause of action beyond those explicitly provided for in the Dramshop Act. It held that the Dramshop Act provides the exclusive remedy against tavern operators for alcohol-related injuries. *Cunningham*, 22 Ill. 2d at 30-31, 174 N.E.2d at 157.

¶ 24 Since *Cunningham*, our supreme court has held there is no common law cause of action for injuries arising out of the sale or gift of alcoholic beverages. *Charles v. Seigfried*, 165 Ill. 2d 482, 486, 651 N.E.2d 154, 157 (1995). The rationale behind this rule is that the drinking of the intoxicant, not the furnishing of it, is the proximate cause of the intoxication and the resulting injury. *Charles*, 165 Ill. 2d at 486, 651 N.E.2d at

157. As a matter of public policy, the furnishing of alcoholic beverages is considered too remote to serve as the proximate cause of the injury. *Charles*, 165 Ill. 2d at 486, 651 N.E.2d at 157.

¶ 25 *Charles* involved a minor who was killed in a car accident that occurred after the minor drove away from a party where he became intoxicated. The administrator of the minor's estate brought suit against the social host who provided alcohol to the minor, claiming the host breached his common law duty of reasonable care. The supreme court declined to create any form of social host liability, noting it is established law that the General Assembly has preempted the entire field of alcohol-related liability through its passage and repeated amendment of the Dramshop Act. *Charles*, 165 Ill. 2d at 491, 651 N.E.2d at 159.

¶ 26 As explained by the supreme court in *Charles*:

> "Since *Cunningham*, this court has frequently reiterated the rule that a dramshop cause of action is *sui generis* and exclusive. [Citations.] Accordingly, this court has consistently refused to recognize any cause of action for alcohol-related liability beyond those explicitly provided for in the Dramshop Act. [Citations.] In doing so, this court has rejected all theories of liability advanced by plaintiffs, including those based upon the Dramshop Act itself, upon common law negligence, or upon certain prohibited sales and activities within the Liquor Control Act of 1934. [Citations.]
>
> As a result, few rules of law are as clear as that no liability for the sale or gift of alcoholic beverages exists in Illinois outside of the Dramshop Act. Our

appellate court has generally adhered to this fundamental rule and has declined to create a new cause of action, regardless of whether the case involved adults, underage persons, or minors; liquor vendors or social hosts." *Charles*, 165 Ill. 2d at 489-90, 651 N.E.2d at 158.

¶ 27 In the instant case, we find that plaintiffs' common law causes of action for negligent retention based on defendants' provision of alcohol to a minor are preempted by the Dramshop Act. Two cases relating to the circumstances of this case that support our finding are *Puckett v. Mr. Lucky's Ltd.*, 175 Ill. App. 3d 355, 529 N.E.2d 1169 (4th Dist. 1988); and *Ruth v. Benvenutti*, 114 Ill. App. 3d 404, 449 N.E.2d 209 (3d Dist. 1983).

¶ 28 In *Puckett*, the plaintiff's guardian brought suit against a tavern alleging it negligently hired an unfit person to sell liquor. The tavern's employee had sold alcohol to a minor who then proceeded to operate an automobile after becoming intoxicated. The minor crashed the automobile into a tree and injured the plaintiff, who was a passenger.

¶ 29 The tavern filed a motion to dismiss the plaintiff's complaint for failure to state a cause of action, arguing there is no common law right to recover against a tavern for selling intoxicating liquor. *Puckett*, 175 Ill. App. 3d at 357, 529 N.E.2d at 1170. The tavern asserted the plaintiff's sole remedy is provided in the Dramshop Act. The trial court granted the tavern's motion to dismiss, and the plaintiff appealed. On appeal, the court held that the tavern had no common law negligence liability arising from the illegal sale of alcohol to a minor, finding the Dramshop Act was the exclusive source of liability. *Puckett*, 175 Ill. App. 3d at 357, 529 N.E.2d at 1170.

¶ 30 Similarly, in *Ruth*, a plaintiff brought a common law cause of action for willful,

wanton, and intentional misconduct against a tavern that sold him alcohol as a minor. The plaintiff sought recovery for injuries sustained in a car accident that occurred after he left the bar intoxicated. *Ruth*, 114 Ill. App. 3d at 405, 449 N.E.2d at 210.

¶ 31 Several weeks prior to the car accident, the minor's mother went to the defendant's tavern and requested that the defendant not serve any alcohol to her son. The minor's mother informed the defendant that her son was underage and that he had previously injured himself after being served alcoholic drinks by the defendant. *Ruth*, 114 Ill. App. 3d at 405, 449 N.E.2d at 210.

¶ 32 The plaintiff's complaint alleged that at the time the defendant served him on the day of the accident, the defendant knew he was a minor and not of legal drinking age. The complaint further alleged that the defendant's actions in serving him were in knowing disregard of his mother's request, and with knowledge that he was unable to control himself when intoxicated. *Ruth*, 114 Ill. App. 3d at 405, 449 N.E.2d at 210.

¶ 33 The trial court dismissed the plaintiff's complaint, and the plaintiff appealed. The question raised on appeal was whether there is a common law cause of action for the willful, wanton, and intentional misconduct of a tavern owner who sells intoxicating liquors to a minor, when the tavern owner knows the minor is underage and particularly susceptible to the effects of alcohol. *Ruth*, 114 Ill. App. 3d at 405, 449 N.E.2d at 210.

¶ 34 The plaintiff argued that a cause of action premised on the willful and wanton misconduct of a tavern owner in serving liquor to a minor should be adopted in Illinois. In response, the court acknowledged that no such cause of action existed at common law, nor has it been adopted by any Illinois court. The court further noted:

"In fact, it has been repeatedly held that the Dramshop Act's imposition of liability on tavern owners and tavern keepers is the exclusive remedy against such defendants for injuries to person, property, or means of support by an intoxicated person or in consequence of intoxication." *Ruth*, 114 Ill. App. 3d at 406, 449 N.E.2d at 210.

¶ 35 The court's findings in *Puckett* and *Ruth* indicate the Dramshop Act preempts common law causes of action for negligence. In particular, we stress the court's finding in *Puckett* that no common law negligence liability arose from the illegal sale of alcohol to a minor where the plaintiff alleged the defendant negligently hired an unfit person to sell liquor. We also stress the court's finding in *Ruth* that no common law liability arose from the illegal sale of alcohol to a minor despite the mother's specific request to defendant that it not serve alcohol to her underage son.

¶ 36 In the instant case, plaintiffs allege common law causes of action for negligent retention, asserting defendants retained an unfit employee who sold alcohol to a minor. The minor later sustained serious injuries in a car accident after becoming intoxicated from the liquor the allegedly unfit employee sold him. These common law claims are preempted by the Dramshop Act. Accordingly, plaintiffs' exclusive remedy is the Dramshop Act, and we need not consider whether defendants in fact negligently retained an unfit employee.

¶ 37 Plaintiffs contend their common law causes of action for negligent retention are independent of the Dramshop Act, as the sale of alcohol to an underage person is not the "primary thrust" of their cause of action. Plaintiffs argue the Dramshop Act does not

preempt claims based on legal theories independent of defendants' provision of alcohol, and contend they are entitled to recovery under the common law theory of negligent retention and/or hiring despite the fact that this claim is premised on defendants' provision of alcohol to a minor.

¶ 38 Plaintiffs cite to several cases in support of their argument: *Wakulich v. Mraz*, 203 Ill. 2d 223, 785 N.E.2d 843 (2003); *Harris v. Gower, Inc.*, 153 Ill. App. 3d 1035, 506 N.E.2d 624 (5th Dist. 1987); *Lessner v. Hurtt*, 55 Ill. App. 3d 195, 371 N.E.2d 125 (2d Dist. 1977); *Simmons v. Homatas*, 236 Ill. 2d 459, 925 N.E.2d 1089 (2010); and *Hicks v. Korean Airlines Co.*, 404 Ill. App. 3d 638, 936 N.E.2d 1144 (1st Dist. 2010). We distinguish these cases from the case at bar for the following reasons.

¶ 39 In *Wakulich*, the plaintiff alleged that two brothers, acting as social hosts, provided alcohol to the plaintiff's minor daughter. The daughter became intoxicated and lost consciousness as a result. The brothers placed the plaintiff's daughter in the family room of their home, where they observed her "vomiting profusely and making gurgling sounds." *Wakulich*, 203 Ill. 2d at 227, 785 N.E.2d at 846. The brothers then removed her soiled blouse and placed a pillow under her head to prevent aspiration, but refused to take her home, refused to contact her parents, refused to seek medical attention, and prevented others from calling 9-1-1 or seeking medical intervention. *Wakulich*, 203 Ill. 2d at 227, 785 N.E.2d at 846.

¶ 40 The daughter died the following day, and the daughter's mother brought an action against the two brothers as social hosts for negligence in providing alcohol to her underage daughter, and against the two brothers and their father for negligent

performance of a voluntary undertaking of the daughter after she lost consciousness. *Wakulich*, 203 Ill. 2d at 227, 785 N.E.2d at 846. The trial court granted the defendants' motion to dismiss for failure to state a cause of action, and the mother appealed. The appellate court reversed the dismissal of the counts against defendants alleging negligent performance of a voluntary undertaking, and affirmed the dismissal of the remainder of the complaint. The mother again appealed.

¶ 41 The supreme court affirmed the dismissal of the negligence claim concerning the brothers' provision of alcohol to the underage daughter, reiterating that Illinois law does not recognize social host liability for the provision of alcohol. *Wakulich*, 203 Ill. 2d at 237, 785 N.E.2d at 852. Regarding the voluntary undertaking claim, the supreme court agreed with the appellate court that it was improperly dismissed. The court indicated that the brothers' status as social hosts was irrelevant to this claim, as the brothers' liability arose "by virtue of their voluntary assumption of a duty [of] care *** irrespective of the circumstances leading up to that point." *Wakulich*, 203 Ill. 2d at 242, 785 N.E.2d at 854.

¶ 42 This court reached a similar conclusion in *Harris*. *Harris* involved a bar patron who was served alcohol to the point that he became intoxicated and lost consciousness. While intoxicated and unconscious, employees of the tavern removed the patron from the bar and placed him in a car in the tavern's parking lot. The patron froze to death, and the patron's surviving wife brought a claim against the tavern for common law negligence. *Harris*, 153 Ill. App. 3d at 1036, 506 N.E.2d at 624.

¶ 43 Defendants filed a motion for judgment on the pleadings, asserting the Dramshop Act was the exclusive remedy against owners and operators of taverns for injuries to

person, property, or means of support by an intoxicated person or in consequence of intoxication, which the trial court granted. *Harris*, 153 Ill. App. 3d at 1037, 506 N.E.2d at 625. The patron's wife appealed, arguing that the Dramshop Act was not the only remedy available because her complaint was predicated on the defendants' negligent conduct toward the decedent after he became intoxicated and unconscious rather than the defendants' negligence in supplying the decedent with alcohol. *Harris*, 153 Ill. App. 3d at 1037, 506 N.E.2d at 625.

¶ 44 The court determined that although the plaintiff alleged that defendants supplied the decedent with intoxicating liquor that caused him to lose consciousness, this was "not the act that allegedly resulted in decedent's death." *Harris*, 153 Ill. App. 3d at 1038, 506 N.E.2d at 626. Rather, the court found that the plaintiff alleged the tavern employees harmed the decedent by placing him in peril. Thus, the court found the plaintiff's cause of action for negligence was independent of the Dramshop Act, as the claim was based on the negligent acts against the decedent rather than the negligence of the defendants in providing intoxicating liquor. *Harris*, 153 Ill. App. 3d at 1038, 506 N.E.2d at 626.

¶ 45 *Wakulich* and *Harris* both concerned negligent conduct that was independent of the provision of alcohol. In *Wakulich*, the defendants assumed a duty of care of an intoxicated and unconscious minor, and were negligent in preventing the minor from receiving medical attention. In *Harris*, the defendants were negligent in placing an intoxicated and unconscious patron of their bar in a car outside in freezing temperature. Both *Wakulich* and *Harris* concern negligence performed after and independently from the furnishing of alcohol, which is why the court allowed the plaintiffs to proceed with

their common law negligence claims. In the instant case, defendants' sole negligent act was selling alcohol to a minor. Defendants did not perform a negligent act subsequent to the selling of alcohol or assume any duty of care. Accordingly, we find plaintiffs' common law negligent retention claims are not independent of the Dramshop Act.

¶ 46 Plaintiffs also cite to *Lessner* in support of their argument that their negligent retention claims are independent of the Dramshop Act. *Lessner* involved a customer who was injured in a fight at a cocktail lounge and brought an action against the lounge owner for injury damages. The plaintiff alleged the lounge was negligent through its employees, in that it knew its patron was intoxicated, knew the patron threatened the plaintiff with physical violence, did not remove the patron from the bar when the plaintiff was endangered, and refused to aid the plaintiff when the threat of physical harm to the plaintiff became imminent. *Lessner*, 55 Ill. App. 3d at 196, 371 N.E.2d at 125.

¶ 47 The trial court entered summary judgment for the cocktail lounge owner after finding the plaintiff's exclusive remedy was through the Dramshop Act, and the plaintiff appealed. On appeal, the court indicated the plaintiff's complaint made no reference to or allegation regarding negligence by reason of the sale or supply of liquor. *Lessner*, 55 Ill. App. 3d at 197, 371 N.E.2d at 126. As such, the court found the Dramshop Act did not preempt the plaintiff's cause of action for negligence, finding the cocktail lounge could be found negligent and liable for failure to protect its patrons from physical harm by a person on the premises. *Lessner*, 55 Ill. App. 3d at 197, 371 N.E.2d at 126.

¶ 48 We again distinguish *Lessner* from the instant case. Where *Lessner* concerned negligence liability for a defendant's failure to protect patrons on its premises, the instant

case concerns negligent retention claims that are solely based on defendants' provision of alcohol to a minor. Plaintiffs allege that the injuries sustained in the car accident were a result of defendants' negligent selling of alcohol to a minor. Accordingly, the Dramshop Act provides the exclusive remedy for these claims.

¶ 49 Plaintiffs next cite to *Simmons* in support of their argument. In *Simmons*, the plaintiffs brought an action for common law negligence and liability under the Dramshop Act against the owner of an adult entertainment club after an intoxicated patron was involved in a car accident that killed the plaintiffs' decedents. *Simmons*, 236 Ill. 2d at 462-63, 925 N.E.2d at 1092. The club did not serve alcohol, but did allow patrons to bring their own alcohol into the club. The club also sold glasses, ice, soft drinks, and mixers to add to the alcohol brought by patrons.

¶ 50 The plaintiffs' complaint alleged that a patron and his friend arrived at the club around 9 p.m. on the night in question and left a car with the club's valet service. The patron and his friend then walked into the club with a fifth of rum and a fifth of vodka. Over the next two hours, the patron became "visibly intoxicated." *Simmons*, 236 Ill. 2d at 462, 925 N.E.2d at 1092. The club's employees ejected the patron and his friend from the club after witnessing the patron vomiting in the restroom, and instructed the valet service to bring the patron's car to the front of the club.

¶ 51 After the valet service brought the car to the front door, the club's employees opened the driver-side front door and instructed the patron to leave the premises. Approximately 15 minutes later, the patron was involved in a car accident that resulted in the deaths of the patron's friend, the driver of the other vehicle, and that driver's unborn

daughter. *Simmons*, 236 Ill. 2d at 462, 925 N.E.2d at 1092.

¶ 52 The defendant moved to dismiss the plaintiffs' complaint, arguing the Dramshop Act was the sole remedy for actions involving liability from alcohol-related injuries. The defendant's motion to dismiss was denied. The trial court concluded the Dramshop Act did not apply to the club because it did not sell or give alcohol to its patrons, but recognized "there is no common law cause of action against a provider of alcoholic beverages for injuries arising out of the sale or gift of such beverages." *Simmons*, 236 Ill. 2d at 463, 925 N.E.2d at 1093. The court then allowed the plaintiffs' remaining common law counts to proceed after considering the question of whether the defendant owed a duty to the plaintiff.

¶ 53 As part of its order denying the defendant's motion to dismiss, the court certified questions for immediate review pursuant to Illinois Supreme Court Rule 308 concerning whether the plaintiffs' allegations established a duty owed to the plaintiff that was independent of the Dramshop Act. *Simmons*, 236 Ill. 2d at 464, 925 N.E.2d at 1093. The appellate court and supreme court each granted leave to appeal and affirmed.

¶ 54 The supreme court found the defendants could be held liable to the plaintiffs as a result of assisting and encouraging the patron to drive while intoxicated. Specifically, the court noted:

> "As the circuit court recognized, this case presents a set of special circumstances. We do not hold today that restaurants, parking lot attendants or social hosts are required to monitor their patrons and guests to determine whether they are intoxicated. We hold only that where, as here, a defendant is alleged to

have removed a patron for being intoxicated, places the patron into a vehicle and requires him to drive off, such facts are sufficient to state a common law negligence cause of action that is not preempted by the Dramshop Act." *Simmons*, 236 Ill. 2d at 481, 925 N.E.2d at 1102-03.

¶ 55 None of the facts from *Simmons* are at issue in the instant case. *Simmons* involved employees who encouraged and assisted an intoxicated patron to drive his vehicle. In contrast, plaintiffs' negligent retention claims are based on the selling of alcohol to a minor who then proceeded to drive his vehicle on his own accord after becoming intoxicated. Defendants in the instant case did not encourage the minor to drive his vehicle while intoxicated. We do not find the facts of this case to be a special set of circumstances in which plaintiff's common law negligence claims are not preempted by the Dramshop Act.

¶ 56 Finally, plaintiffs cite to *Hicks* in support of their contention that their negligent retention claims fall outside the realm of the Dramshop Act. In *Hicks*, an employee of Korean Airlines Company was involved in a car accident after leaving a company-sponsored dinner where she became intoxicated. The accident resulted in the deaths of the employee and the driver of another vehicle. The plaintiff brought suit against Korean Airlines alleging it was vicariously liable for the negligent and intoxicated driving of its employee who was acting within the scope of her employment at the time of the accident. *Hicks*, 404 Ill. App. 3d at 639, 936 N.E.2d at 1145.

¶ 57 Korean Airlines filed a motion for summary judgment arguing it could not be directly or vicariously liable for its employee's alleged negligence because the Dramshop

Act "preempts the entire field of alcohol-related liability." (Internal quotation marks omitted.) *Hicks*, 404 Ill. App. 3d at 640, 936 N.E.2d at 1146. The trial court granted Korean Airlines' summary judgment, and the plaintiff appealed.

¶ 58 The question raised on appeal was whether the negligence claims brought against Korean Airlines were preempted by the Dramshop Act. The appellate court reversed after finding the plaintiff's claim was based on vicarious liability under the theory of *respondeat superior*. The court indicated this theory was not dependent upon the sale or gift of alcohol, and, therefore, was not preempted by the Dramshop Act. *Hicks*, 404 Ill. App. 3d at 648, 936 N.E.2d at 1152.

¶ 59 In each of the five cases referenced above, the court held the plaintiff's common law claims of negligence were not preempted by the Dramshop Act because the sale of alcohol was not a primary element of the cause of action. The courts in those cases concluded that the duty owed to the plaintiff was independent and unrelated to the provision of alcohol, and, therefore, the plaintiffs properly stated a cause of action for common law negligence that was not preempted by the Dramshop Act.

¶ 60 In contrast, plaintiffs' claims of negligent retention are solely based on allegations concerning the illegal sale of alcohol. Plaintiffs' claim that the sale of alcohol to a minor is not the "primary thrust" of their cause of action is mistaken, as the sale of alcohol to Worthen forms the very basis for plaintiffs' claims of negligent retention. We fail to recognize that plaintiffs' claims are based on legal theories independent of defendants' provision of alcohol. Accordingly, the Dramshop Act provides the exclusive remedy for plaintiffs and preempts their common law claims of negligent retention.

¶ 61 CONCLUSION

¶ 62 For the reasons stated herein, we affirm the judgment of the circuit court of Jackson County.

¶ 63 Affirmed.