RENDERED: February 14, 1997; 10:00 a.m.
NOT TO BE PUBLISHED
MODIFIED: March 7, 1997; 2:00 p.m.

95-CA-2162-MR

GEORGE REECE and
ELOISE REECE — APPELLANTS

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE BENJAMIN L. DICKINSON, JUDGE
ACTION NO. 92-CI-0120

EVANS & EVANS, INC. (d/b/a
CHARLES EVANS LIQUOR OUTLET) — APPELLEE

OPINION AFFIRMING

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BEFORE: WILHOIT, Chief Judge; EMBERTON and SCHRODER, Judges.

WILHOIT, CHIEF JUDGE. Chad Reece, son of the appellants, George and Eloise Reece, was killed in an automobile accident during a high-speed chase. The appellants filed a wrongful death action against the minor driver of the automobile and his parents; the City of Glasgow, its chief of police, and three of its police officers; and the City of Edmonton, its chief of police, and two of its police officers. The appellants also named the appellee as a defendant. The appellants settled with each of the

defendants except the appellee. The circuit court granted the appellee's motion for summary judgment and this appeal followed.

On the day of the fatal accident, Robert Thompson, a minor, drove Chad Reece and two other minors from their hometown of Edmonton to Bowling Green to buy alcoholic beverages. They pulled to the side of the appellee's store and recruited an unidentified female to go into the store and purchase liquor for them. It is uncontroverted that the minors could not be seen from the inside of the liquor store. Robert Thompson testified in his deposition that

> [A] few moments later the lady had brought back out our alcohol, and one of the workers that worked there, he was outside putting some in a car, and the lady had handed us the half a gallon of Jack Daniels, and I don't recall if he put it in the back seat or she did, but he told us while he was out there to drive carefully and not to drink and drive.

The other two survivors of the automobile accident gave investigative statements which were filed in the record. One youth stated that he could not remember seeing any employee of the appellee in the parking lot when they received the alcoholic beverages. The other said that an employee was outside of the liquor store and that "he [the employee] probably saw us and the car but I don't reckon he saw them put it in the car." There was no evidence that at the time the female purchased the bottle containing the alcoholic beverage the appellee knew she intended to deliver it to minors.

The circuit court granted summary judgment in the appellee's favor, stating that the appellee "did not permit

alcohol to be sold to a minor through this transaction, nor did Evans 'deliver' alcohol to the minors. . . . To hold Evans liable for damages resulting from the sale of alcohol to a legal customer who later transferred the alcohol to a minor, would impute liability where no recognized duty exists."

The appellants contend that Robert Thompson's testimony creates a genuine issue of material fact that the appellee violated KRS 244.080(1), which provides that a retail licensee shall not "sell, give away or deliver any alcoholic beverages, or procure or permit any alcoholic beverages to be sold, given away or delivered to" a minor. They maintain that Robert Thompson's deposition testimony creates a genuine issue of material fact that the appellee, through its employee, permitted alcoholic beverages to be delivered to minors. The supreme court in Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell, Ky., 736 S.W.2d 328 (1987), stated that KRS 244.080 "identifies a standard of care imposed upon commercial vendors for the protection of the public, which includes both the consumer and third parties, when the factual circumstances are such that the vendor should reasonably foresee what might result."

The record must be viewed in a light most favorable to the appellants, and all doubt resolved in their favor. See Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991). We must assume that an unidentified female purchased a bottle containing an alcoholic beverage and brought

it out to the car occupied by the minors. There is no evidence that anyone other than she delivered the bottle to them although an employee of the appellee saw the delivery of the bottle to the minors. The question here becomes whether the duty of the appellee not to deliver or permit delivery of alcoholic beverages to the minors was broad enough to encompass a duty on its employee to retrieve the bottle from the minors' automobile after it had been delivered to them and before they could leave the premises. We think not. The appellee's employee had no right to enter the automobile and seize the bottle from the minors, let alone a duty to do so, although he could have required them to leave the premises.

The circuit court judgment is affirmed.

SCHRODER, JUDGE, CONCURS.

EMBERTON, JUDGE, DISSENTS BY SEPARATE OPINION.

EMBERTON, JUDGE, DISSENTING. I respectfully disagree with the majority. I find difficulty in believing that under the facts as represented by appellants a duty to prevent the delivery of alcoholic beverages to the minors does not exist. The statutory language of Ky. Rev. Stat. (KRS) 244.080, is sufficiently comprehensive to infer that the legislature intended such a duty. Here the argument is made by the appellants that the employee inferred he knew the minors had, by one means or another, obtained alcoholic beverages on the premises. A reasonably prudent person, especially by virtue of the experience gained by working at a liquor store, knows the ingenuity of

teenagers to be such that a third party is frequently used to purchase their liquor. If these allegations are found to be factual then the knowledge of the employee is imputed to the appellee. Genuine issues of fact exist and a summary judgment should not have been granted. I would send it back for trial. Steelvest, Inc. v. Scansteel Service Ctr., Inc., Ky., 807 S.W.2d 476 (1991) and Paintsville Hospital Company v. Rose, Ky., 683 S.W.2d 255 (1985).

BRIEF FOR APPELLANTS:

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