CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG
Alternative Dispute Resolution
❖ Resolution Arts Building ❖
2630 J Street, Sacramento, CA 95816
ph: (916) 442-6739 • fx: (916) 442-4107
elong@ernestalongadr.com • www.ernestalongadr.com

Fiorini v City Brewing Company, LLC 11/6/14

Products Liability; B & P Code section 25602; Civil Code section 1714; Multi-ingredient product; Interactive effects; Common consumer product

On October 5, 2010, at approximately 2:00 p.m., plaintiff's decedent met with two friends at a gym in Fresno and lifted weights. According to the young man's friends, his demeanor at the time was unremarkable and normal. Fiorini and his friends left the gym and drove to the SSS Chevron convenience store. Fiorini purchased two cans of Four Loko, beer, and sandwiches. After leaving the convenience store, Fiorini drove to his friends' apartment where he drank the two cans of Four Loko and a quantity of beer. Fiorini then began to act in an irritated, agitated and disoriented manner—a manner that his friends had not seen previously.

At approximately 5:00 p.m., Fiorini left his friends' apartment and drove to a house he rented with two others. After arriving home, he exhibited unusual behavior and made statements about an impending riot and also stated "they're coming to get us." Thereafter, Fiorini became extremely disoriented, excited, agitated, and paranoid. At some point, Fiorini located his shotgun, went into the backyard and began firing at targets leaning against a fence. While in the backyard, Fiorini again told a housemate to get in the house as "they" were coming to get them. His housemates then called 911 and requested police assistance. After police officers arrived at the scene, Fiorini came out onto the front porch of the house with the shotgun resting on his shoulder. The police officers opened fire, shooting him eight times. Fiorini died instantly.

Defendant Phusion Projects, LLC (Phusion) invented and owned the caffeinated, alcoholic beverage line known as Four Loko and was in the business of formulating, marketing, and selling Four Loko. Defendant City Brewing brewed, bottled, and labeled Four Loko for Phusion and its business also included distributing and selling Four Loko. Defendant Donaghy Sales, LLC (Donaghy Sales), sold and distributed the product, and Defendant Sukhjit S. Sangha owned the SSS Chevron where Fiorini purchased the two cans of Four Loko, beer, and sandwiches on the day he died. City Brewing is the only defendant remaining in this appeal. The other defendants were dismissed, either voluntarily or involuntarily.

In his wrongful death action, Plaintiff claims the product consumed by his son, the decedent, called "Four Loko," was sold in the United States in 23.5-ounce nonresealable cans, which was approximately twice the size of the standard 12-ounce can of soda or beer. It contained 12 percent alcohol by volume in the version sold in California; this amount of alcohol was equivalent to five or six 12-ounce cans of beer. One can also contained as much caffeine as two cups of coffee or three to four cans of Coca-Cola. It also contained the stimulants guarana, taurine, and wormwood. Wormwood is the active ingredient in absinthe. Four Loko also contained sugar, natural and artificial flavors, and carbonation. As formulated in October 2010, consumption of a single can of Four Loko would cause a 225-pound man to achieve unlawful intoxication as defined by California's traffic laws.

Plaintiff asserted in the complaint that the marketing and sales efforts for Four Loko targeted underage and college-aged consumers and promoted overconsumption. Also, Four Loko was sold primarily in convenience stores where clerks were less likely to verify a customer's age or might fail to recognize it as containing alcohol. Four Loko acquired nicknames because of its potency and disorienting effects, including "liquid cocaine," "liquid crack," and

"blackout in a can." Plaintiff described Four Loko as the quintessential alcoholic energy drink and alleged such drinks posed health risks by masking intoxication.

Plaintiff's complaint referred to studies and articles that addressed the effects of ingesting alcohol, caffeine, and other stimulants together. One study found that when the ingestion of alcohol alone was compared to the ingestion of alcohol and an energy drink, the subject's perception of impaired motor coordination was reduced significantly without an objective reduction in the deficits caused by alcohol on objective motor coordination and visual reaction time. Another article reported that students who mix alcohol with energy drinks have a significantly higher prevalence of alcohol-related consequences, including being taken advantage of sexually, taking advantage of another sexually, riding with an intoxicated driver, being physically injured, and requiring medical treatment.

The complaint also described actions by the FDA related to alcoholic beverages that contained caffeine and other stimulants. After obtaining information from Phusion, the FDA sent Phusion a letter dated November 17, 2010, stating that caffeine, as used in Four Loko, was an unsafe food additive and, therefore, Four Loko was adulterated under the Food, Drug, and Cosmetic Act (21 U.S.C. § 342(a)(2)(C)). Similarly, the Federal Trade Commission issued a letter dated November 17, 2010, advising Phusion that "its marketing and sale of Four Loko and Four Maxed may constitute an unfair or deceptive act or practice in violation of the Federal Trade Commission Act, 15 U.S.C. § 45." On November 16, 2010, in anticipation of the position of federal regulators, Phusion announced it would reformulate Four Loko and remove caffeine.

Plaintiff alleged that ordinarily, the amount of alcohol Fiorini consumed that day would have caused him to lose consciousness or to act in a subdued manner. Instead, because of Four Loko's high caffeine content and the presence

of other stimulants, Fiorini remained awake and in an extremely disoriented, agitated, and paranoid state of mind.

Plaintiff's negligence cause of action alleged City Brewing owed a duty of reasonable care to the public to (1) provide Four Loko free of defects and dangers and (2) adequately warn of dangers and risks known to City Brewing. Plaintiff also alleged City Brewing breached this duty as it (1) labeled, distributed, and sold Four Loko in a manner so as to make it unsafe and inherently dangerous for consumption by the intended, foreseeable consumer and (2) misled and inadequately warned consumers as to Four Loko's contents, potency, and dangerousness.

Plaintiff's strict liability cause of action alleged (1) Four Loko was defective and unreasonably dangerous; (2) consumers were inadequately warned as to Four Loko's contents, potency, and dangerousness; (3) City Brewing was in the chain of distribution from Phusion to Fiorini; and (4) but for the defects and inherent dangers in Four Loko and related failure to warn, Fiorini would not have achieved the level of intoxication, disorientation, and agitation he experienced on October 5, 2010.

In response to the complaint, City Brewing filed an answer, while Phusion and Donaghy Sales filed demurrers. The trial court sustained the demurrers of Phusion and Donaghy Sales without leave to amend and stated "the sweeping immunity of Business and Professions Code section 25602 applies to bar Plaintiff's action."

This ruling prompted City Brewing to file a motion for judgment on the pleadings. The motion echoed the demurrers by arguing plaintiff's claim was "barred by immunity, afforded by statute and common law, for those who sell or furnish an alcoholic beverage from liability for injuries to (or by) an intoxicated consumer of the beverages. (§ 25602; Civ. Code, § 1714, subd. (b).)" Plaintiff

opposed the motion, arguing section 25602 did not apply. The trial court granted the motion and on February 5, 2013, the trial court entered a judgment in favor of City Brewing that stated plaintiff's claims were dismissed with prejudice.

In the appeal to the Fifth District Court of Appeal the Justices began their opinion by noting that **the ability of plaintiff to allege a cause of action turns on whether City Brewing is immune under California's dram shop statutes.** (§ 25602; Civ. Code, §§ 1714, subd. (b), 1714.45, subd. (a).)

"Prior to 1971, California courts uniformly held that the *consumption* of alcoholic beverages, rather than the *serving* of alcoholic beverages, was the proximate cause of injuries resulting from the intoxication of the imbiber." In *Vesely v. Sager* (1971) 5 Cal.3d 153, a unanimous California Supreme concluded that a tavern keeper owed a duty of care to the public based on the version of section 25602 then in effect, which stated that every person who sold any alcoholic beverage to any obviously intoxicated person was guilty of a misdemeanor.

About five years later, the California Supreme Court extended this duty of care to out-of-state businesses that sell alcoholic beverages to intoxicated patrons who subsequently have an automobile accident in California and inflict injuries upon a California resident. (*Bernhard v. Harrah's Club* (1976) 16 Cal.3d 313). The next extension of the duty of care occurred in *Coulter v. Superior Court* (1978) 21 Cal.3d 144 when the court extended the duty of care to social hosts, stating that the "danger of ultimate harm is as equally foreseeable to the reasonably perceptive host as to the bartender. The danger and risk to the potential victim on the highway is equally as great, regardless of the source of the liquor."

Less than five months after *Coulter* was decided, the Legislature adopted Senate Bills Nos. 1645 and 1175, which were chaptered by the Secretary of State

on September 20, 1978. This legislation reversed the judicial extension of civil liability for the furnishing of alcohol.

Senate Bill 1645 amended section 25602 by designating its existing provision as subdivision (a) and adding subdivisions (b) and (c). The new subdivisions stated persons who committed the misdemeanor defined in subdivision (a) had no civil liability and declared how section 25602 "shall be interpreted." The current version of section 25602 provides:

> "(a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.
>
> "(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.
>
> "(c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Vesely* …, *Bernhard* …, and *Coulter* … be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person." (Italics added.)

In addition, Senate Bill 1645 amended Civil Code section 1714 to address the *Vesely-Bernhard-Coulter* decisions with much broader language than used in

subdivision (c) of Business and Professions Code section 25602. Civil Code section 1714 now provides, in part:

> "(b) It is the intent of the Legislature to abrogate the holdings in cases such as *Vesely* …, *Bernhard* …, and *Coulter* … and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person."

By enacting Senate Bill 1645**, the Legislature "in essence created civil immunity for sellers and furnishers of alcohol in most situations**." (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 701.) In *Strang v. Cabrol* (1984) 37 Cal.3d 720 (*Strang*), the court described the provisions added by Senate Bill 1645 as providing a "sweeping civil immunity." Here, as background for the analysis of the scope of subdivision (c) of section 25602, the Justices evaluated whether subdivision (a) or (b) applied to the factual allegations made against City Brewing.

Business and Professions Code section 25602 Analysis:

Subdivision (a) of section 25602 states that selling, giving, or furnishing an alcoholic beverage to certain persons is a misdemeanor. Plaintiff's factual allegations against City Brewing, if accepted as true, are insufficient to establish City Brewing committed the misdemeanor for two reasons. First, the complaint's allegations do not describe Fiorini as a person who may not be given an alcoholic beverage—that is, a "habitual or common drunkard" or an "obviously intoxicated person." Second, even if Fiorini had been such a person,

City Brewing did not sell or cause the cans of Four Loko to be sold to Fiorini. Rather, the complaint alleges SSS Chevron sold the cans of Four Loko to Fiorini. Therefore, the only person or entity in the chain of supply that might have committed the misdemeanor defined by subdivision (a) of section 25602 by selling Four Loko to Fiorini was SSS Chevron—the only entity in a position to know if it was selling, giving, or furnishing Four Loko to a common drunkard or an obviously intoxicated person.

Subdivision (b) of section 25602 creates a civil immunity, but the immunity is limited to persons who have supplied an "alcoholic beverage pursuant to subdivision (a) of this section." The scope of this statutory limitation is not ambiguous. The immunity applies to protect a person who is alleged to have breached a duty to the public by committing the misdemeanor defined in subdivision (a) of section 25602. Here, City Brewing is not alleged to have committed the misdemeanor when it brewed, bottled, and labeled the cans of Four Loko eventually consumed by Fiorini. Therefore, **the civil immunity provided by subdivision (b) of section 25602 does not apply to the allegations against City Brewing.**

The single sentence in subdivision (c) of section 25602 contains the Legislature's declaration that "this section shall be interpreted so that …." This language, when read in context with the more direct language in subdivision (b) of Civil Code section 1714, establishes that subdivision (c) of Business and Professions Code section 25602 does not set forth an independent rule of law, but serves as a guide for how courts should interpret the substantive provisions in subdivisions (a) and (b) of section 25602. Because the misdemeanor and immunity provisions in section 25602 do not apply to the allegations against City Brewing, the declaration about how section 25602 must be interpreted has no direct application in this appeal.

City Brewing—apparently recognizing that the claims against it do not fit within the terms of section 25602—contends the trial court's decision is supported by Civil Code section 1714 and we may affirm that decision on any basis presented by the record, whether or not relied upon by the trial court. City Brewing argues that Civil Code section 1714 was presented below because its motion for judgment on the pleading explicitly referred to that statute.

We agree with City Brewing that the potential application of Civil Code section 1714 to this case presents a theory of law that might be a basis for sustaining the trial court's decision. (See *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329 [a decision, correct in law, will not be disturbed on appeal merely because given for the wrong reason].) Consequently, we turn to the broader language contained in subdivision (b) of Civil Code section 1714 and examine whether that provision operates as a bar to plaintiff's claims.

Civil Code Section 1714 Analysis:

The version of section 1714, subdivision (b) currently in effect reinstates the common law rule that immunized from civil liability those who furnish alcoholic beverages to a person who then injured himself or herself or a third party as a result of intoxication. (*Rybicki v. Carlson* (2013) 216 Cal.App.4th 758, 762.)

The parties have raised many issues regarding the applicability of this immunity to City Brewing. The Fifth DCA limited its discussion to the meaning of the statutory term "furnishing" and whether City Brewing furnished the cans of Four Loko to Fiorini. It concluded a beverage's manufacturer, separated from the ultimate consumer by a regional distributor and a local retail outlet, does not "furnish" the beverage to the consumer. Applying this interpretation to the allegations of the complaint, the Justices concluded that City Brewing did not furnish the Four Loko to Fiorini and, therefore, City Brewing is not protected

from plaintiff's product liability claims by the civil immunity contained in Civil Code section 1714, subdivision (b).

The trial court concluded the term "furnish" logically applies to any entity in the chain of distribution that sells or otherwise transfers the beverage to the next link. City Brewing contended this interpretation is correct and, therefore, it is protected by the civil immunity in California's dram shop laws.

Plaintiff contends there are no federal or state cases that apply the civil immunity in California's dram shop laws to a products liability claim brought against the beverage's manufacturer. In plaintiff's view, the dram shop laws were not intended to protect manufacturers of defective and dangerous beverages from civil liability.

Civil Code section 1714, subdivision (b) contains the Legislature's statement of its intent "to abrogate the holdings in cases such as *Vesely* …, *Bernhard* …, and *Coulter* … and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of *furnishing alcoholic beverages to an intoxicated person*, namely that the *furnishing* of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person."

The edition of Black's Law Dictionary current at the time Civil Code section 1714, subdivision (b) was adopted contains the following definition of "furnish": "To deliver, whether gratuitously or otherwise. As used in liquor laws, 'furnish' means to provide in any way, and includes giving as well as selling." (Black's Law Dict. (4th rev. ed. 1968) p. 804.)

California courts have interpreted the terms "furnish" and "furnished" as requiring an affirmative act by the purported furnisher to supply the alcoholic

beverage to the drinker. (*Ruiz v. Safeway, Inc.* (2012) 209 Cal.App.4th 1455, 1460 (*Ruiz)* The decision in *Ruiz* demonstrates that the term "furnishing" does not encompass the entire chain of supply. In *Ruiz*, the parents of a child killed in an automobile accident brought an action against a supermarket under California's dram shop liability law. The parents alleged the supermarket furnished beer, or caused beer to be furnished, to the driver who caused the accident when its checker sold beer to the driver's companion. (*Ruiz*, *supra*, 209 Cal.App.4th at p. 1457.) The supermarket moved for summary judgment, which the trial court granted. The appellate court affirmed, concluding as a matter of law that the supermarket did not furnish beer to the driver. (*Id*. at pp. 1461, 1464.) The appellate court concluded the supermarket did not furnish the driver with beer because (1) the checker sold the beer to the defendant driver's companion and not the driver, and (2) "nothing about that sale constitutes an affirmative act directly related to the driver, or an act that *necessarily* would have resulted in the companion furnishing or giving that beer to the driver." Therefore, *Ruiz* is an example of a case where the term "furnished" was applied to exclude entities further up the chain of supply from the person who handed the beverage to the consumer.

In addition, the view that the term "furnishing" includes only transfers at the end of the chain of supply is supported by statutory text setting forth the Legislature's intent to "reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of *furnishing alcoholic beverages to an intoxicated person* …." (Civ. Code, § 1714, subd. (b).) The phrase "to an intoxicated person" suggests the furnisher would have some way of knowing whether or not the person was intoxicated, which further suggests that a furnisher would have some control over who received the beverage. This type of awareness and control is possible for social hosts, taverns, bars, and restaurants, but not for manufacturers who are far removed from the ultimate consumer.

The Fifth District thus concluded that the term "furnishing" as it appears in Civil Code section 1714, subdivision (b) requires the purported furnisher to perform an affirmative act in supplying the alcoholic beverage to the person who drank it.

Here, Plaintiff's complaint alleged (1) City Brewing brewed, bottled, and labeled the Four Loko purchased by Fiorini, (2) Donaghy Sales distributed the cans to SSS Chevron, and (3) SSS Chevron sold the Four Loko to Fiorini. Nothing in the complaint states, or provides a reasonable basis for inferring, that (1) City Brewing had any control over the cans of Four Loko after they were delivered to the Donaghy Sales or (2) City Brewing performed any affirmative act that caused the cans of Four Loko to be transferred into Fiorini's possession.

Based on the facts alleged, City Brewing did not "furnish" the Four Loko to Fiorini. Thus, City Brewing's motion for judgment on the pleadings cannot be granted on the ground City Brewing was immune from civil liability pursuant to Civil Code section 1714, subdivision (b).

Civil Code Section 1714.45 Analysis:

City Brewing also contends that the trial court's decision should be affirmed because manufacturers of alcohol are provided with a specific statutory immunity from product liability claims. City Brewing argues it is protected by subdivision (a) of Civil Code section 1714. 45, which provides:

> "(a) In a product liability action, a manufacturer or seller shall not be liable if both of the following apply:
>
> "(1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community.

> "(2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts."

City Brewing contends alcohol is a "common consumer product" and, because Four Loko contains alcohol, it too is a common consumer product. In addition, City Brewing asserts that adding caffeine to Four Loko did not take it outside the scope of the statute because caffeine is "the most widely used stimulant in the world, and a component of many common beverages, alcoholic or not." Implicit in the parties' arguments is **a dispute about the proper method for analyzing a multi-ingredient product and determining whether it qualifies as a common consumer product for purposes of Civil Code section 1714.45.**

City Brewing deconstructs Four Loko into the products of alcohol and caffeine and asserts they both unquestionably are consumer products whose dangers are common knowledge. From this foundation, City Brewing concludes that Four Loko is a common consumer product.

First, City Brewing has cited no case or secondary authority that (1) expressly adopts the deconstructionist approach for a multi-ingredient product or (2) states the multi-ingredient product is a common consumer product if some or all of the ingredients, standing alone, qualify as a common consumer product.

Second, City Brewing's deconstruction of Four Loko is incomplete because it does not address all of the stimulants the complaint alleged were contained in Four Loko, such as guarana, taurine, and wormwood. As a result, City Brewing has not demonstrated the risks inherent in those stimulants are matters of common knowledge.

Third, when a plaintiff alleges the manufacturer of a common consumer product has adulterated or contaminated that product, courts will not apply the immunity if the adulteration or contamination made the product unreasonably dangerous. (See *Naegele v. R.J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 864 (*Naegele*); Rest.2d Torts, § 402A, com. i, p. 352.) For instance, in *Naegele*, a smoker who developed lung cancer sued tobacco companies, alleging the companies manipulated the addictive properties of cigarettes by using additives and, more specifically, controlled nicotine delivery to the smoker by adding ammonia. (*Naegele*, at p. 865.) The conduct complained of occurred when tobacco was still listed in Civil Code section 1714.45 as an inherently unsafe common consumer product known to the ordinary consumer as unsafe. The California Supreme Court concluded the statutory immunity did not bar claims alleging "tobacco companies, in the manufacture of cigarettes, used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking." (*Naegele*, at p. 861.) The court stated the immunity statute was intended to protect tobacco companies that made and sold products containing tobacco that is pure and unadulterated.

Similarly, comment i to Section 402A of the Restatement Second of Torts (Restatement) describes unreasonably dangerous products by stating:

> "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous."

Naegele and section 402A of the Restatement demonstrate that the dangers and risks associated with the product in question must be considered as a whole. We conclude the reasoning underlying this approach justifies extending it

beyond contaminated product claims to cases where a plaintiff alleges some of the product's ingredients mask or enhance the dangerous attributes of other ingredients and thereby create an unreasonably dangerous product. The law should not ignore interactive effects that might render a product more dangerous than is contemplated by the ordinary consumer who purchases it and possesses the ordinary knowledge common to the community as to the product's characteristics. Therefore, when a court addresses whether a multi-ingredient product is a common consumer product for purposes of Civil Code section 1714.45 and the ingredients have an interactive effect, the product and its inherent dangers must be considered as a whole so that the interactive effects of its ingredients are not overlooked or trivialized.

Here, plaintiff alleged (1) Four Loko's dangerousness was due to the *combination* of high levels of alcohol and stimulants and (2) alcoholic energy drinks, such as Four Loko, posed health risks by masking intoxication. Based on these allegations, which are accepted as true for purposes of this appeal, we conclude whether Four Loko was a common consumer product for purposes of Civil Code section 1714.45 must be determined by analyzing the beverage as a whole rather than considering the effects of its ingredients in isolation from one another.

The factors relevant to whether Four Loko was a common consumer product include, but are not limited to, (1) how long Four Loko and, more generally, alcoholic energy drinks have been available to consumers and (2) how well the effects of the product are understood.

The complaint alleged that Four Loko was created in 2005 and Four Loko and other alcoholic energy drinks were banned, in effect, by the November 2010 letters of the FDA and Federal Trade Commission. Thus, the product life of the version of Four Loko sold to Fiorini was relatively short when compared to the product life of the consumer products of "sugar, castor oil, alcohol, and butter"

that are listed in subdivision (a)(2) of Civil Code section 1714.45. This short product life supports the inference that Four Loko was not a common consumer product.

The community's understanding of alcoholic energy drinks is a topic addressed in the articles attached to plaintiff's complaint. The 2008 article stated that the effects of combining caffeine and the other ingredients of energy drinks (such as guarana, yerba mate, taurine, carnitine, creatine, ginkgo, biloba, ginseng and vitamins) are incompletely understood. The 2006 article addressing the ingestion of alcohol and energy drinks stated there was "little scientific evidence on the interaction of these substances." These statements indicate the combination of stimulants and alcohol in Four Loko was not a common consumer product.

These inferences precluded the Justices from finding, as a matter of law, that Four Loko was a common consumer product for purposes of Civil Code section 1714.45, subdivision (a). As a result, that factual question should be presented to the trier of fact.

The judgment in favor of City Brewing is reversed. The trial court is directed to vacate its ordering granting City Brewing's motion for judgment on the pleadings and file a new order denying that motion. Plaintiff is to recover his costs on appeal.

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