

1997

Michael L. Adkins and Roberta B. Adkins v. Uncle Bart's INC., dba, Uncle bart's Club, et al., : Reply Brief

Utah Court of Appeals

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UTAH SUPREME COURT
BRIEF

970261

IN THE UTAH SUPREME COURT

MICHAEL L. ADKINS and
ROBERTA B. ADKINS

Plaintiffs/Appellants,

vs.

UNCLE BART'S INC., dba ,
UNCLE BART'S CLUB et al.

Defendants/Appellees.

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Appellate Court No.: 970261

REPLY BRIEF OF THE PLAINTIFFS / APPELLANTS

Appeal from the Third District Court, Salt Lake County, Judge
Timothy Hanson

Priority Number 15

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MICHAEL L. ADKINS and)	
ROBERTA B. ADKINS)	
)	
Plaintiffs/Appellants,)	
)	
vs.)	
)	
UNCLE BART'S INC., dba ,)	Appellate Court No.: 970261
UNCLE BART'S CLUB et al.)	
)	
Defendants/Appellees.)	
)	

Appeal from the Third District Court, Salt Lake County, Judge
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LIST OF ALL PARTIES

MICHAEL L. ADKINS AND ROBERTA B. ADKINS,
PLAINTIFFS / APPELLANTS

v.

CHARLEY'S CLUB INC. dba CHARLEY'S CLUB,
*ANN SISTTIE dba, THE CLUBHOUSE, CLUB
MANAGEMENT INC., JAMES D. MICKELSON,
DOUGLAS J. MICKELSON, JEANNIE B. MICKELSON,
MARLENE M. MICKELSON, JUDY DUKE, TRACY
DUKE, **PAUL G. BREDEHOFT, JOHN DOES
AND JANE DOES 1 TO 10

DEFENDANTS / APPELLEES

* The jury ruled in favor of Ann Sisttie dba, The Clubhouse.
No Appeal was taken from that decision.

** Paul Bredehoft did not appeal the decision against him.

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ARGUMENT

POINT ONE: UTAH STATUTES AND COMMON LAW PROVIDE MULTIPLE MEANS OF RECOVERY AGAINST PROVIDERS OF ALCOHOL. THE DRAMSHOP ACT IS NOT AN EXCLUSIVE REMEDY.

Counts two and three of Plaintiff's Complaint (R. 6) allege causes of action for negligent sale of alcohol to an intoxicated or interdicted person by Defendants and willful and wanton conduct of Defendants. These two causes of action are based upon negligence and willful misconduct in violation of statute. The lower Court dismissed those causes of action and ruled that the Dramshop Act was Plaintiff's exclusive remedy.

Plaintiff's position is that the Court erred as a matter of law in making that ruling and that in fact, Plaintiff's have a common law cause of action and a cause of action for statutory violation against the liquor providers. This is the subject of Point 3 of Plaintiff's opening brief.

seeking to justify the ruling of the Court,
arg y and ask this Court to rule that the Dramshop
Act other common law and statutory remedies.

to it's defense of the Court Order ruling that
the Dramshop Act pre-empted all other causes of action, Defendants
purport to provide a history of liability in Utah for furnishing
alcohol to another. In so doing, the cases of *Yost v. State* 640
P.2d 1044 (Utah 1981) and *Rees v. Albertson's, Inc.* 587 P.2d 130
(Utah 1978) are cited.

In Footnote No. 8, Defendants state that neither *Rees* nor
Yost are traditional "Dramshop" cases. They claim that in each

case, the injured Plaintiffs were minors who had purchased alcohol directly from the Defendants.

That statement is not true. In *Rees*, the action sought contribution for fifty four thousand, seven hundred forty two and 50/100 dollars (\$54,742.50), which had been paid on the part of Rees in satisfaction of claims against him. The summary judgment in favor of Albertson's was reversed and remanded by this Court. It will be noted that this appears to be an insurance subrogation and not a suit against Albertson's, Inc. for injuries to Rees. The plain implication of that case is that Dramshop liability existed in this state before the passage of the Dramshop Act and that there was third party causes of action.

In *Yost*, the statement of facts shows that all of the alcohol was purchased by one Hammond (age 18), a friend of Yost. Here again, this Court has approved an action against a liquor provider to third persons who injured the claimant. A careful reading of that case will show that the action is by the person to whom the liquor was sold. This shows conclusively that there was common law Dramshop Liability in this state before the adoption of the first Dramshop Act in 1981.

Defendants then claim that the Dramshop Act pre-empted all common law causes of action and bases the assertion on *Retherford v. AT&T Communications* 844 P.2d 949 (Utah 1992).

We again point out that Plaintiffs suit embraces several causes of action. One of which relates to the negligent sale of

alcohol to Paul Bredehoft, which is a common law claim and the violation of the Alcohol Beverage Control Act. The issue in *Retherford* was whether the employees' common law claims were pre-empted by the Utah Anti Discrimination Act or by the Federal Taft Hardley Act. The statute of limitations had run on a number of the claims that could have been brought under those two acts. However, there were other claims not embraced within the two acts and Plaintiff was permitted to proceed to trial on those claims.

Retherford dealt only with statutory pre-emption regarding common law claims. Plaintiff's causes of action assert claims under both the Dramshop Act, common law negligence and violation of the Alcohol Beverage Control Act. Both statutes were adopted at the same legislative session (in 1985). There is nothing in either act which states that it is an exclusive remedy. (cf Title 34A-5-107(15), which specifically states that the procedures contained in that section are the exclusive remedy under state law for employment discrimination). The two liquor sections of the law stand on equal footing. How can it be said that one statute pre-empts the other, or that either pre-empt common law causes of action?

The 1997 Legislature amended the Dramshop Act (32A-14-101). Each house of the Legislature adopted virtually identical "intent language" for the amendments. The Senate Journal contains the following:

INTENT LANGUAGE FOR SUB. S.B. 112

On Motion of Senator Buhler, the following intent language is printed in the Senate Journal. Senator Mayne commented.

The express inclusion of wrongful death to Section 32A-14-101 does not create a new right but merely clarifies that a person has the right to recover both special and several (sic general) damages for wrongful death under the Dramshop Act.

The bill does not modify any common law right that exists for injuries or wrongful death resulting from giving, selling, or otherwise providing alcoholic beverages.

The House Journal states the intent language as follows:

INTENT LANGUAGE ON Sub s.b. 112

In passing 1st Substitute Senate Bill 112, Dramshop Liability Amendments, the Legislature intends the following:

The express inclusion of wrongful death to Section 31A-14-101 does not create a new right but merely clarifies that a person has the right to recover both special and general damages for wrongful death under the Dramshop Act.

The bill does not modify any common law right that exists for injuries or wrongful death resulting from giving, selling, or otherwise providing alcoholic beverages.

When the Defendants asked this Court to adopt their reasoning that the "Dramshop Act pre-empts all other common law and statutory claims of civil liability for furnishing alcohol to another", they may not have been aware that the Legislature of the State of Utah does not agree.

This Court must reverse the lower Court Order dismissing Plaintiffs' statutory and common law claims.

POINT TWO: THE DRAMSHOP DAMAGE CAP IS NOT CONSTITUTIONAL.

Under this point, Defendant argues only that Article XVI, § 5 of the Utah Constitution has no application to this case. In support, it cites cases, such as *Tiede v. State* 915 P.2d 500 (Utah 1996) and *McCorvey v. Department of Transportation* 868 P.2d 41 (Utah 1993). Those cases deal only with the concept of "Governmental Immunity". The state can be sued only if it gives it's consent. If the state does consent, then it may impose conditions on that consent including a damage limitation. In the case of *Condemarin v. University Hospital* 775 P.2d 348 (Utah 1989), cited but not discussed by Defendant, the Court determined that the University Hospital was acting in a proprietary capacity and therefore, the damage cap was constitutionally flawed under a due process and uniform operation of the laws analysis. *Condemarin* has controlling importance in this case.

In Plaintiff's opening brief, numerous provisions of the Utah Constitution are cited, each of which or in combination, show that the damage cap is unconstitutional.

Defendants dismiss all of Plaintiff's arguments in that regard by stating that Plaintiffs never raised these constitutional issues in the trial court and hence they cannot be asserted on appeal. The statement is astonishing to say the least. The attention of the Court is invited to a Memorandum filed by Plaintiffs on June 27, 1996, following the entry of the verdict in this case (R. 1288). The Court will see immediately that Plaintiffs cite Article XVI, § 5 of the Utah Constitution as well as Article I, § 24 (Uniform Operation of Laws) and Article

I, § 11 (Open Courts of the Utah Constitution). Even further, in a Memorandum filed on August 5, 1996, in response to the brief of Amicus (R. 1425), Plaintiffs stated at Pg. 1427:

In a footnote to "Amicus" Point II it is stated that there are no constitutional issues in this case because a common law action against a liquor provider did not exist. The premise for the conclusion is erroneous and even further, there are several constitutional provisions that bear on this case regardless of whether a common law action against a liquor provider existed. So that there will be no doubt in anyone's mind, the damage cap in the Dramshop Act violates the following provisions of the Utah Constitution:

1. Article I, § 7 (Due Process of Law)
2. Article I, § 10 (Trial by Jury)
3. Article I, § 11 (Open Courts)
4. Article I, § 24 (Uniform Operation of Law)
5. Article XVI, § 5 (Wrongful Death - Damages)

Cases already before this Court, such as *Condemarin v. University Hospital* 775 P.2d 348 (Utah 1989), point to the conclusion that when the rights of a class of citizens are taken away by the Legislature, such as the damage cap in this case, the Legislation cannot pass the heightened scrutiny test imposed by the Utah Constitution. Even before that point is reached, the damage cap must fail under Article XVI, § 5 where the Legislature is prohibited from abrogating the Wrongful Death Statute or limiting the amount of damage thereunder.

Although the lower Court disagreed with Plaintiffs' position regarding the constitutional issues, it clearly knew that they had been briefed and argued. In it's Memorandum decision (R. 1521), after discussing Article XVI, § 5 of the Utah Constitution, the Court states at Page 1524, the following:

The Court does not find that the other constitutional provisions relied upon by the Plaintiffs could allow this Court to declare the damage cap unconstitutional. Accordingly, this Court is required to grant Defendant private clubs' motion to enter the Judgment against them in accordance with the damage limitation imposed by legislative mandate.

There can be no question that all of the constitutional issues raised by Plaintiff on this appeal, were cited and argued before the lower Court.

POINT THREE: PLAINTIFFS DO HAVE STANDING TO SUE THE DEFENDANT LIQUOR PROVIDERS FOR THE WRONGFUL DEATH OF THEIR SON, SEAN ADKINS.

Defendants claim under this point that Plaintiffs lack standing to sue and as support for that proposition, they adopt points I, II, and III of the brief filed by Amicus.

Defendants raise this issue for the first time on appeal. It is true that this issue first surfaced in the lower Court in a memorandum filed, not by Defendants, but by Amicus after the case had been tried. In its brief, in an argument before the Court, it suggested to the Court that the Utah Dramshop Act did not allow a suit for wrongful death, and therefore the case should be dismissed.

The lower Court dealt summarily with that assertion and ruled that the Utah Dramshop Act did embrace a cause of action for wrongful death and that if the Legislature intended that result, it did not so state. The lower Court stated:

While the courts must follow the clear mandates of legislative statutes, the language relating to the types of injuries and damages that may be sued upon under the Dramshop Act is less than a model of clarity. A fair reading of the statute does not suggest to this Court that the Legislature intended to allow recovery for injuries and damages as a result of a violation of the Dramshop Act for any injury or loss, as long as it does not result in death, the greatest loss. Where a legislative statute and its scope are not clear or is ambiguous, this Court should not impose an interpretation upon that legislative statute that causes an unreasonable result. There is no logical reason, either in this record or in the Court's mind that could justify a conclusion that the Legislature in creating a statutory right of action against a liquor provider as contained in the Dramshop Act, intended to exclude a cause of action to persons who had suffered a loss because of the death of a child, such as the plaintiffs here. If the Legislature was intent on carving out an exception to

persons who have a cause of action under the Dramshop Act so as to exclude death claims, it could have easily said so, and it did not. This Court declines to read such an illogical statement to the unclear language of the statute. (R. 1527-1528)

Amicus requested and was granted leave to file a brief by this Court. The three points contained in the current brief and relied upon by Defendants are similar to those asserted below. They are:

POINT ONE: THE WRONGFUL DEATH ACT DOES NOT APPLY TO THE UTAH DRAMSHOP ACT.

POINT TWO: PLAINTIFFS MAY NOT RECOVER UNDER THE DRAMSHOP ACT FOR THE DEATH OF THEIR SON.

POINT THREE: THE COURT IS NOT BOUND BY THE PARTIES STIPULATION THAT THE WRONGFUL DEATH ACT PROVIDES A BASIS FOR RECOVERY AGAINST THE DRAMSHOP DEFENDANTS.

A. This Court will not consider issues raised for the first time on appeal.

The Defendants would, of course, have accepted a dismissal of this case based upon the suggestion of Amicus. However, they made no issue of that point in the lower Court. It was not until this appeal that Defendants adopt the position of Amicus.

This Court has announced in a number of cases that it will not entertain an issue raised for the first time, post judgment or on appeal. *LeBaron & Associates v. NEC Information Systems* 823 P.2d 479 (Utah 1991) cited therein are *Turtle Management, Inc. v. Hagas Management, Inc.* 645 P.2d 667 (Utah 1982); and *James v. Preston* 746 P.2d 799 (Utah Ap. 1987). In the *LeBaron* case, it is stated:

... It would make little sense to allow a party to proceed at trial without submitting a legal theory to the court, and then allow that party to raise the issue

following trial and require the court to re-open trial to consider the issue... (*LeBaron & Associates Supra*)

B. The Defendants Stipulated that the Wrongful death statutes of the State of Utah fully applied in this action.

On the 5th day of April, 1996, at a hearing of motions pending before the lower Court, Defendants stipulated that the wrongful death statute for the death of a child applied without exception, to Plaintiffs cause of action. This Stipulation was embodied in a Court Order dated April 22, 1996. A copy of the Court Order (R. 1025-26) is attached as Addendum "A", to this brief. The case was tried to the jury, based in part upon that Court Order. When a party stipulates to a matter of fact of law before trial, and then attempts to repudiate that stipulation following trial, this is entirely inappropriate and beyond the scope of any procedural rule.

C. The wrongful death statutes apply to the Utah Dramshop Act.

The Utah Legislature has stated its intent regarding causes under the Dramshop Act in the broadest terms. The liquor provider is liable for:

Injuries in person, property, or means of support to any third person, or to the spouse, child, or parent of that third person, resulting from the intoxication. (Title 32A-14-101(1))

Then to emphasize that intent, it added Section (3) to the Statute which reads:

A person who suffers an injury under Subsection 1 has a cause of action against the person who provided the alcoholic beverage in violation of Subsection 1.

When the Legislature provided a cause of action to a spouse, child or parent of the third person, it obviously contemplated a wrongful death action.

When the Legislature amended the Dramshop Liability Act in 1997, it made the above interpretation clear in its intent language.

The express inclusion of wrongful death to Section [32A-14-101] does not create a new right but merely clarifies that a person has the right to recover both special and general damages for wrongful death under the Dramshop Act. (Senate Journal, Friday, January 31, 1997 and House Journal, Wednesday, February 19, 1997)

If further support were needed, the Court is invited to consider the case of *Beaupre v. Boulevard Billiard Club* 510 A.2d 415 (Rhode Island 1986). In that case the lower Court held that the Dramshop Act of Rhode Island did not allow a wrongful death action. On appeal, the Court reversed, stating as follows:

Section 3-11-1 represents the current trend in our society to deal with the serious problem of alcohol-related injury by holding those individuals who dispense intoxicating beverages in violation of liquor laws responsible for the consequences of their actions. It is the manifest intent of the Legislature that this statute be construed liberally to further the Legislature's declared purpose of promoting the reasonable control of the traffic in alcoholic beverages G.L. 1956 (1976 Reenactment) § 3-1-5. To implement this legislative intent, the statute was couched in the broadest of terms, allowing recovery for "any injury" caused by the wrongful action of an intoxicated person. The pain and suffering associated with a fatal injury as well as the wrongful death of an individual are certainly within the context of the phrase "any injury to the person". The plain language of the statute, when coupled with the clear legislative intent, compels a finding that the wrongful death of an individual constitutes a compensable injury under § 3-11-1.

POINT FOUR: THE TRIAL COURT DID NOT ERR IN RULING THAT PUNITIVE DAMAGES COULD BE AWARDED IN THIS CASE.

Under this point, Defendants state that the Dramshop Act does not provide for punitive damages, therefore, punitive damages cannot be awarded.

Whether punitive damages can be awarded against Dramshop Defendants is a matter of first impression. This issue is inferentially addressed in the case of *Biswell v. Duncan* 742 P.2d 39 (Utah 1987). The appeals court held:

After careful examination of the authorities on this question, we hold that punitive damages are recoverable against a drunken driver in an automobile personal injury case where it can be established (1) that the Defendant motorist acted with actual malice or a reckless disregard of the rights and safety of others, and (2) that his drunken driving was a contributing cause of the accident. We believe that one who drives a car after voluntarily drinking to excess, with its great potential for causing serious injury, could be found, under proper circumstances, to demonstrate a "reckless indifference to the rights of others" sufficient to allow the issue of punitive damages to be considered by the trier of fact...

... Cognizant of the grave problems drunk driving poses, the Utah Legislature has enacted one of the strongest impaired driving laws in the country. See Utah Code Ann. §§ 41-6-44 -41-6-44.20 (1987). In addition, the 1981 Legislature passed the "Dramshop Act" which imposes liability for those who provide intoxicating liquors which result in injuries to third persons. Utah Code Ann. § 32A-14-1 (1986). These statutes represent a legislative determination that public safety is gravely endangered when a person operates a motor vehicle after consuming alcoholic beverages...

Following *Biswell*, the Legislature adopted 17-18-1 UCA 1953 relating to punitive damages. The statute in part reads:

(1) (a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the

tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward and a disregard of, the rights of others.

(b) The limitations, standards of evidence, and standards of conduct of Subsection (1)(a) do not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-66-44...

The standards and limitations in the act do not apply to intoxicated drivers and that by necessary implication, should not apply to those who furnish the alcohol.¹ As stated in *Biswell*, punitive damages may be awarded against intoxicated drivers. It must logically follow that punitive damages may be awarded against those who supply the alcohol. There is no provision of the Dramshop Act which states or implies that punitive damages may not be awarded. This case gives the Court an opportunity to extend the reasoning of *Biswell* and to clearly state that punitive damages may be awarded against alcohol providers under the same standards as applied to intoxicated drivers.

Here the two clubs gave the driver Bredehoft enough alcohol to bring his BAC to 0.27 at the time of the accident. This is three and one half times the statutory limit. Clearly that type of conduct must be punished and punitive damages appears to be the only way to impose responsibility.

¹ The Lower Court, in it's instructions submitted the issue to the jury on a clear and convincing standard.

POINT FIVE: THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE INDIVIDUAL MICKELSON DEFENDANTS AND CLUB MANAGEMENT, INC.

Before trial, the lower Court granted summary judgment to the individual Mickelson Defendants and Club Management, Inc.

In support of the summary judgment granted by the lower Court, Defendants base their claim of immunity upon the fact that they complied with the law in that the two private clubs, Uncle Bart's Club and Charley's Club were properly formed non-profit corporations and that Club Management, Inc. the profit corporation was properly formed and existing at the time of the events giving rise to the action and did not sell liquor to Paul G. Bredehoft.

The Mickelson Family had such a community of interest in ownership with the three corporations that the separate personalities of the corporation and the individuals no longer existed; and that to sanction a corporate shield in this case would promote an injustice. Furthermore, the various elements relating to this subject disclosed by the facts developed prior to trial, show that there is a genuine issue of material fact that should have been determined by a jury.

The facts taken from the financial documents and depositions of the individuals show the following:

1. Uncle Bart's Club and Charley's Club were acquired by Mickelsons for approximately \$31,000.00 in about 1989 or 1990. The personal property represented by that purchase became the property of Club Management, Inc. This property is leased to Uncle Bart's Club and Charley's Club under the terms of a

Management Agreement between Club Management, Inc. and two other clubs. Neither of the private clubs have any assets.

2. All of the officers, trustees, and directors of the Club Management, Inc., and the two clubs are all members of the Mickelson Family. There are no outsiders.

3. It is not possible from reference to the stock certificates attached to Defendant's Memorandum to determine who the stock holders are in Club Management, Inc., except James D. Mickelson and Jeannie B. Mickelson. There is some indication that Douglas J. Mickelson and Marlene M. Mickelson were stockholders but there is no certificate to so indicate. Jeannie B. Mickelson, in her deposition, did not know whether she was a stockholder of Club Management, Inc. (Deposition of Jeannie B. Mickelson, Page 13)

4. Uncle Bart's Club and Charley's Club are in form, non profit corporations owned by its members. However, each of the those clubs have entered into an identical management contract with Club Management, Inc. (Ex 21) Under the terms of the contract, the clubs purchase the liquor and other consumables. All of the personnel utilized by the clubs are provided by Club Management, Inc. Additionally, Club Management, Inc. provides management services.

5. Under the Management Contract, Club Management, Inc., is entitled to receive for its services, \$35.00 per hour not to exceed One Hundred Five (105) hours per week. Potentially, Club Management, Inc., could earn from each club, the sum of one hundred ninety one thousand, one hundred dollars (\$191,100.00)

per year. Neither of the clubs show a profit of any consequence. The money is siphoned off each club for the benefit of the Mickelson Family.

6. None of the "members" of Uncle Bart's Club or Charley's Club participate either in the management of the club or its gross profit. There is no evidence that any profits or other benefits are ever returned to the members.

7. There is no evidence that either of the clubs held Trustees meetings.

8. There is no evidence that Club Management, Inc., held regular directors meetings.

9. At most, once per year, the family met and signed corporate papers prepared by James Mickelson, who is an attorney. (Deposition of Marlene M. Mickelson, Page 18)

10. All money generated by the club is handled and controlled exclusively by the Mickelson Family.

A. Compliance with some corporate formalities is not sufficient to provide insulation for personal liability.

The rule adopted by the Utah Court regarding the Alter Ego Doctrine was distinctly stated in the case of *Colman v. Colman* 743 P.2d 782 (Utah).

To disregard the corporate entity under the equitable alter ego doctrine, two circumstances must be shown: (1) Such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter ego of one or a few individuals; and (2) if observed, the corporate form would sanction a fraud, promote injustice, or result in an inequity. (citing cases) It is not necessary that the plaintiff prove actual fraud, but must only show that failure to pierce the corporate veil would result in an

injustice. *Healthwin-Midtown Convalescent Hosp.*, 511 F. Supp. at 420.

Certain factors which are deemed significant, although not conclusive, in determining whether this test has been met include: (1) undercapitalization of a one-man corporation; (2) failure to observe corporate formalities (3) nonpayment of dividends; (4) siphoning of corporate funds by the dominant stockholder; (5) non functioning of other officers or directors; (6) absence of corporate records; (7) the use of the corporation as a facade for operations of the dominant stockholder or stockholders; and (8) the use of the corporate entity in promoting injustice or fraud. (citing cases). . . .

Although corporate documents were prepared and filed with the State of Utah and the UTAH ALCOHOL BEVERAGE COMMISSION, they were mere formalities. Charley's Club and Uncle Bart's Club are non profit corporations. Club Management, Inc., is a for profit corporation. Club Management has a management agreement with Uncle Bart's Club and Charley's Club. The Agreements are identical. The basic structure of the agreement is that Club Management, Inc., will lease to the non-profit corporations, employees and equipment and provide management. (Ex 21)

A significant provision of the agreement is that Club Management, Inc., will provide not less than three senior officers as managers. In fact, only one member of the Mickelson Family was involved in the management duties at Uncle Bart's Club and one member at Charley's Club; Jeannie B. Mickelson at Charley's Club and Marlene M. Mickelson at Uncle Bart's Club. The evidence shows that for the most part, their duties consisted of employing personnel, purchasing liquor and supplies, and monitoring liquor inventory as matched to cash register tapes to control any leakage of either liquor or money from the club. There was no management at either club on March 1, 1994, at the

time that Paul G. Bredehoft was drinking at Uncle Bart's Club and Charley's Club. In fact, Jeannie B. Mickelson testified that she was the manager of Charley's Club and she usually left the club by 2:30 in the afternoon (Deposition of Jeannie B. Mickelson, Page 49). There was no oversight or instruction given to bartenders. Marlene M. Mickelson was manager of Uncle Bart's Club and performed the same work for Uncle Bart's that Jeannie B. Mickelson did for Charley's Club. She usually left the club between 6:30 and 7:30 p.m. leaving the club in charge of the bartender (Deposition of Marlene M. Mickelson, Page 43). When she hired bartenders she did not tell them how much liquor they could give any one person in a given period of time (Deposition of Marlene M. Mickelson, Page 41).

There apparently was very little management related to compliance with the law and regulations of the UABC. As an example, the membership lists of both club (Ex 30 and 31) show that Paul G. Bredehoft was not a member of either club in 1994, the year of the accident. The law is clear on this subject. § 32A-5-107(7) provides:

A private club may not sell alcoholic beverages to any person other than a member, guest, or visitor who holds a valid visitor card issued under Subsection (6).

The case of *DeFusion Co. v. Utah Liquor Control Com'n* 613 P.2d 1120 (Utah 1980) held:

A person who is not a member or who does not hold a valid guest card is an "interdicted person" with respect to alcoholic drinks in the club. Thus, the sale of liquor to such a person, as well as the purchase from the liquor store by such person, is proscribed by the statutes.

All of the Mickelson Family know Paul G. Bredehoft. Douglas Mickelson knew that he had had at least one prior DUI. James Mickelson represented Paul G. Bredehoft in a DUI in Tooele County and knew that he had had prior DUI's (Deposition of James Mickelson, Pg. 71). James Mickelson was on the premises of Uncle Bart's briefly the night of the accident. He spoke to Paul G. Bredehoft and saw that he had a drink in front of him (Deposition of James Mickelson, Pg. 75). The Mickelson Family committed a crime by allowing Paul Bredehoft to drink liquor at the two clubs.

Another important factor is the way the money generated by the clubs was handled. No one, other than the Mickelson Family, had access to the money.

There is testimony in the depositions that the only money received by the Mickelson Family was a management fee of approximately \$1500.00 per month to Marlene M. Mickelson and Jeannie B. Mickelson. There were some legal fees paid to James D. Mickelson. However, examination of the tax returns for 1993, attached to Defendants Memorandum, points in a different direction. The gross income of both clubs for 1993 is \$770,651.00. Of that amount, \$184,545.99 was charged to employee expense. Then there is a combined charge for both clubs for advertising and promotion of \$113,565.85. We know that only the Mickelson Family had access to the checks and cash of the two clubs. If the advertising and promotion accounts for 1993 were

spent for that purpose then it is a violation of statute. Title 32A-5-107(23) UCA provides:

A private club may not engage in any public solicitation or public advertising calculated to increase its membership.

If the account was a true advertising and promotion account, it violated statute. If it were used for other purposes, there was a diversion of funds from what would otherwise be the capital of both clubs.

It is obvious that the Mickelson Family makes its living from these two private clubs. Title 32A-5-107(22) provides:

A private club may not pay any person or entity any fee, salary, rent, or other payment of any kind in excess of the fair market value for the service rendered, goods furnished, or facilities or equipment rented. It is the intention of this subsection to insure that no officer, managing agent, employee, or other person derives economic benefit from the operation of the club.

The Mickelson Family clearly benefits economically from the two private clubs in violation of the statute. There is abundant evidence at this point that the two private clubs and Club Management, Inc., share a complete unity of interest with the Mickelson Family. They comprise all of the officers, directors, and trustees of the entities. They handle all of the money. The clubs and management company operate for the sole benefit of the Mickelson Family. No dividends are paid, no club members other than the family participate in management and no benefits are ever returned to the members. The purposes of the two clubs are not educational, charitable, or recreational as they claim to be (See Articles of Incorporation of Charley's Club, Inc. a Non

Profit Corporation as R. 1844, Ex 35). The sole reason for the existence of the clubs is to sell alcoholic beverages for the profit of the Mickelson Family. It is also clear that they do not adequately manage the clubs or provide the senior officers for management.

B. To Allow Corporate Immunity in this Case Would be To Sanction a Fraud, Promote Injustice, or Result in an Inequity.

This point relates to the second circumstance set forth in the *Colman* case (Supra.) and followed in the case of *Envirotech Corp. v. Callahan* 872 P.2d 487 (Utah 1994).

As noted earlier, Paul G. Bredehoft would have had to have a total of 18 to 22 drinks. Paul G. Bredehoft consumed the alcohol producing his intoxication at the two clubs operated by the Mickelson Family and managed by Club Management, Inc.

Patti Middaugh, one of the bartenders at Uncle Bart's Club, testified in her deposition that when Paul G. Bredehoft left the premises on March 1, 1994, at approximately 6:30 he had consumed seven drinks (Deposition of Patti Middaugh, Page 30). This was sufficient to put his BAC over the statutory presumption of 0.08. In addition, that number of drinks violated the standard promulgated by "T.I.P.S." which all bartenders must adhere. This is usually one drink per hour. Jackie Lackey, the bartender who preceded Patti Middaugh, testified that she served Paul Bredehoft seven (7) drinks (Tr. 443).

Paul G. Bredehoft was an interdicted person by definition and hence it was a crime for either club to serve him liquor.

It is important to note also, that Title 32A-12-103 provides that parties in charge are vicariously criminally liable as principals with those who are guilty of the offense.

When the entire State Alcohol Beverage Control Act is surveyed, if it is apparent that it is, as stated, an exercise of the police power for the protection of the citizens of this State and fastens regulatory control and criminal liability on all those who participate in the sale of alcoholic beverages in violation of law. *Reeves v. Gentile* 813 P.2d 111 (Utah 1991)

The individual Defendants and Club Management, Inc. assert that they did not sell Paul Bredehoft liquor and therefore cannot be guilty of a violation of the DABC. Plaintiffs stress to the Court that providing Paul Bredehoft with a sufficient amount of liquor to create a 0.27 BAC was criminal. Plaintiffs stress to the Court that the principals in these two clubs are vicariously liable for the criminal violation pursuant to Title 32A-12-103 UCA 1953. The violation of Title 32A-5-107(24)(h) is a crime. The individual Defendants and Club Management, Inc. are liable for that crime. As here, the violation gives rise to a civil cause of action. The lower Court erred in granting summary judgment to the individual Defendants and Club Management, Inc.

POINT SIX: PUNITIVE DAMAGES ARE SEPARATE AND APART FROM DAMAGES CONTEMPLATED BY THE DAMAGE CAP IN THE DRAMSHOP ACT.

Under this point, Defendants state that the terms of the damage cap section of the Dramshop Act, limit the amount to one hundred thousand dollars (\$100,000.00) regardless of whether it is determined to be general or punitive damages.

Except for Article XVI, § 5 (Wrongful Death), Defendants have not argued the constitutionality of the damage cap. If this Court determines, as surely it must, that the Damage Cap is unconstitutional, then the argument of Defendants under this point is moot. If however, the Court should determine that the Dramshop Cap is constitutional, then the Court must further determine whether the Damage Cap embraces both compensatory and punitive damages. Defendants do not cite any authority or case law for their conclusion. The answer to the question is contained in the statute, but not the conclusion Defendants are striving for.

In Utah Code Ann. § 32A-14-101(5), it is stated:

The total amount of damages that may be awarded to any person pursuant to a cause of action under this chapter ... (emphasis added)

Subsection (3) of the statute reads:

A person who suffers an injury under Subsection (1) has a cause of action against the person who provided the alcoholic beverage in violation of Subsection (1)

The statute obviously refers to a cause of action for injury. This in turn means general and special compensatory damage, but not punitive damages.

It is well to remember that punitive damages, although based upon an underlying cause of action for injury, serve a far different function than compensatory damage. Punitive damages are awarded as punishment and deterrence, where conduct, as in this case, is outrageous. *Johnson v. Rogers* 763 P.2d 771 (Utah 1988).

POINT SEVEN: THE LOWER COURT DAMAGE AWARD TO EACH PARENT IN THE AMOUNT OF ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) AGAINST EACH DEFENDANT IS CORRECT.

Assuming, arguendo, that the decision of the Court holding that the Dramshop Damage Cap is not unconstitutional², then the interpretation of the Court as to the award of General Damages, namely one hundred thousand (\$100,000.00) to each Plaintiff against each Dramshop Defendant, is correct. Reference to the statute will make the Courts reasoning clear:

(1) Any person who directly gives, sells, or otherwise provides liquor, or at a location allowing consumption on the premises, any alcoholic beverage, to the following person, and by those actions causes the intoxication of that person, is liable for injuries in person, property, or means of support to any third person, or to the spouse, child, or parent of that third person, resulting from the intoxication. . . (emphasis added)

It will be noted that the statute uses the term "parent" in its singular individual form, and not in the joint form "parents". The Legislature intended, by that language, to make the Dramshop operator liable to the parents of a deceased child separately and not jointly as a unit. Both parents have a separate cause of action for their injuries and damage.

The Statute continues:

(3) A person who suffers an injury under Subsection (1) has a cause of action against the person who provided the alcoholic beverage in violation of Subsection(1). (emphasis added)

² Plaintiffs position throughout this case is that the Damage Cap is unconstitutional and defends the decision of the Court in the alternative.

The Act does not provide a cause of action for a group, such as "children" and "parents". It provides a cause of action for each "person" who suffers an injury.

The Statute goes on to state:

(5) The total amount of damages that may be awarded to any person pursuant to a cause of action under this chapter that arises after July 1, 1985, is limited to \$100,000.00 and the aggregate amount which may be awarded to all persons injured as a result of one occurrence is limited to \$300,000.00. (emphasis added)

Here again, the Statute speaks of damages awarded to a person and not a group.

Case Law supports the reasoning of the Court. In the Utah case of *Switzer v. Reynolds* 606 P.2d 44 (Utah 1980), the decedent, Switzer, was killed in an accident on June 24, 1963. He left surviving, a wife and five (5) minor children. Not until 1974, did the surviving wife, as guardian for the children, file an action on their behalf for the death of their father. The lower Court dismissed the case on the evident ground that the statute of limitations had run. The Supreme Court held that the statute was tolled during the minority of the children, ruling that even though the limitations statute might bar recovery for one heir, it could be tolled for other heirs. The Court stated:

The wrongful death action of § 78-11-7 is not a joint cause of action. Therefore, a defense which would bar recovery by one of the heirs will not preclude all other heirs. Thus, individual circumstances may toll the statute of limitations of § 78-12-28(2) as to one of the heirs. The concept that the wrongful death action is a joint cause of action has been rejected in recent decisions, which will be discussed infra.

The reasoning applied in *Switzer*, in the case of death to an adult leaving heirs, applies equally to the wrongful death action

of a child set forth in § 78-11-6 UCA 1953. See also *In Re Behm's Estate*, 213 P.2d 657 (Utah 1950).

Cases from another jurisdiction relate specifically to the Dramshop Act of that state and the damage cap in the statute. In the case of *Childers v. Modglin*, 119 N.E.2d 519 (Ill. 1954) action was brought under the Dramshop Act by the surviving wife and ten (10) children of Childers. The theory of the Complaint was that the Plaintiffs were entitled to the damage cap of \$15,000 for each of the eleven Plaintiffs. Defendant argued that the maximum that could be recovered was the damage cap of \$15,000 in the aggregate. The Court held:

By applying the limit in this case to each cause of action separately, all parts of the statute are consistent, the application is definite and certain, it applies equally to all persons, and makes the statute practical and workable. To apply the limit to a group of persons produces inconsistency within the statute itself, leads to consequences at times absurd, results in a variety of inequalities, and is wholly impractical in its operation without extensive tinkering; in fact, it would require the courts to fill in a number of voids which would normally be regulated by statute, if any such system had been contemplated.

Under these conditions we reject the objectionable alternative, and hold that the limit of recovery applies to each separate right of action as it previously existed. Any plaintiff who is injured within the terms of the statute has the right to recover up to, but not exceeding, \$15,000.00, regardless of the existence of other claims, established or establishable, and regardless of the number of defendants sued or suable.

The decision of the Childers' case was followed in the later Illinois case of *Hudson v. Leverenz*, 132 N.E.2d 427 (Ill.)³

³ Following the two cases cited, the Illinois Legislature amended the Dramshop Act and it was held in *Moran v. Katsinas*, 157 N.E.2d 38 (Ill. 1959) that the cap applied regardless of the number of injured parties. The Court did not however, overrule the two cases cited above.

To underscore the reasoning of the lower Court, we suggest two hypotheticals. Assume a situation where a child is killed under circumstances giving rise to a Dramshop Action. Assume further that the parents are divorced. The Court could not compel them to make common cause against the Dramshop Act. They would each have a cause of action and the damages awarded would be commensurate with the individual loss. Also, assume a further situation where the Dramshop Defendant has a defense to one of the parents. Obviously this would not bar a suit brought by the other parent.

The Utah Dramshop Act is couched in terms of individual causes of action for those injured by a liquor provider. It contains no term or language indicating that those who suffer injury, such as parents or children, must join and aggregate their individual claims below the Dramshop Cap.

**POINT EIGHT: THE LOWER COURT DID NOT ERR IN DENYING DEFENDANTS
MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL
WITH RESPECT TO PUNITIVE DAMAGE JUDGMENT AGAINST DEFENDANTS.**

Under this point, Defendant, Charley's Club must marshal the evidence in support of the jury's award of punitive damages. The statement is incomplete and does not correctly portray the negative evidence.

The Court is referred to the Statement of Facts contained in Plaintiffs' initial brief where these matters are highlighted. To emphasize this point, we note that Defendants have failed to discuss the fact that there was no senior management present at either club on the fatal night. Jim Mickelson was on the premises of Uncle Bart's, not Charley's Club as indicated on Page 45 of Charley's Club brief. He spoke to Paul Bredehoft and noticed that he was drinking. Bredehoft was not a member of either club and it was a violation of the regulations and criminal statutes to serve him liquor. Yet, he consumed from 18 to 22 ounces of liquor at Uncle Bart's and Charley's Club. Patti Middaugh, a bartender at Uncle Bart's said that when Paul Bredehoft left that club, he had consumed a sufficient number of drinks to make him legally intoxicated. (Tr. 153)

Gloria Anderson, bartender at Charley's Club, would only admit that she served Paul Bredehoft one drink. If the bartenders are to be believed (obviously the jury did not believe them) then Paul Bredehoft only had seven or eight drinks that night and all the alcohol was imbibed at the two clubs (except the one half beer at the Clubhouse, which is not here involved).

(There is no indication that Bredehoft drank at establishments other than Uncle Bart's and Charley's as it implied on Page 45 of Charley's Club brief). Paul G. Bredehoft drank at only two establishments and those were Charley's Club and Uncle Bart's Club, owned and operated by the Mickelson Family.

Steven Moreland was a former bartender employed at both clubs in 1993. He knew Paul G. Bredehoft and testified that Bredehoft was a frequent patron at Uncle Bart's and was always intoxicated when he left the bar. (Tr. 228)

Steve Moreland attended employee meetings during the term of his employment. The underlying theme at these meetings was how to sell more drinks. Mr. Moreland was encouraged to sell more alcohol to patrons. (Tr. 225)

Steve Moreland was never given any instructions as to how much liquor he could sell to a patron or when to stop serving a patron. (Tr. 224) He observed Bredehoft and Douglas Mickelson drinking together at Uncle Bart's. (Tr. 223)

Defendants fail to recognize or state that there was no management at either club on the evening and night of the fatal accident; with one exception: James Mickelson stopped by Uncle Bart's for a few minutes, observed Paul Bredehoft and engaged him in conversation. Paul Bredehoft was not a member and should not have been served liquor.

POINT NINE: DEFENDANTS DID NOT SEEK A NEW TRIAL ON "ALL ISSUES" IN THE LOWER COURT.

For the first time in this case, the Defendants ask this Court for a new trial on all issues under the guise of a Motion for New Trial on the issue of Punitive Damage. The matters under this point now briefed and argued before this Court by Defendants were not presented to the Court below on Motion for New Trial.

(R. 1693-1708)

Now Defendants ask for a new trial based upon the failure of the Court to apportion damages among Defendants, error in instructions, and error in awarding a joint and several judgment against Defendants.

Defendants argue that this Court should re-examine and over rule, the case of *Reeves v. Gentile*, 813 P.2d 111 (Utah 1991) and hold that the negligence of all Defendants must be compared. Defendants overlook the fact that the Dramshop Act contains the following:

(7) Nothing in this chapter precludes any cause of action or additional recovery against the person causing the injury.

The Legislature has, by that section, clearly separated the person causing the injury from the liquor supplier and thereby makes apportionment impossible.

Although not stated in Defendants brief, what they seek is to compare their culpability with that of Paul Bredehoft, thereby reducing their exposure to the million dollar verdict.

The actions of Paul Bredehoft on the fatal night were criminal. He was convicted of automobile homicide and that

conviction was recently affirmed on appeal by the Court of Appeals. *State v. Bredehoft*, 353 Utah Adv. Rep 3 (CA, 10/01/98)

In a case such as this, where the liquor providers are under a positive statutory duty to prevent the very conduct on the part of Bredehoft that caused the death of Sean Adkins, how can the Defendants come before this Court and say they should be given the advantage of the conduct of Bredehoft? We do not believe that the Legislature intended such a result in the adoption of the comparative negligence statutes. See *State v. McBride*, 940 P.2d 539 (Utah Ct. App. 1997); *Field v. Boyer Co.* Utah Adv. Rep. 10 (Utah 1998) and *Cortez v. University Mall Shopping Center* 941 F.Supp 1096 (D. Utah 1996). Furthermore, neither Defendant filed a cross claim against the other or against Paul Bredehoft. In the case of *National Services v. B. W. Norton Manufacturing*, 937 P.2d 551 (Utah Ct. App. 1997), the Appeals Court stated:

In reaching our conclusion, we recognize that prohibiting subsequent apportionment suits essentially requires joint torfeasor codefendants to raise cross-claims against each other in the underlying tort action or else such claims may be lost. As such, cross-claims for apportionment among joint torfeasor codefendants are mandatory.

POINT TEN: DEFENDANTS DID NOT REQUEST A NEW TRIAL OF THE LOWER COURT BASED UPON INSTRUCTION NO. 33.

Defendants' Motion for New Trial in the lower Court was based on the issue of punitive damages. They now seek a new trial in this Court on all issues based upon the claim that wrongful death damages are not included in the Dramshop Act. This is not the approach they took in the lower Court. In the lower Court, they sought a new trial only on the issue of punitive damages (R. 1754)

They overlook (1) the fact that they stipulated in open court that the Wrongful Death Act did apply to the Dramshop Act; (2) that the Legislature in it's "Intent Language" states that the Wrongful Death Acts applies; and (3) that in fact, the only rational interpretation of the Dramshop Act is that it does include actions and damages for wrongful death.

POINT ELEVEN: THE TRIAL COURT ERRED IN FAILING TO AWARD INTEREST FROM THE DAY OF THE SPECIAL VERDICT.

This point has been adequately briefed by Plaintiffs in their brief.

POINT TWELVE: THE TRIAL COURT ERRED IN GRANTING A STAY OF EXECUTION IN THIS MATTER.

This point has been adequately briefed by Plaintiffs in their brief.

CONCLUSION

1. Defendants assert that the Wrongful Death Statutes of the State of Utah do not apply to the Utah Dramshop Act. The argument is vilacious because:

a. Defendants stipulated before trial that the Wrongful Death Act did apply and the lower Court so ordered.

b. The Utah State Legislature in it's recent amendment to the Dramshop Act in its "Intent Language" said the Wrongful Death Statutes apply.

c. Analysis of the language of the Dramshop Act shows that the Wrongful Death Acts apply.

2. Defendants ignore one of the major issues in this case; the constitutionality of the Damage Cap in the Dramshop Act. (Except Article XVI, §5 (Wrongful Death)). The constitutional provisions briefed and argued in the lower Court by Plaintiffs mainly Article I, §7 (Due Process of Law); Article I, §10 (Trial

by Jury); Article I, §11 (Open Courts); Article I, §24 (Uniform Operation of Law). In addition to Article XVI, §5 (Wrongful Death - Damages), all point on erringly. Point Two, the conclusion that the Damage cap is unconstitutional.

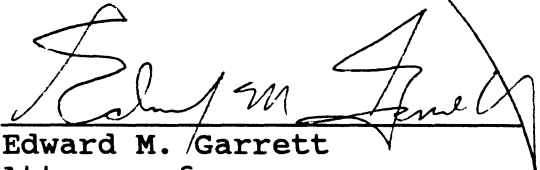
3. The Court erred in granting Summary Judgment to the individual Defendants and Club Management, Inc.

4. The lower Court was in the advantaged position of hearing all the evidence and observing the demeanor and credibility of all the witnesses. It determined that punitive damages were properly submitted to the jury and the amount of damage awarded by the jury is well within the guidelines set forth in *Crookston v. Farmers Insurance Exchange* 817 P.2d 789 (Utah 1991)

The cross-appeal of Defendants should be denied and the relief requested by Plaintiffs in their appeal should be granted.

RESPECTFULLY SUBMITTED this 19th day of October, 1998.

GARRETT & GARRETT

By 
Edward M. Garrett
Attorney for
Plaintiffs/Appellants

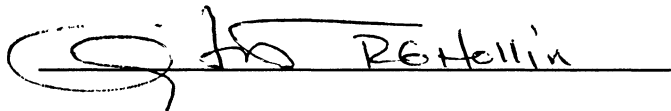
CERTIFICATE OF MAILING

I hereby certify that on this 19 day of October, 1998, I mailed a true and correct copy, first class, postage prepaid, of the foregoing REPLY BRIEF OF THE PLAINTIFFS / APPELLANTS to the following:

Mark L. Anderson
Dale J. Lambert
CHRISTENSEN & JENSEN, P.C.
175 South West Temple, #510
Salt Lake City, Utah 84101-1410

Donald Purser
PURSER & ASSOCIATES, P.C.
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Salt Lake City, Utah 84111

Paul G. Bredehoft
Pro Se
Inmate # 23348
Housing Unit W-B-324
P.O. Box 250
Draper, Utah 84020

A handwritten signature in black ink, appearing to read "S. H. R. Hellen", is written over a horizontal line.

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ADDENDUM

ADDENDUM

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"A"

Order of April 22, 1996 (Addendum No. 7 in Appellants' Brief)

ADDENDUM "A"

APR 22 1956

by E. Thompson Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN
AND FOR SALT LAKE COUNTY, STATE OF UTAH

ORDER

Civil No. 940907146 PI

Judge Timothy R. Hanson

On the 5th day of April, 1996, at a hearing on various motions pending in this case, the Defendants and each of them in open court and on the record stipulated that the elements of damage for a cause of action, for the wrongful death of a child, as established by the Wrongful Death Statute 78-11 (78-11-6) and the interpreted case law of the Appellate Courts of the State of Utah apply without exception to this cause of action claiming a violation of the DramShop Liability Act 32A-14-101 U.C.A. (1953).

The Court having considered the stipulation of the Defendants now orders:

1. That the Stipulation of Defendants as set forth above is the "law of the case" in this action and that the elements of a cause of action for the death of a child, as set forth in Title 78-11-6 U.C.A. (1953) and the interpretive decisions of the Appellate Courts of this State apply without exception to the cause of action pending in this Court based upon Title 32A-14-101 U.C.A.1953 (DramShop Liability Act).

Dated this 22 day of April, 1996.

By 

District Judge