

1988

Marjorie Allisen v. American Legion Post No. 134 : Brief of Respondent

Utah Supreme Court

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BRIEF

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DOCKET NO. **880031**

IN THE SUPREME COURT OF THE

STATE OF UTAH

MARJORIE ALLISEN,

Plaintiff-Respondent,

-vs-

AMERICAN LEGION POST NO. 134,

Defendant-Appellant.

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Case No. 880031

Category No. 15

BRIEF OF RESPONDENT STATE OF UTAH DEPARTMENT OF TRANSPORTATION

Interlocutory appeal from an Order of Dismissal of the
Second Judicial District Court of Davis, State of Utah.

Honorable Douglas L. Cornaby, District Judge.

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FILED

MAY 18 1988

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STATEMENT OF THE PARTIES

In addition to the parties named in the caption on appeal, the following were also parties to the action below:

1. State of Utah Department of Transportation - Third Party Defendant (hereafter referred to as UDOT).

2. Utah Power and Light - Third Party Defendant (hereafter referred to as UP&L).

3. Clearfield City - Third Party Defendant (hereafter referred to as Clearfield).

4. Mountain States Telephone and Telegraph - Third Party Defendant.

Mountain States Telephone and Telegraph was dismissed from the suit by stipulation and that dismissal has not been appealed.

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Case No. 880031

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This Respondent disagrees with the Statement of Issues for Review in Appellant's Brief. Of those issues presented by Appellant, only a. and f. are properly before this Court.

Therefore, the only issues properly presented in this appeal are:

a. Whether the version of the Utah Dramshop Act in effect at the time of the accident which forms the basis of this action applied to those providing only "light" beer.

b. Whether one liable under the Dramshop Act is a joint tortfeasor entitled to contribution from one whose liability is based on simple negligence.

STATUTES

The following statutes are believed to be controlling or instructive in the present case. The full text of each, or the

pertinent parts thereof, are set forth in Addendum A to this brief:

Section 32-11-1, Utah Code Ann., 1953 (as amended and as in effect on January 30, 1985).

STATEMENT OF THE CASE

This Respondent agrees with the Statement of the Case presented by Appellant.

SUMMARY OF ARGUMENTS

A. The district court correctly dismissed the Third Party Complaint, although incorrectly finding that the Dramshop Act in effect at the time of the accident applied to providers of light beer. The dismissal should, therefore, be upheld and the issue of contribution in Dramshop actions need not be addressed.

B. Even if the Dramshop Act in effect at the time of this accident did apply to providers of light beer, the district court correctly ruled that one liable under that act is not entitled to contribution.

ARGUMENT

POINT I

THE DISTRICT COURT SHOULD HAVE DISMISSED PLAINTIFF'S COMPLAINT, AND THE THIRD PARTY COMPLAINT ON THE GROUNDS THAT THE DRAMSHOP ACT IN EFFECT WHEN PLAINTIFF'S CAUSE OF ACTION AROSE DID NOT APPLY TO PROVIDERS OF LIGHT BEER.

This Respondent agrees with and adopts by reference the argument of Appellant in this respect. The lower court

specifically ruled that the Dramshop Act did apply to sellers of light beer but granted Third Party Defendants' motions to dismiss on the issue of contribution. This Court is inclined to affirm a ruling of a lower court even if on other grounds. State v. Bryan, 709 P.2d 257 (UT 1985); Branch v. Western Petroleum, Inc., 657 P.2d 267 (UT 1982); Jespersion v. Jespersen, 610 P.2d 326 (UT 1980). Even though the lower court specifically did not dismiss the case on the issue of light beer, the lower court's ruling in that regard was in error, this Court should find that the Dramshop Act in effect at the time of this accident did not apply to light beer, and affirm the dismissal of the Third Party Complaint.

POINT II

ONE LIABLE UNDER A DRAMSHOP ACT IS NOT ENTITLED TO CONTRIBUTION

This Respondent acknowledges there is a conflict in authority among those states which have decided this issue. Some allow contribution, finding that a Dramshop Act creates tort liability. The more reasoned approach is that the Dramshop Act does not make of the Dramshop a joint tortfeasor, since, at common law, there is no duty owed by one providing beer to another who may be injured thereby, and the statute is the sole remedy against the dramshop. This conclusion was reached by the Illinois Supreme Court in the cases of Jodelis v. Harris, 517 N.E.2d 1055 (Ill 1987) and Hopkins v. Powers, 497 N.E.2d 757 (Ill

1986). Jodelis involved an attempt by a sober motorist to obtain contribution against the dramshop which had served the injured pedestrian liquor, a much more compelling situation than that presented here. Illinois has consistently reached this same conclusion, an approach reached after over 80 years of dealing with dramshop cases.

This result is indicated by subsection (2) of § 32-11-1, U.C.A. That section states:

A person who suffers an injury referred to in subsection (1) of this section, shall have a cause of action against the intoxicated person and the person who provided the intoxicating liquor in violation of subsection (1) above, or either of them.

Had the legislature intended joint and several liability on the part of a dramshop, with full rights of contribution, it would have been just as easy for them to say so.

Third Party Plaintiff's statements in his its brief that the negligent design and maintenance of the intersection was a substantial cause of the accident and its characterization of the conditions of the intersection as abominable appear to be an improper attempt to persuade this Court with emotion. No evidence has been presented to the district court which would in any way indicate that the design of the intersection, or placement of the power pole, in any way contributed to this accident. In fact, despite a number of attempts by counsel to tell him that these things caused the accident, Wesley Harju, in his deposition,

specifically stated the power pole did not obstruct his vision and gave no indication that the condition of the highway created any problems for him.

The facts of this case are not such as to compel this Court to decide this case any differently than it should. Third Party Plaintiff is simply not entitled to contribution and the Third Party Complaint was properly dismissed.

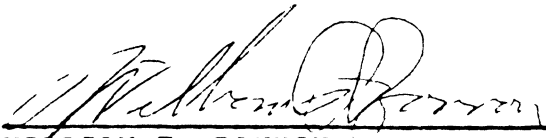
CONCLUSION

The version of the Dramshop Act in effect at the time of this accident did not apply to those who served only light beer. The Complaint, and therefore the Third Party Complaint should have been dismissed by the District Court. As a result, this Court should affirm the dismissal of this Respondent.

A Dramshop is not a joint tortfeasor and is not entitled to contribution. The dismissal of this Respondent should, therefore, be affirmed.

DATED this 18th day of May, 1988.

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CERTIFICATE OF MAILING

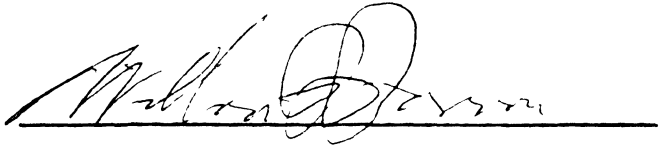
This is to certify that I mailed four copies of the foregoing BRIEF OF RESPONDENT to the following this 18th day of May, 1988:

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A handwritten signature, likely "William D. Brown", is written over a horizontal line.