

1988

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

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARJORIE ALLISEN,

Plaintiff/Respondent,

vs.

AMERICAN LEGION POST NO. 134,

Defendant/Appellant.

Supreme Court

Case No. 880031

(District Court

Case No. 38319)

Category No. 10

BRIEF OF THE RESPONDENTS CLEARFIELD CITY
AND UTAH POWER AND LIGHT COMPANY

INTERLOCUTORY APPEAL FILED FROM
THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
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I. COMPLETE LIST OF ALL PARTIES TO THE PROCEEDING

Pursuant to Rule 24(i) of the Rules of the Utah Supreme Court, Clearfield City and Utah Power & Light Company adopt by reference defendant/appellant American Legion Post No. 134's list of all parties to the proceeding set forth as page 2 of its brief.

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IV. JURISDICTION OF THE COURT

Pursuant to Rule 24(i) Clearfield City and Utah Power & Light Company adopt by reference defendant/appellant American Legion Post No. 134's jurisdictional statement set forth on page 7 of its brief.

V. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Pursuant to Rule 24(i) Clearfield City and Utah Power & Light Company adopt by reference respondent State of Utah Department of Transportation's statement of issues set forth on page 1 of its brief.

VI. ADMINISTRATIVE STATUTORY AUTHORITY

Pursuant to Rule 24(i) Clearfield City and Utah Power & Light Company adopt by reference defendant/appellant American Legion Post No. 134's statutory authority set forth on page 8 and Appendix A of its brief.

VII. STATEMENT OF THE CASE

Pursuant to Rule 24(i) Clearfield City and Utah Power & Light Company adopt by reference defendant/appellant American Legion Post No. 134's statement of the case set forth on pages 9-10 of its brief.

VIII. SUMMARY OF ARGUMENTS

Pursuant to Rule 24(i) Clearfield City and Utah Power & Light Company adopt by reference POINTS I and II of defendant/

appellant American Legion Post No. 134's summary of arguments set forth on pages 10-11 of its brief, and adopt by reference respondent State of Utah Department of Transportation's summary of arguments set forth on page 2 of its brief.

POINT III

AMERICAN LEGION POST NO. 134 HAS NO RIGHT TO CONTRIBUTION BECAUSE CONTRIBUTION IS CONTRARY TO THE VERY PURPOSE OF DRAM SHOP LIABILITY, BECAUSE THE CAUSE OF ACTION FOR CONTRIBUTION WAS ELIMINATED BY THE UTAH LEGISLATURE BEFORE ANY RIGHT OF AMERICAN LEGION POST NO. 134 TO CONTRIBUTION AROSE IN THIS CASE, AND BECAUSE, IN ANY EVENT, CLEARFIELD CITY AND AMERICAN LEGION POST NO. 134 ARE NOT "JOINT TORTFEASORS."

IX. ARGUMENT

Pursuant to Rule 24(i), Clearfield City and Utah Power & Light Company adopt by reference POINTS I and II of defendant/appellant American Legion Post No. 134's argument set forth on pages 12-18 of its brief, and adopt by reference respondent State of Utah Department of Transportation's argument set forth on pages 2-5 of its brief.

POINT III

AMERICAN LEGION POST NO. 134 HAS NO RIGHT TO CONTRIBUTION BECAUSE CONTRIBUTION IS CONTRARY TO THE VERY PURPOSE OF DRAM SHOP LIABILITY, BECAUSE THE CAUSE OF ACTION FOR CONTRIBUTION WAS ELIMINATED BY THE UTAH LEGISLATURE BEFORE ANY RIGHT OF AMERICAN LEGION POST NO. 134 TO CONTRIBUTION AROSE IN THIS CASE, AND BECAUSE, IN ANY EVENT, CLEARFIELD CITY AND AMERICAN LEGION POST NO. 134 ARE NOT "JOINT TORTFEASORS."

A. Contribution is Contrary to the Very Purpose of Dram Shop Liability.

The reason for dram shop liability is, as a matter of social policy, to encourage dram shops to exercise care not to turn drunks out on the street where they hurt innocent people. To this end, the Utah Dram Shop Act requires a dram shop to pay for the damages caused by the drunk that the dram shop has turned loose on the public.

It makes no sense to have a Dram Shop Act imposing such liability on the dram shop and, at the same time, to allow the dram shop the right of contribution against some other person, corporation, or entity who played absolutely no part whatsoever in getting the tortfeasor drunk or turning the drunk loose on the innocent public.

The argument can be made, as in this case, that if the dram shop has no right to contribution, and if the dram shop has no insurance, that the innocent person will not be compensated. However, allowing contribution in this situation encourages dram shops not to go to the expense of obtaining insurance. Methods other than contribution exist to assure that the responsible people pay for getting a tortfeasor drunk and turning him loose on the innocent public. For example, in this case, the plaintiff could directly name the bartender, the bartender's supervisors, the management of the American Legion Post, and

any person, corporation, or entity responsible for establishing the policies and procedures of the American Legion Post for serving beer. Allowing contribution from Clearfield City and Utah Power & Light Company makes no sense in the overall context of public policy and the purpose for which the Utah Dram Shop Act was established. A dram shop and the people responsible for the dram shop ought not to be allowed to shift responsibility to comply with statutes or to shift the burden to be responsible for statutorily prohibited conduct because someone or something was in the same general vicinity of an accident caused by the dram shop's conduct.

B. "Contribution" was abolished by the Utah Legislature prior to any right to contribution having vested in the American Legion Post.

No right of contribution existed at common law. Meriweather v. Nixon, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799); Union Stockyard Co. v. Chicago, Burlington & Quincy R.R. Co., 196 U.S. 217 (1905); Hardman v. Matthews, 1 Utah 2d 112, 262 P.2d 748 (1953).

The Utah Legislature created the right of contribution in 1973 as part of the Utah Comparative Negligence Act.

In 1986 the Utah legislature abolished the right of contribution as part of the Utah Liability Reform Act, effective

April 28, 1986. See Utah Code Ann. § 78-27-40 (Repl. 1987). Thus, the Utah Liability Reform Act abolished the statutory concept of contribution that had existed in Utah from 1973 to 1986.

The precise issue presented in this case is whether American Legion Post No. 134 had a vested right to contribution prior to April 28, 1986. Utah case law is compelling that American Legion Post No. 134 had no such vested right.

In Unigard Ins. Co. v. City of LaVerkin, 689 P.2d 1344, 1346-47 (Utah 1984) the court held that an action for contribution arises only after a tortfeasor has paid more than the tortfeasor's pro rata share of liability. The chronology of important events in this case is as follows:

<u>EVENT</u>	<u>DATE</u>
1. Occurrence Sued Upon (R. at 1, 152.)	January 30, 1985
2. Plaintiff's Complaint Filed (R. at 1.)	November 1, 1985
3. Abolition of Contribution (Utah Code Ann. § 78-27-40 (Repl. 1987).)	April 28, 1986
4. Defendant's Summary Judgment Motion Heard and Ruled on (R. at 105, 109.)	June 25, 1986
5. Plaintiff's Amended Complaint Filed (R. at 116.)	July 10, 1986
6. American Legion Post No. 134's Third Party Complaint Filed (R. at 152.)	March 19, 1987

American Legion Post has paid nothing to date, let alone more than its pro rata share of liability. Pursuant to Unigard Ins. v. City of LaVerkin, American Legion Post 134's cause of action for contribution has not even arisen, let alone "vested."

With respect to Clearfield City's claims, the issue is much different than a determination of whether the abolition of joint and several liability and contribution go hand in hand, and whether one can be abolished without the other. In this case, the person injured by the drunk, the plaintiff, Marjorie Allisen has not sued Clearfield City under any legal theory. She has sued American Legion Post No. 134, the dram shop; the dram shop is the only party that has sued Clearfield City.

Finally, in Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985) the Utah Supreme Court held that the legislature has the power to abolish purely statutory rights. Contribution was a purely statutory right. No right to contribution existed at common law, and no right to contribution existed in Utah until the statute was enacted in 1973. In Berry the court stated that "[t]he law in this State, as it is elsewhere, is that 'no one has a vested right in any rule of law'. . . ." Id. at 675. The legislature has the power to change laws that it has created. The right to contribution in Utah was a statutory right that arose only under the conditions precedent set forth in the statute that created the right. One of those conditions was that a joint tortfeasor first must have paid

more than his pro rata share of the common liability before any cause of action for contribution arose. In this case, American Legion has not first paid more than it's pro rata share - American Legion has paid nothing. Therefore, American Legion Post No. 134's cause of action for contribution has never arisen, and a fortiori it did not arise prior to April 28, 1986, the effective date that contribution was abolished in Utah.

C. In any event, American Legion Post No. 134 and Clearfield City and Utah Power & Light Company are not "joint tortfeasors."

In 1973 the Utah legislature created the right of contribution among "joint tortfeasors." However, American Legion Post No. 134 and Clearfield City and Utah Power & Light Company are not joint tortfeasors. The liability of American Legion Post No. 134 does not derive from the common law; it derives from the Utah Dram Shop Act. It is a statutory liability. If a jury determines that the American Legion Post did give, sell, or otherwise provide the beer, and if the jury finds that the giving, selling, or otherwise providing the beer caused the plaintiff's injuries, the American Legion Post No. 134 pays pursuant to statutory liability. On the other hand, the liability of Clearfield City and Utah Power & Light Company, if any (and any is expressly denied), is common law tort liability grounded in common law concepts of negligence.

In Shelby v. Keck, 85 Wash. 2d 911, 541 P.2d 365 (1975), Keck killed Shelby in Myhre's bar. Shelby's wife sued both Keck and Myhre's. Shelby's wife settled with Keck. The trial court dismissed Keck. Shelby's wife objected to the dismissal of Keck on the grounds of "joint and several liability." Id. at 370. The Washington Supreme Court held that the "joint and several liability" argument was "without merit since Myhre's liability was premised on its independent acts of alleged negligence, irrespective of Keck's liability." Id.

The same reasoning is applicable to this case: American Legion Post's liability is statutory liability related to providing beer, whereas the alleged liability of Utah Power & Light Company and Clearfield City is common law liability arising out of the alleged placement of a pole and the alleged design of the highway, alleged acts wholly independent of the American Legion Post's dram shop conduct and statutory liability.

In Virgilio v. Hartfield, 4 Mich. App. 582, 145 N.W. 2d 367 (1966), Hartfield's Bar and Sid and Wally's Bar served intoxicants to Naeyaert when he was intoxicated. Naeyaert then drove a car and got in a collision, resulting in injury to Virgilio's husband. Virgilio sued the bars under the Dram Shop Act. The bars sued Naeyaert in a third-party action. Naeyaert moved to dismiss on the grounds that he was not a "joint tortfeasor"

with the bars. The motion was granted. The bars appealed. On appeal, the Court held that a bar owner who serves an intoxicated person intoxicants is not a joint tortfeasor in a tort committed by the intoxicated person. The Court's reasoning was that the bar's liability was grounded in violation of a statute, whereas the driver's liability was grounded in tort. The driver and bars were therefore not joint tortfeasors, even though there was a single indivisible injury.

The same reasoning is applicable to this case: American Legion Post No. 134's liability is statutory; the liability of Clearfield City and Utah Power & Light Company, if any, is grounded in common law tort. Third-party plaintiff and third-party defendants are not joint tortfeasors; therefore, there is no right of contribution.

The cases advanced by defendant/appellant American Legion Post No. 134 that hold that a dram shop and a drunk are jointly and severally liable are clearly distinguishable. In those cases, the conduct of the drunk and of the dram shop are not, as in this case, independent.

In Phillips v. Union Pacific R.R. Co., 614 P.2d 153 (Utah 1980), Parham drove a vehicle that collided with Union Pacific's train killing Phillips, a passenger in the vehicle. Phillip's wife sued Union Pacific. Union Pacific brought a third-party action against Parham and his employer, Hammary,

seeking contribution. The trial court dismissed the third-party complaint.

On appeal, the Utah Supreme Court held there was no right to contribution because the Union Pacific was not a joint tortfeasor with Parham and Hammary. The court reasoned that:

There can be no contribution between the defendant railroad and Hammary and Parham, because they cannot be joint tortfeasors. See 2A Larsen on Workmen's Comp. 295, Sec. 76.20 Contribution. Their respective liabilities are grounded upon different social issues sought to be recognized by the Legislature when it adopted legislation dealing with Workmen's Compensation. Our statute defines a joint tort-feasor as one of two or more persons jointly or severally liable in tort for the same injury. The liability of the employer is not tort liability at all, but only requires that the injured employee be in the course and scope of the employment.

Id. at 154.

The same reasoning is applicable to this case: American Legion Post No. 134's liability is grounded in statute, whereas the liability of Clearfield City and Utah Power & Light Company, if any, is grounded in common law tort. They are not joint tortfeasors, and there is no right of contribution.

X. CONCLUSION

At the time of the accident sued upon, there was no Utah dram shop liability for giving, selling, or otherwise providing beer. Further, American Legion Post No. 134 has no right to contribution because contribution is contrary to the very

purpose of dram shop liability. American Legion Post No. 134's cause of action for contribution was eliminated by the Utah legislature before any right of American Legion Post No. 134 of contribution arose. In any event, Clearfield City and Utah Power and Light Company are not joint tortfeasors with American Legion Post No. 134. For the foregoing reasons, the lower court's judgment in favor of Clearfield City, the State of Utah Department of Transportation, and Utah Power & Light Company and against American Legion Post No. 134, no cause of action, should be affirmed.

DATED this 25th day of May, 1988.

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ADDENDUM

Pursuant to Rule 24(i) of the Rules of the Utah Supreme Court, Clearfield City and Utah Power & Light Company adopt by reference defendant/appellant American Legion Post No. 134's addendum.

SCMRHH214

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing Brief of Respondents Clearfield City and Utah Power and Light Company to the following parties on the 25th day of May, 1988:

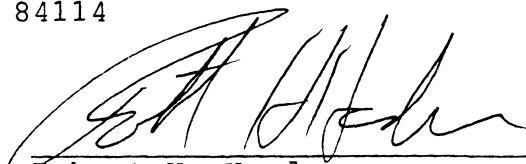
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