

1988

Marjorie Allisen v. American Legion Post No. 134 : Reply Brief

Utah Supreme Court

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JUL 8 1988

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

MARJORIE ALLISEN,	:	
	:	
Plaintiff/Respondent, :		Supreme Court
		Case No. 880031
vs.	:	(District Court
		Case No. 38319)
AMERICAN LEGION POST NO. 134,	:	
	:	
Defendant/Appellant. :		

REPLY BRIEF OF THE APPELLANT

INTERLOCUTORY APPEAL FILED FROM

THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARJORIE ALLISEN, : REPLY BRIEF OF APPELLANT

Plaintiff/Respondent, : Supreme Court
Case No. 880031
vs. : (District Court
Case No. 38319)

AMERICAN LEGION POST NO. 134, :

Defendant/Appellant. :

Comes now Defendant/Appellant by and through its
counsel, Barry Gomberg of David Bert Havas and Associates, and
respectfully submits the following Reply Brief of Appellant
pursuant to Rule 24 of the Utah Supreme Court.

PARTIES

- | | | |
|----|---|--|
| A. | MARJORIE ALLISEN | Plaintiff
Respondent
Referred to herein as "Allisen" |
| B. | AMERICAN LEGION POST
#134 | Defendant/Third-Party Plaintiff
Appellant
Referred to herein as "the Legion" |
| C. | STATE OF UTAH DEPART-
MENT OF TRANSPORTATION | Third-Party Defendant
Respondent
Referred to herein as "UDOT" |
| D. | UTAH POWER & LIGHT
COMPANY | Third Party Defendant
Respondent
Referred to herein as "UP&L" |
| E. | CLEARFIELD CITY | Third-Party Defendant
Referred to herein as "Clearfield" |

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SUMMARY OF ARGUMENTS

Marjorie Allisen ("Allisen") argues in her response brief that even if this Court holds that the plain meaning of the Dram Shop Act in effect at the time of the accident bars her reliance upon that statute that she should be allowed to proceed on a common law negligence theory. This should not be allowed for two reasons:

1. Allisen did not properly raise that issue in the trial court, and should not be allowed to do so at this time, and
2. Utah does not recognize common law liability for dram shops.

If Allisen is allowed to bring a common law negligence claim against the American Legion Post Number 134 the Legion must, in turn, be allowed to seek contribution from the third-party defendants dismissed below. The arguments third-party defendants presented to justify their dismissal are inapplicable to a common law negligence theory.

ARGUMENT

POINT I

MARJORIE ALLISEN SHOULD NOT BE ALLOWED TO
PROCEED ON A COMMON LAW NEGLIGENCE THEORY
BECAUSE THAT ISSUE WAS NOT PROPERLY RAISED IN
THE TRIAL COURT.

A theory of recovery which was not submitted to the trial court ought not be considered on appeal. General Appliance Corporation v. Haw, Inc., 516 P2d 346 (Utah 1973). In that case this Court held that the interest of orderly procedure precluded considerations of theories not raised at trial. Id. at 348.

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Similarly, in Simpson v. General Motors Corporation, 470 P2d 399 (Utah 1970), this Court ruled that a theory of liability which the plaintiff there attempted to inject on appeal for the first time would not be addressed. The reasoning again was that "[o]rderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round of litigation." Id. at 401. See also, Yost v. State, 640 P2d 1044 (dram shop action where a defense was disallowed on appeal because it had not been raised in the trial court).

Here, Allisen attempts to perpetuate this merry-go-round of litigation by raising a new cause of action for the first time on this appeal. Had Allisen wished to bring a common law dram shop action she should have done so at the outset rather than attempting to prolong the litigation at this stage.

POINT II

MARJORIE ALLISEN SHOULD NOT BE ALLOWED TO
PROCEED ON A COMMON LAW NEGLIGENCE THEORY
BECAUSE UTAH DOES NOT RECOGNIZE COMMON LAW
DRAM SHOP LIABILITY.

Allisen's attempt to raise a cause of action based upon a common law dram shop theory would require this Court to do here what it explicitly chose not to do in Yost v. State, 640 P2d 1044. In that case this Court "refused to adopt by judicial fiat remedies commonly available under so-called 'civil damage' or

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'dram-shop acts." Id. 1046. In the case of Beach v. University of Utah, 726 P2d 413 (Utah 1986) this Court reviewed the Yost decision in the margin at 417 and reiterated that "Utah recognizes no common law right of action against a provider of alcohol based upon the fact that the alcohol was furnished in violation of the law."

This approach was followed by the Tenth Circuit in 1984 in Tovar v. Lee, No. 84-1540 (10th Cir., Nov. 20, 1984) an apparent unpublished opinion, but, which was previously relied on by Clearfield City in its Motion for Summary Judgment, a copy of the Order and Judgment is attached hereto marked as Exhibit "A". That court upheld a decision of District Court Judge Bruce Jenkins based upon his reading of the Utah Dram Shop Act in effect at the time of the accident in this case. Judge Jenkins held, and the Tenth Circuit agreed, that Utah's Dram Shop Act was preemptive. When the Utah legislature created a cause of action against the providers of liquor for third parties injured by those to whom such liquor was provided it preempted all other causes of action based upon such a theory.

What Allisen is attempting to do here is to expand the liability of a provider of alcohol beyond the boundaries explicitly laid out by the legislature. She does this first by arguing that what the legislature said was not what it meant. Failing that, she requests this Court to amend the law (as the legislature eventually did) effective at the time of the

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accident. Such action would constitute judicial fiat rejected in Yost, and should not now be adopted.

POINT III

IF ALLISEN IS ALLOWED TO PROCEED ON A COMMON
LAW NEGLIGENCE THEORY, THEN THIRD-PARTY
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT MUST
BE DENIED.

The logic of the Third-parties' Motion for Summary Judgment derives from Allisen's Dram Shop Act claim. Their arguments that contribution is inappropriate for dram shop actions and that they cannot be "joint tort feasons" with a dram shop under a dram shop action are inapposite to a common law action. As a result, if this Court holds that Allisen may proceed against the American Legion Post No 134, then it must also allow the Legion to seek contribution from the third-party defendants for their negligence. Any other result would be grossly unfair to the Legion.

CONCLUSION

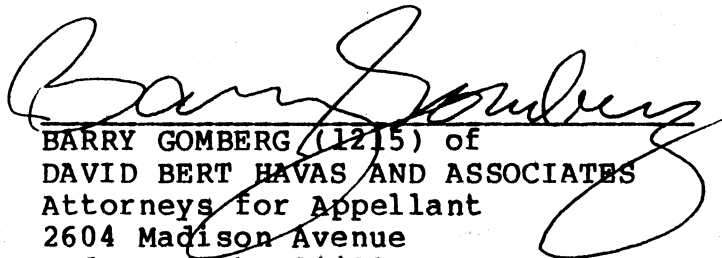
Allisen should not be allowed at this late date to add a new cause of action based upon common law dram shop liability. To do so would be unfair to the American Legion, disruptive of orderly procedures, and would require this Court to create by judicial fiat a cause of action the legislature had preempted. If Allisen is allowed to include this new cause of action then the American Legion Post Number 134 must also be allowed to seek

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contribution from those who under common law principles could be considered joint tort feasons.

RESPECTFULLY SUBMITTED this 8th day of July, 1988.

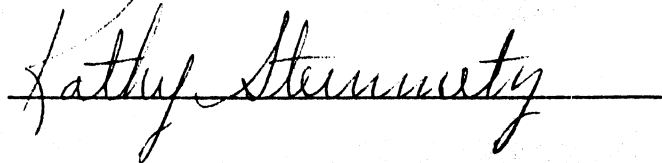

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Reply Brief of Appellant, to Robert Gordon and Paul H. Proctor, Attorneys for Utah Power and Light Company, 1407 West North Temple, Suite 340, Salt Lake City, Utah 84140; to James R. Hasenyager of Marquardt, Hasenyager and Custen, Attorneys for Plaintiff, 2661 Washington Boulevard, Suite 202, Ogden, Utah 84401; to William F. Bannon, Assistant Attorney General and Stephen J. Sorenson, Assistant Attorney General, Chief, Litigation Division, Attorneys for State of Utah Department of Transportation, 236 State Capitol, Salt Lake City, Utah 84114; to Robert H. Henderson of Snow, Christensen & Martineau, Attorneys for Third-Party Defendant Clearfield City, 10 Exchange Place, 11th Floor, Salt Lake City, Utah 84145, postage prepaid this 8th day of July, 1988.

A handwritten signature in cursive script, reading "Kathy Steenmuntz", is written over a horizontal line.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

NOV 20 1984

HOWARD K. PHILLIPS
Clerk

RICHARD JESSE TOVAR,)
)
Plaintiff-Appellant,)
)
v.)
)
MERLIN EVAN LEE, d/b/a)
101 Rancho Service, Virgin,)
Utah,)
)
Defendant-Appellee.)

No. 84-1540
(D.C. Civil No. C-83-1077J)
(D. Utah, Central Division)

ORDER AND JUDGMENT

Before BARRETT, DOYLE, and McWILLIAMS, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

The issue is whether, under Utah law, an intoxicated person has a cause of action against a dram shop owner for personal injuries sustained in a motorcycle accident caused by such person's voluntary consumption of intoxicating beverages in the dram shop. The district court held that under Utah law there was no such cause of action. We agree.

From the complaint we learn that Richard Jesse Tovar, an adult, became intoxicated in a tavern owned by Merlin Evan Lee. In this regard, it is alleged that Lee, or his agents and employees, negligently permitted Tovar to become intoxicated and that thereafter, while still in an intoxicated condition, Tovar drove his motorcycle off the road and sustained serious personal injuries and is now, in fact, a quadriplegic. Tovar sought general damages from Lee, the dram shop owner, in the amount of \$10,000,000. Federal jurisdiction is based on diversity of citizenship. 28 U.S.C. § 1332.

In his answer, Lee first pled that the complaint failed to state a claim upon which relief could be granted. Later, Lee moved for judgment on the pleadings. Lee's position is that under the Utah Dram Shop Act only a third party who sustains injuries because of the acts of an intoxicated person has a cause of action against the dram shop owner who permitted his patron to become intoxicated, and that the Act does not create a cause of action against the dram shop owner on behalf of an intoxicated patron who himself sustains injury as a result of intoxication. Utah Code Ann. § 32-11-1, et seq. (Supp. 1983). At this juncture, Tovar sought to amend his complaint so as to include a separate claim against Lee based on a Utah statute relating to the maintenance of a common or public nuisance.

The district court denied Tovar's motion to file an amended complaint and granted Lee's motion for judgment on the pleadings. A judgment of dismissal followed. Tovar appeals. We affirm.

The Utah Dram Shop Act creates, in so many words, a cause of action in favor of a third party, who sustains injury at the hands of an intoxicated person, against the dram shop owner who permitted his patron to become intoxicated. Utah Code Ann. § 32-11-1 (Supp. 1983). However, that statute does not create any such cause of action in favor of the intoxicated person against the dram shop owner.

Lee's position is that the Dram Shop Act is preemptive and that the only cause of action created by that statute is one in favor of an injured third party against the dram shop owner.

Tovar's position is that the statute is not preemptive and that Tovar, under Utah law, has a common law cause of action against Lee, the dram shop owner, or, in the alternative, that he has a cause of action under Utah statutory law pertaining to the maintenance of a public nuisance. As indicated, the district court sustained Lee's position and entered judgment in his favor.

This is another diversity case which turns on a federal judge's understanding of local state law. It would appear that the Utah Supreme Court has not yet addressed the precise issue here involved. In such circumstance, the view of a resident federal district judge on an unsettled question of local state law is entitled to some deference by a federal appellate court, and, on review, should not be overturned unless the appellate court has a rather firm view that the federal district judge erred. See Colonial Park Country Club v. Joan of Arc, ____ F.2d ____ (10th Cir. 1984) (No. 83-1333); Budde v. Ling-Temco-Vought, 511 F.2d

1033 (10th Cir. 1975). We have no such feeling in the instant case.

Our attention has not been directed to any Utah case which would support Tovar's contention that he has a common law cause of action against Lee. The Utah Dram Shop Act creates a cause of action in favor of an injured third party against the dram shop owner, but creates no corresponding cause of action in favor of an intoxicated person who injures himself. We are disinclined to disturb the district court's belief that the Utah Dram Shop Act is preemptive. In this regard, in *Miller v. City of Portland*, 288 Or. 271, 604 P.2d 1261, 1265 (Or. 1980), the Oregon Supreme Court (Or. 1980), considering a dram shop act similar to the Utah statute, spoke as follows:

This court has never previously recognized a common law cause of action in favor of a person who suffers injury resulting from his or her own consumption of alcohol. Nor have most other courts. Because it would be contrary to apparent legislative policy, we also consider it inappropriate to create a common law cause of action for physical injury to minors caused by their illegal purchase of alcoholic liquor.

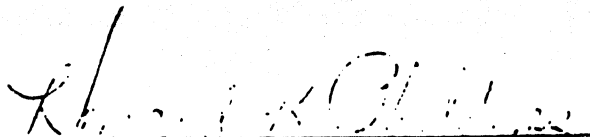
For a general discussion of the policy considerations militating against creating a cause of action against a tavern owner in favor of one who voluntarily gets intoxicated, see *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976). In that case, the court stated:

A rule of liability here could have no other possible effect upon patrons than to encourage them to excessive liquor consumption at taverns. Forthwith upon the announcement of a rule of law which permits a drunken patron to recover damages for his own injuries from the tavern keeper, patrons who have heretofore felt concern for their own safety should they become overly intoxicated will relax their personal efforts, for three readily apparent reasons. First, because they will

assume that the bartenders will exercise greater care on their behalf; second, because they very naturally will feel that if they are hurt they will be compensated for such hurt; and third, because we . . . will in effect have encouraged their over indulgence, by pampering their delinquency. It cannot be otherwise. The already tragic statistics which so horribly describe the slaughter of innocent persons by drunk drivers will immediately increase, to society's further disadvantage. Id. at 611-12.

As stated above, the district court refused to allow Tovar to amend his complaint so as to include a separate claim based on the local statute pertaining to a public nuisance, and such is now assigned as error. Although leave to amend shall be freely granted when justice so requires, leave to amend need not be granted where the "futility of amendment" is apparent. *Mountain View v. Abbott Laboratories*, 630 F.2d 1383, 1389 (10th Cir. 1980). Believing, as we do, that the Utah Dram Shop Act is preemptive, there can be no cause of action in favor of Tovar based on any public nuisance theory.

Judgment affirmed.


HOWARD K. PHILLIPS, Clerk