

1988

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

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

UTAH
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DOCKET NO.

IN THE SUPREME COURT OF THE STATE OF UTAH

MARJORIE ALLISEN,

:

Plaintiff/Respondent, : Case No. 880031

v. :

AMERICAN LEGION POST NO. 134, :

Defendant/Appellant. : (District Court
Case No. 38319)

BRIEF OF THE RESPONDENT MARJORIE ALLISEN

Appeal from the Second Judicial District Court,
Davis County, Judge Douglas L. Cornaby

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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Defendant/Appellant. : (District Court
Case No. 38319)

BRIEF OF RESPONDENT MARJORIE ALLISEN

JURISDICTIONAL STATEMENT

This appeal was granted by Order of this Court on March 1, 1988, pursuant to Rule 5 of the Supreme Court.

STATEMENT OF THE ISSUES

A. Did the old Utah Dram Shop Act apply to providers of beer as well as other alcoholic drinks?

B. Would interpreting the old Utah Dram Shop Act to not apply to providers of beer lead to absurd and incongruous results?

C. Would interpreting the old Utah Dram Shop Act to not apply to providers of beer be within the intent of the Utah Legislature?

D. Should the court recognize an action for negli-

gence on the part of a provider of beer who negligently serves beer to an already intoxicated person?

STATUTORY AUTHORITY

The statutes, rules or cases in support of Respondent's position are as follows:

STATUTES:

Utah Code Annotated Section 32-1-3
Utah Code Annotated Section 32-7-14
Utah Code Annotated Section 32-11-1
Utah Code Annotated Section 32A-14-1

STATEMENT OF CASE

Respondent was severely injured when she was struck by an automobile operated by a Mr. Wesley Harju. Mr. Harju was a member of the American Legion Post in Clearfield, Utah. Prior to the accident, he consumed at least six glasses of beer at this American Legion Post. Mr. Harju weighs approximately 115 pounds. The accident occurred when Mr. Harju turned onto SR-126 in front of the Legion Post and collided with the Respondent who was walking in the area at the time.

Subsequently, the Respondent filed suit against the American Legion Post under our Utah Dram Shop Act. Appellant moved for summary judgment on the basis that Mr. Harju was served "light beer" prior to the accident. Appellant contended that light beer was not "liquor" within the meaning of the Utah Dram Shop Act effective at the time of the accident. The trial court denied this motion. (See

attached order of the court.) Subsequently, the trial court granted motions for summary judgment brought by Clearfield City, Utah Power and Light Company and the State of Utah. All of these parties were brought into this lawsuit as third party defendants by Appellant American Legion Post 134.

SUMMARY OF ARGUMENT

The Utah Legislature intended for the 1981 Dram Shop Act to apply to providers of beer as well as vodka, whiskey, gin and other strong drinks. This is because the object of the Dram Shop Act was to force providers of alcoholic beverages to share a portion of the large cost to society that results from the misconduct of intoxicated individuals. Since one can become drunk by drinking beer or by drinking whiskey, the Dram Shop Act must sensibly apply in both instances.

The discrepancy in language between the Liquor Regulatory Act and the Dram Shop Act can be accounted for by the fact that the laws were enacted twelve years apart. Also, it can be explained because the two acts have fundamentally differing purposes. One act regulates liquor sales. The other creates a private cause of action against providers of alcoholic beverages. Definitions from one should not automatically be applied to the other.

The Utah Legislature has clarified the meaning of the old Dram Shop Act by amending it to include providers of

beer. This should make it clear that it always was the intent of the legislature to include providers of beer within the statute. The fact that they were not included was an oversight not a design.

Public policy considerations mandate that the old Dram Shop Act be applied to providers of beer. Otherwise, an absurd result will follow. In other words, a provider of beer, certainly the largest quantity alcoholic beverage consumed in this state, will escape liability for causing an intoxication while a provider of whiskey would not. Laws should not be interpreted to lead to absurd results.

Finally, the court should allow Respondent to maintain an action against the American Legion Post for common law negligence if it holds that the old Dram Shop Act does not apply here. Such a result would be in harmony with Utah statutory law and common sense.

ARGUMENT

POINT ONE: THE UTAH DRAM SHOP ACT IN EFFECT AT THE TIME OF THE ACCIDENT CONTAINED THE PHRASE "LIQUOR" WHICH WAS MEANT TO INCLUDE BEER.

Appellant's contention that this lawsuit cannot proceed because beer is not liquor as defined in the old Utah Dram Shop Act is one which is without merit and must be rejected.

The first argument which is made is that the "plain meaning" of liquor simply does not encompass beer. This

point is not well taken. It is common knowledge that liquor is regulated because it has the propensity to make people intoxicated. Intoxicated individuals are more lacking in judgment than non-intoxicated individuals. Intoxication causes individuals to act in a careless, negligent and reckless manner. This can cause unnecessary, severe and even fatal injuries to innocent third parties. Drunk or intoxicated motorists cause thousands of deaths every year on our nation's highways. They cause billions of dollars in direct and indirect costs to society. In an effort to see that a small portion of the losses to innocent victims can be compensated, the legislature enacted the Dram Shop Act.

Obviously, the legislature intended to penalize establishments who serve intoxicated customers alcohol. It also intended to penalize establishments who served minors alcohol when these establishments cause an intoxication which results in injury to a third person when damages are assessed. The whole idea of the Dram Shop Act was to force manufacturers and retailers of intoxicating beverages to share some of the exorbitant cost to society imposed by drunks causing accidents.

Therefore, in light of the purpose of the Dram Shop Act, the plain meaning of liquor must be held to include beer. This is because beer can cause an intoxication just as bourbon, vodka, scotch, gin or rum can.

The legislative history of the Dram Shop Act makes it equally clear that the legislature intended to allow Dram Shop suits against beer retailers as well as those of other alcoholic beverages. In order to understand the true intent of the legislature though, it is necessary to undertake an analysis of all Utah liquor regulatory legislation. Young v. Barney, 433 P.2d 846 (Utah, 1966).

In 1969, the Utah Legislature adopted a comprehensive regulatory code for selling and serving liquor and alcoholic beverages. The code set forth provisions for operating liquor stores, private clubs and restaurants. Contained in this 1969 law is a section which defines liquor. Beer is excluded from this definition. [U.C.A. 32-1-3]

In 1981, in response to national trends, the Utah Legislature passed the first Dram Shop Act. This statute stated that:

(1) Any person who gives, sells, or otherwise provides intoxicating liquor to another contrary to subsection 16-6-13.1 (8)(d), subsection 32-1-36.5 (1)(1), section 32-7-14 or subsection 32-7-24 (b) or (c), and thereby causes the intoxication of the other person, is liable for injuries in person, property, or means of support to any third person, or the spouse, child or parent of that third person, resulting from the intoxication.

(2) 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.

(3) If a person having rights or liabilities under this section dies, the rights or liabilities provided by this section shall survive to or against that person's estate.

[U.C.A. 32-11-1, emphasis added.]

Appellant contends that the definition of liquor in U.C.A. 32-1 through U.C.A. 32-7 enacted around 1969 must control the definition of liquor in U.C.A. 32-22-1 which was enacted in 1981. Respondent submits that the definition from this entirely different scheme of regulation must not be automatically lifted from the code and applied to the Dram Shop Act. First, there is no legislative history which would indicate it was the intent of the 1981 legislature to apply the same definition of "liquor" which appeared in earlier legislation. Second, there was a gap of twelve years from the passage of the earlier legislation until the passage of the Dram Shop Act. Third, the Dram Shop Act is fundamentally different legislation than the other liquor measures enacted in 1969. The 1969 legislation pertained to licensing of liquor sales establishments and administrative regulation of such sales. Dram Shop's legislation has a fundamentally different character. It creates a private right to sue on the part of innocent third parties who are injured by intoxicated individuals. It does not enlarge or change the power of the Utah Liquor Commission as was the intent of the 1969 legislation. Therefore, the same set of

definitions should not automatically be applied to both statutes.

The subsequent legislative history of the Dram Shop Act is even more crucial than the prior history. In 1986, the Utah Legislature amended the 1981 Dram Shop Act to include all "alcoholic beverages". (U.C.A. 32 A-14-1) This new statute states:

(1) Any person who directly gives, sells, or otherwise provides liquor, or at a location allowing consumption on the premises, any alcoholic beverage to a person:

(a) Who is under the age of 21 years or,

(b) Who is apparently under the influence of intoxicating alcoholic beverages or products or drugs or,

(c) Whom the person furnishing the alcoholic beverage knew or should have known from the circumstances was under the influence of intoxicating alcoholic beverages or products or drugs or,

(d) Who is a known interdicted 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. An employer is liable for the actions of its employees in violation of this chapter.

(2) A person who suffers an injury under Subsection (1) has a cause of action against the person who provided the liquor or other alcoholic beverage in violation of Subsection (1). [Emphasis added]

Appellant contends that the new Dram Shop Act was enacted because the old act did not cover beer. Respondent submits that this was not the case at all. Rather, the statute was enacted to clarify an ambiguity in the old law. In other words, the legislature changed the law so that everyone would clearly understand that the act was meant to apply to beer as well as other intoxicating beverages. The law was changed for purposes of clarity rather than substance.

In considering the meaning that the Utah Legislature intended the old Dram Shop Act to have it is important to understand a principle of statutory construction. This principle is that reason and intention may prevail over technically applied literalness. Andrus v. Allred, 404 P.2d 972 (Utah, 1965).

Public policy considerations are extremely important in this case. If the court accepts Appellant's interpretation of the 1981 Dram Shop Act it will lead to an absurd result. Bars which serve beer are immune from a Dram Shop suit while private clubs which serve bourbon, vodka or gin will not be immune. The court will fail to have focused on the most important thing: the fact that someone was made intoxicated. The court should consider the principle of statutory construction which says that statutes should not be construed to lead to unintended and incongruous results.

Snyder v. Clune, 390 P.2d 915 (Utah, 1964). Curtis v. Harman Eletronics, 575 P.2d 1044 (Utah, 1978) [Statutes are presumed not to be intended to produce absurd consequences and will be construed so that they do not]. Barton v. Carson, 380 P.2d 926 (Utah, 1963) [Statutes should be accorded reasonable and logical meanings].

POINT TWO: EVEN IF THE COURT HOLDS THAT THE OLD
DRAM SHOP LAW DOES NOT PERMIT AN
ACTION FOR INTOXICATION CAUSED BY
BEER, IT MUST ALLOW THIS ACTION TO
PROCEED ON A COMMON LAW NEGLIGENCE
THEORY.

Even if this court should hold that the old Dram Shop Act does not apply to beer, then Respondent's case cannot be dismissed. Rather, Respondent should be allowed to maintain this lawsuit against American Legion Post 134 on the basis of a common law negligence theory.

The record in this case established that Mr. Wesley Harju consumed six beers at the American Legion Post prior to the accident. At the time of the accident, Utah had a statute in effect which made it unlawful to serve an intoxicated individual alcoholic beverages. U.C.A. 32-7-14 stated that:

No person shall sell or supply any alcoholic beverages or permit alcoholic beverages to be sold or supplied to any person under or apparently under the influence of liquor.

The central idea of negligence law is that if one violates a duty and as a proximate result of that violation

injures another, he is liable for damages. Duties can be created by statute or by common law. Respondent contends that U.C.A. 32-7-14 creates a duty to not serve intoxicated persons alcoholic beverages. Any breach of this duty should be considered negligence. If injuries proximately result from this negligence, a jury should be allowed to award the injured party damages.

Even if the court believes this statute creates no duty, this court should recognize a duty through a common law analysis. In United States v. Carroll Towing Company, 159 F.2d 169 (CA2, 1947) the court states the now classic formula for determining whether an activity constituted negligence. Judge Learned Hand indicated that a duty exists depending upon (1) the probability of injury, (2) the gravity of the potential injury, and (3) the burden of taking precautions. In the case at bar, the probability that an intoxicated patron of the Legion could harm someone was considerable. The gravity of a potential injury was high (particularly if we include motor vehicle accidents). Finally, the burden of taking precautions was not high. Bartenders need simply to be instructed to not serve more than two or three beers to each customer as a maximum.

Under any analysis the court must recognize a legal duty on the part of the American Legion Post to not serve beer to intoxicated patrons. The breach of this duty must

be held to actionable as negligence.

CONCLUSION

The idea that one who serves an intoxicated patron beer instead of whiskey should be immune from lawsuit under the Dram Shop Act is absurd. The legislature did not intend such a result. Rather, the discrepancy in statutory language exists because:

1. There was a twelve year gap between the passage of the Liquor Regulatory Act and the first Dram Shop Act;

2. The Dram Shop Act has a fundamentally different nature than the Liquor Regulatory Act. Therefore, the legislature did not intend definitions from the regulatory law to be lifted and automatically applied to the Dram Shop Act.

It must also be noted that the legislature has acted and now changed the language "liquor" to "alcoholic beverages". This should be interpreted as clarifying the meaning of the earlier law rather than changing it. Clearly, the old Dram Shop Act was intended to cover servers of beer as well as whiskey, vodka and other strong drinks.

Even if the court interprets the old Dram Shop Act to exclude servers of light beer, Respondent must be permitted to proceed with this case. Respondent can proceed on a theory of negligence. Such a theory can be based on U.C.A. 32-7-14 or upon the common sense idea that it is dangerous

to serve alcoholic beverages to an intoxicated individual.

RESPECTFULLY submitted this 8th day of June, 1988.

Mark David Las
JAMES R. HASENYAGER
Attorney for Respondent

CERTIFICATE OF MAILING

* * * * *

I hereby certify that on this 8th day of June, 1988, I mailed four true and correct copies of the above and foregoing Brief of Respondent, postage prepaid, to:

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IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

MARJORIE ALLISEN,

Plaintiff,

ORDER AND JUDGMENT

vs.

AMERICAN LEGION POST NO.
135,

Civil No. 38319

Defendant.

Honorable Douglas Cornaby

AMERICAN LEGION POST NO.
134,

Third-Party Plaintiff,

vs.

STATE OF UTAH DEPARTMENT OF
TRANSPORTATION, et al.,

Third-Party Defendants.

Clearfield City's Motion for Summary Judgment in it's
favor and against third-party plaintiff American Legion Post

No. 134 came on regularly for a hearing on October 27, 1987. The State of Utah Department of Transportation and Utah Power & Light Company joined in Clearfield City's Motion. The Court reviewed the Motion and the Memoranda on file, and the Court fully heard the argument of counsel. The Court being fully advised in the premises, NOW, THEREFORE, IT IS ORDERED that the Motion for Summary 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 be, and hereby is granted.

Based thereon, NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that: Judgment be, and hereby is entered 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.

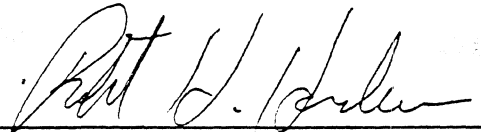
DATED this _____ day of _____, 1987.

BY THE COURT:

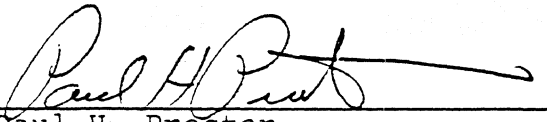
DOUGLAS CORNABY
DISTRICT COURT JUDGE

Approved as to form prior to signature and entry by the Court:

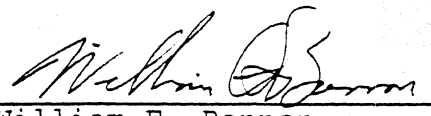
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AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

DONNA CAMPBELL, being duly sworn, states that she is employed in the office of Snow, Christensen & Martineau, attorneys for Clearfield City and that she served a copy of Proposed ORDER AND JUDGMENT
upon the following parties:

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by placing a true copy thereof in an envelope and mailing the same Postage prepaid on the 29th day of October, 1987.

SUBSCRIBED and sworn to before me this 29th day of October 1987.

My Commission Expires: 5/13/88

Donna Campbell
SECRETARY

Charles A. Smith
NOTARY PUBLIC

Residing in the State of Utah