1980

George Kevin Yost v. State of Utah et al : Brief of Appellant Chris L. Peterson

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE KEVIN YOST, a Minor, by and through his Guardian Ad Litem, CHARLENE YOST, and CHARLENE YOST, individually, Plaintiffs and Respondents, v. STATE OF UTAH, STEVE HAMMON, CARLO SACCO, d/b/a SACCO'S PRODUCE, QUICK STOP, INC., a Utah Corporation, and CHRIS L. PETERSEN, d/b/a CHRIS'S, Defendants and Appellants.	)	Case No. 16990

BRIEF OF APPELLANT
CHRIS L. PETERSON

Appeal from the Judgment of the
District Court of Weber County
Honorable John F. Wahlquist, Judge

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Plaintiffs and Respondents,	)	
v.	)	Case No. 16990
STATE OF UTAH, STEVE HAMMON, CARLO SACCO, d/b/a SACCO'S PRODUCE, QUICK STOP, INC., a Utah Corporation, and CHRIS L. PETERSEN, d/b/a CHRIS'S,	)	
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BRIEF OF APPELLANT
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STATEMENT OF THE KIND OF CASE

This is an action brought by the plaintiff seeking to recover damages from the State of Utah, Carlos Sacco, d/b/a Sacco's Produce, Quick Stop, Inc., and Chris L. Petersen, for the alleged sale of alcoholic beverages to plaintiff, who was a minor at the time of the accident of the age of 16 years, alleging as the basis of its cause of action, the negligence of these defendants for the sale of alcoholic

beverage to the plaintiff, and an action against the defendant, Steve Hammon, based upon the fact that he was an adult over the age of eighteen (18) at the time of the accident, and was the driver and owner of the motor vehicle wherein Steve Hammon was the host driver, and the plaintiff, George Kevin Yost, was the guest passenger.

DISPOSTION IN LOWER COURT

The Court allowed and granted a Motion for Summary Judgment to Carlo Sacco, d/b/a Sacco's Produce, even though they had sold alcoholic beverages to the respondent, Yost. The Court further granted Judgment as against the defendant, Steve Hammon, the State of Utah, and Chris L. Petersen, finding five percent (5%) negligence on the part of the State of Utah, five percent (5%) negligence on the part of Yost, and thereby providing that Yost could not obtain judgment against the State of Utah; finding eighty percent (80%) comparative negligence as against the driver and adult, Steve Hammon, and finding ten percent (10%) negligence as to the defendant, Chris L. Petersen.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Lower Court's Order and Judgment as to the percent of liability attributed to the appellant Chris L. Petersen, and the percent attributable to

the plaintiff, as well as the other defendants in this action, and for reversal of the Motions for Summary Judgment as against the co-defendant, Sacco's, and for the dismissal in total, as to any liability of Chris L. Petersen, upon the grounds as stated as a defense in the Answer of the plaintiff, and as affirmed in the Affidavit attached that the said defendant and appellant is not the principal party in interest in this action before the Court, and upon the further grounds that the lower court has failed to properly interpret and apply the Utah Comparative Negligence Act.

STATEMENT OF FACTS

The only appellant in this action before the Court is the defendant Chris L. Petersen, who while alleged to be the owner of premises operated as "Chris's" made an affirmative denial of any liability or connection with the action before the Court, and no evidence of any kind throughout the entire litigation, and nowhere in the record before the Court is there any evidence or proof that the appellant,Chris L. Petersen, against whom judgment has been rendered, is in fact the owner or operator of the premises wherein the plaintiff is alleged to have purchases alcoholic beverages. There is an Affidavit attached to this Brief in affirmation thereof.

Throughout the Brief, the appellant Chris L. Petersen, will be referred to as "Appellant", while the other co-defendants will be referred to as "Hammon", "Sacco", "Quick Stop", and "State of Utah".

The Respondent (Yost) was sixteen (16) years old on the date of the accident, which occurred on August 31, 1976 (R 106). Hammon, who was the driver of the 1972 Ford three quarter ton truck involved in the accident, and wherein Yost was a passenger, was over eighteen (18) years of age as of the date of the accident, and one Ronald K. Sills, was fifteen (15) years of age at the time of the accident, and is not a party to this action, but was a passenger in the motor vehicle driven by Hammon and wherein Yost was also a passenger at the time of the accident (Dep. at p. 7, R 106).

On the date of the accident, Hammon drove to the public school grounds wherein Yost and Sills made arrangements with Hammon to skip school and to buy alcoholic beverages and drive to Ogden Canyon and into the ski resort areas thereof. (R 107) The three (3) young adults left the school grounds at 12:30 p.m., all three planning a drunken spree and drove to Sacco's in Roy, Utah, and Hammon, together with Yost and Sills, went inside the premises where Hammon purchased 2 six packs of beer without being required to show any identification as to the age of the purchaser, Hammon.

Yost, Sills and Hammon each drank two (2) cans of beer while enroute to the State Liquor Store at Clearfield, Utah. (T244)

Hammon drove his truck into the rear parking lot of the Clearfield State Liquor Store and was able to purchase five (5) one-fifth bottles of wine, without being required to furnish any ID, and after purchasing the wine, exited through the rear of the store. (Dep. at pp. 13 & 14).

The three (3) young adults then went to the drive-in window of Quick Stop, and purchased two (2) six-packs of Coors, at the drive-in window. (T 166).

Hammon acquired two (2) six-packs of beer from Sacco's (T 169); two (2) six-packs of beer from Quick Stop; and five (5) one-fifth bottles of wine from the Clearfield Liquor Store (T 166-168).

They then began their trip to Powder Mountain in Ogden Canyon via the North Ogden Divide. All three (3) of the witnesses, Hammon, Yost and Sills, in their testimony, agreed that all five fifths of the wine and a substantial amount of the beer had been consumed by the time they had driven over the North Ogden Divide, (R 108), and as they continued to drive up to Pine View Dam and into the vicinity of Snow Basin, they continued to drink the remainder of their beer and indulged in taking off their clothes and frolicking (R 108).

The driver Hammon, together with Yost and Sills, then left the Snow Basin area, and drove allegedly to a place of business known as Chris's and purchased a six-pack of beer (Dep. at pp. 20, 22 and 61), and Hammon further stated that each of the three (3) drank only a single can of beer, of the beer purchased from Chris's (T 344).

The accident causing the injury to Yost,Hammon and Sills occurred as the truck driven by Hammon descended from the Powder Mountain Resort. (Dep. at p 23) Hammon testifying that it was a steep grade downhill and that he was driving about 25 to 30 miles an hour and had shifted down to a lower gear so as to require less use of the brakes and that the truck got too close to the edge of the road causing the truck to roll over. (Dep. at pp. 23, 24)

Carol Petersen (who was and is the owner and operator of Chris's (See Affidavit attached) testified that her primary occupation was an RN at St. Benedicts Hospital in the capacity of continuing Educational Co-ordinator, and that she had been a registered nurse for twenty-five (25) years, and held a Bachelor's Degree from the Dee Hospital, and was doing Post-Graduate work in Behavioral Sciences, and had been for seventeen (17) years engaged in the operation of Chris's, and that on the date of the accident, she was in fact operating the premises specifically during the times at

which the three (3) young adults testified that they had purchased beer at Chris's. (T 347, 348) She further stated that she had never seen the plaintiff, nor Hammon, nor Sills in the place of business, and that she would never have sold beer to any one of the three persons. (T 348).

Mrs. Petersen further testified that there is another business nearby that had a drive-in window, and sold beer; and that the premises which she operated did not carry Hamms beer, as was testified to by the witnesses. (T 355).

The testimony of Hammon was to the effect that he had never before purchased any beer at Chris's (T 39), and the same testimony was elicited from from Sill. (Dep. at p.39. T 200)

ARGUMENT

POINT I

APPELLANT, CHRIS L. PETERSEN, WAS NOT A PRINCIPAL PARTY IN INTEREST.

In answer to the Complaint of the plaintiff and respondent, the appellant, Chris L. Petersen, filed an affirmative defense that he was not a principal party in interest, alleging thereby that he was not the owner nor operator of the premises known as Chris's. (See Affidavit attached)

The appellant did not appear as a witness for any of the parties to this cause of action, and no evidence of any kind was introduced, evidencing the appellant to be an employee, owner, or operator of the business premises, and the appellant further stated as an affirmative defense that the Complaint of the plaintiff did not state a cause of action as against said appellant.

The respondent alleged in its Complaint that Chris L. Petersen was an owner of the premises known as Chris's, but during the course of the trial offered no evidence whatsoever as to the ownership of the premises, nor did the respondent subpoena the appellant as a witness, take depositions, ask interrogatories, or do anything in an affirmative manner to evidence in any way whatsoever, that the appellant, Chris L. Petersen, was the owner, operator, or in any way connected with the business known as Chris's, even though the appellant made an affirmative defense and denial that said appellant was the owner or operator of the premises, or a party in interest in the matter before the Court.

In First National Bank v. Ford, 216 P.691, the Supreme Court of Wyoming stated:

> The burden of proof is upon the party asserting the affirmative of an issue, using the latter term in the larger sense and as including any negative proposition which such party might have to show. If he alleges a fact that is

> denied, he must establish it. He is the actor, and as such, remains so throughout the case as to the allegations which he makes, or rather must make. Having alleged the truth of a matter in issue, he must prove it. The party denying his allegation cannot have this burden at any time during the trial, for it would be absurd to say that both the plaintiff and defendant have the same burden on the same issue. . . .In other words, the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial. If upon all the facts the case is left in equipoise, the party affirming must fail.

Additional authorities on this issue is Wigmore On Evidence 2d ed. §§ 2483-2490; Chamberlayne On Evidence, § 940; Thayer On Evidence, § 370; Scott v. Wood, 81 Cal. 398, 22 P.871; Sweeney v. Erving, 228 U.S. 233, 33 S.Ct.Rptr. 416.

Wyoming Supreme Court further stated in the First National Bank, supra:

> He who has the burden of proof, properly speaking, has imposed on him the obligation to establish the existence of the facts alleged by evidence, and leave sufficient to destroy the equilibrium and overbalance any weight of evidence produced by the other party.

Guild v. Moore, 32 N.Dak. 432, 155 N.W. 44; 67 Wash. 210, 121 P.452.

POINT II

THE LOWER COURT ERRED IN ITS ASSESSMENT OF THE COMPARATIVE NEGLIGENCE OF ALL OF THE PARTIES WHO WERE TORTFEASORS.

The Supreme Court of Utah in Craig Rees v. Albertson's, Inc., 587 P.2d 130 (Nov. 2, 1978), had before it the issue as to whether or not a summary judgment was justified when there was a sale of beer by one party, and other alcoholic beverages by a second party, in determining whether or not one of the parties was negligent in the sale of an alcoholic beverage sold by one, was a proximate cause as against the sale of alcohol by the other party constituting the proximate cause of the intoxication and injury to the plaintiff, both parties having presented expert witnesses wherein one party alleged that there is no evidence to show a casual relationship as between the plaintiff's alleged purchase of beer from the defendant, and the plaintiff's intoxication as against the other alcohol which was consummed by the plaintiff by reason of mixing of the defendant's alcohol with that of another seller of alcoholic beverages. The Court in reply to the position statements of the experts and the allegations made by the appellant and the defendant stated:

> That even if it cannot be determined exactly how much of the defendant's beer contributed to his intoxication from the brand names on empty cans in plaintiff's car, it could reasonably be believed that a substantial portion thereof combined with other liquors to cause plaintiff's intoxication, and that defendant

> could therefore be deemed to have contributed in causing the accident. . . . Upon this basis it is urged that notwithstanding whatever his own negligence and responsibility may be, under our statute which now permits contribution by joint tort-feasors, the plaintiff is entitled to have a determination made as to his claim of defendant's negligence and responsibility.

The Court further stated:

> What is necessary to meet the test of negligence and proximate cause, is that it be reasonably foreseeable, not that the particular accident would occur, but only that there is a likelihood of an occurence of the same general nature. In that contention, it is to be had in mind that the jury is entitled to base its judgment, not only upon the facts shown, but to indulge such reasonable inferences as may be fairly drawn therefrom. Considered in that light, we think reasonable minds could believe that in selling beer to a minor, such as plaintiff, the defendant should reasonably have foreseen the likelihood of it being combined with an automobile and result in some occurrence such as eventuated here.

In the instant matter before the Court, the trier of facts assessed five percent (5%) of comparative negligence to the State of Utah, by reason of its liquor store selling five (5) one-fifths of wine to Hammon, notwithstanding the fact that the purchaser parked in the parking lot of the liquor store, and entered through its parking lot door from the rear, and existed the same way, after having purchased

the five (5) one-fifths of wine, without the furnishings of an ID. The Court found that the State Liquor Store sold five (5) bottles of wine to Hammon, even though Hammon's appearance would have put anyone on notice who was reasonably observant that he was eighteen (18) years old, and was not in fact twenty-one (21) years of age; found that the boys left the State Liquor Store in the truck after the purchase of the wine; found that the boys did drink all five (5) one-fifths of the wine. (R 137)

It is noted that the Court found only five percent (5%) of comparative negligence for the State Liquor Store having sold such large quantity of alcohol to a person under the age of twenty-one (21) and who obviously had, according to the Court, an appearance of being not of the age of twenty-one (21), was negligent only in an amount of five percent (5%).

Comparing the five percent (5%) negligence of the State Liquor Store for its sale of five fifths of alcohol to the minor, as against the purchase and sale of a single six-pack of beer, as was testified to by Hammon in his deposition, which was taken on November, 1977, for an accident which had occurred on August 31, 1976. (Dep., at pp. 20, 22 and 61). The Court made the finding that Chris L. Petersen had negligent liability of ten percent (10%) or twice the amount of negligence of that of the State Liquor Store.

The Court made a finding in justification of the larger percent as against Petersen, by stating in its Memorandum Decision, that the act of Petersen selling the beer to Hammon was an act of gross negligence, evidencing a total disregard for the consequences, based upon the allegation that because of the location of the premises of Chris's that anyone who sold beer to Hammon, would know that he was in a vehicle and driving, and in a drunken condition at the time the alcohol was sold to Hammon. (R 140-141)

The Court made a finding in its arriving at a conclusion of gross negligence by alleging:

> There is a campground in the area, but both the campground and this tavern are well known landmarks in Weber County, and they are separated by some distance. The Court also noticed that this was after school had started in the late summertime or early fall. The Court believes that with any decree of observation at all, anyone who sold the beer to them would know they were in a vehicle and driving. (R 140)

The testimony of the only witnesses who were called upon to give information as to the premises of Chris's, testified that they had never purchased beer there before, and did not testify that the tavern was a well-known landmark in Weber County. (R 140)

If the Court could take judicial notice that Chris's is a well-known landmark, and that people arrive there by motor vehicle, they could also take judicial notice that the

Clearfield State Liquor Store has a large parking area, is not in a heavy urbanized area, and that it does not rely upon foot traffic or the immediate neighbors in the commercial downtown area of Clearfield, for the purchase of its alcoholic beverages, but relies practically totally upon motor vehicle traffic, and that the same allegation that school had started, that it was in the late summertime or early fall, or that anyone with any decree of observation would know that buyer was in a vehicle and driving, would also pertain to the State Liquor Store.

The only actual testimony as to the location of the defendant, Petersen's, business in relation to the traffic and surroundings, was given at time of trial by Mrs. Petersen, as set forth in the following dialogue on examination:

> Q. Let me ask you, are there other people or other establishments in the area close to Chris's that are similarly situated and that also sell beer.
>
> A. There is one business that has a gas station, a drive-in window, and also sells beer.
>
> Q. OK, now in connection with your business, are there also people that live in the immediate area that come in that live there on a regular basis, buy purchases and leave?
>
> A. There is a campground, Anderson's Cove, down the road a ways, and there are trailer in behind the place.

Q. How many trailers are there behind?

A. I think six or eight.

Q. OK, are there also people that come in and camp there for hunting, fishing, this type of thing?

A. That is mostly the type of people we get.

Q. That is mostly the type you get?

A. Yeah, Yes. They can walk over from the camp up to our place.

Q. OK.

A. When they're on boats.

(T 349)

The Lower Court, in its determination of the comparative negligence of all of the parties who are tort-feasors and contributed to the sale of alcohol to the plaintiff, Hammon, as the driver, and to Sill, as the other passenger, did not take into consideration any comparative negligence whatsoever of the two commercial establishments, who sold beer to them even though Hammon testified that he purchased beer at Sacco's, (D 9) which is an isolated service store, existing for the purpose of serving motor vehicle traffic customers. The testimony of Ronald Sill as a passenger, was that there were two (2) six-packs of beer of 12-oz. cans purchased from Sacco's. (T 169) It was further testified by the witnesses, that the three (3) youths drove up to the the

motor service vehicle window of Quick Stop and purchased two (2) six-packs of Coors beer. (T 166)

There was no expert testimony whatsoever as to the effect of the consumption of alcohol purchased from any of the sellers, or the effect on the driver, or the other parties who were passengers of the driver.

The Court, in its granting of its Summary Judgment to Sacco's, stated in its holding:

> The Court believes and so holds that in addition to the showing of the sale and contravention of law, the evidence must go beyond to show that the circumstances under which a sale were made, were such that the defendant knew, or under the circumstances should have known, the alcohol sale might subject other persons to an unreasonable or unacceptable risk of injuries.

(R 93)

The Court therefore allowed a Summary Judgment and a dismissal of Sacco's from the suit, without waiting to consider any assessment of comparative negligence as to that defendant, based upon the fact that even though the parties drove up to the premises of a store that catered to the driving public, and purchased two (2) six-packs of beer, and all three (3) of the young persons, including the driver and his two passengers, went inside the store at Sacco's to make the purchase of the six packs of beer together. (T 186) That there could be no distinction as between the sale of

12-oz. cans of beer to the three (3) minors as not being under such circumstances, where the defendant knew or should have known under the circumstances that the sale might subject other persons to an unreasonable or unacceptable risk of injuries, while finding in its holding as against Chris's that the sale of one (1) pack of beer to Hammon, only, was of such circumstances as would justify a ten percent (10%) comparative negligence to Chris's and a zero percent (0%) of negligence to Sacco's.

The Court's further finding, in its Memorandum Decision, that a basis of assessing ten percent (10%) negligence as to Chris's was "that these boys were all three extremely intoxicated, and under age". (R 140) While the most competent evidence shows that the alcoholic blood test at the hospital which occurred between 4:00 and 5:00 p.m., was .10%, as to Hammon, with the purchase having been made at Chris's between 3:00 and 3:30 p.m. (T 279), and in accordance with the testimony of Dr. Alvin Cobabe, who is the manager of Powder Mountain and a doctor, (T 209, 210) the accident occurred at 3:30 p.m. (T 228)

The plaintiff and respondent Yost, testified that two (2) six-packs of beer were purchased at Quick Stop (T 241) which was drank immediately, after which they drove to the Clearfield State Liquor Store, parked in the parking lot and Hammon entered the premises through the back door, and came

back out through the back door with five (5) one-fifths of wine, and that they started drinking the wine immediately. (T 242, 243)

Yost further testified that he drank the same quantity as Hammon and Sill, and that they consummed one and one-half (1 1/2) or two (2) six-packs of the beer purchased from Quick Stop, prior to the purchase of the wine at the Clearfield State Liquor Store, then drove to Sacco's and all three (3) went in and purchased two (2) six-packs of Hamms beer. (T 244, 245)

Yost further testified that he drank one and one-half (1 1/2) bottles of the wine, while driving over the divide, prior to reaching Snow Basin, and that the wine and beer was kept in the back of the truck in a box with ice in it (T 267) and that the plaintiff, Yost, climbed into the back of the truck while the truck was moving, each time that it was necessary to replenish the supply of wine or beer in the cab. (T 248)

It was further testified at the time of purchasing from Chris's, that Yost himself had consummed nine (9) beers and one and one-half (1 1/2) fifths of wine, and that he believed the driver to be intoxicated. (T 250) Yost further testified that he had consummed prior to the accident, twelve (12) cans of beer, plus part of another

six-pack, in addition to the one and one-half (1 1/2) bottles of wine. (T 294)

On direct examination, Yost testified that he was riding in the back of the truck, when the truck left Powder Mountain, and the following dialogue was recorded as to the conduct of Yost:

> Q. So you went outside of the inner perimeter of the car, or did you open the door?
>
> A. No. I crawled right through the window.
>
> Q. Is that the window that you had been going back and forth to get your beer all day?
>
> A. Yeah.
>
> Q. You mean as the car was moving, you were going out the passenger side of the car, going in the back of the truck, getting the beer, handing it out, then climbing in that way again?
>
> A. Quite a few times.
>
> (T 285)

Dr. Cobade, manager of the Powder Mountain Ski Resort, and a medical doctor (T 210), testified to the following dialogue:

> Q. When is the first time you became aware of the presence of the young men that were involved in the accident.
>
> A. I was sitting in my office, and I heard a noise out in the parking lot, and I went to the window to see what was happening. And a car was just leaving

the parking lot a quite a high rate of speed and nearly ran off the road when they left.

Q. OK, you say a car. Was it a pickup truck?

A. It was a pickup truck.

Q. Did you see the people that were involved in that truck?

A. I...as I recall, there was one or possibly two people standing in the back end of it. I am sure there was one, because I noticed he had only his shorts.

(T 211)

The testimony of Dr. Cobade, together with the testimony of Yost, that Yost was in the back of the truck and standing up therein at the time that the truck exited from Powder Mountain, and which was just prior to the accident, which occurred within one or onehalf mile after leaving the parking area on Powder Mountain (T 278), is evidence of a total reckless and negligent conduct of a young man of sixteen (16) years of age. The Court in its Memorandum Decision made a finding:

> All of the boys had some training in automobile safety, and all understood in the general sort of way of the dangers of driving and drinking, as they applied the quantities of alcohol consummed, etc.
>
> (R 138)

Q. Had you been drinking with Ron on occasion without Steve?

A. Quite a bit.

Q. During the year or so you had known him, could you give me an estimate of the times you went out drinking with him?

A. Pretty close to every weekend, if possible.

(T 262)

In further questioning the plaintiff, Yost, he was asked:

Q. Then in the course of driver's training and in taking your examination for your license, had you had any information given to you about the effects of drinking and driving?

A. Yeah. They gave me that little pamphlet like so much -- how much weight you are, how many beers you can drink until you will be drunk or something like that.

Q. Yeah. Did you...

A. I looked at those. I never read them, I just looked through it.
(T 262)
* * *

Q. But did you object to Steve driving and drinking.

A. No.

Q. In fact, if I understand your testimony, you didn't pay any attention to the way he was driving?

A. No. I was just having a good time.

(T 263)

The Court found that the plaintiff, Yost, had only five percent (5%) negligence, in spite of all of the previous testimony as to his driver training experience; his knowledge of the effect of alcohol upon the person; his knowledge that the driver was drunk; his previous experience at getting drunk; on drinking beer and wine; his climbing in an out of a moving truck while going through treacherous canyon roads to retrieve beer and wine from the back of the truck; his standing in the back of the truck on leaving Powder Mountain just prior to the accident which occurred on the way down from Powder Mountain; as compared to the negligence of Chris's found by the lower court to be ten percent (10%) negligence or twice the amount of that of the plaintiff by reason of the sale of one (1) six-pack of beer which was made to Hammon and not to Yost, as against the negligence of the State of Utah in selling five (5) one-fifths of wine without requiring an ID, even though the customer entered and left through the motor vehicle parking area of the State Liquor Store, and with full knowledge that practically all of the customers at the State Liquor Store in Clearfield are drive-in customers; with eighty percent (80%) negligence to the driver Hammon, and no negligence as to Sacco's sale of two (2) cans of beer to a known driver, and with all three (3) of the parties being inside the store at the time of the purchase; and with no negligence assessed as against Quick

Stop, where all three (3) drove up to a motor vehicle service window and purchased beer without the requirement of an ID.

POINT III

INTENT OF UTAH COMPARATIVE NEGLIGENCE ACT IS TO EQUITABLY DETERMINE ONE HUNDRED PERCENT (100%) OF TOTAL NEGLIGENCE.

The Utah Comparative Negligence Act, § 78-27-37, et seq., UCA as amended in 1953, and amended in 1973, is almost verbatim to the language of the Comparative Negligence Act adopted by the State of Idaho in 1971, under Idaho Code § 6-801 (Supp., 1973), and the Idaho Code is directly traceable to the original Wisconsin Statutes as Annotated, § 895.045 (1966).

The Utah Act in its title states:

> An act relating to actions for the recovery of damages in actions based on negligence or gross negligence; removing contributory negligence as a bar to any recovery under certain circumstances; providing for the diminishing of any recovery in proportion to the negligence of the person seeking recovery; providing for separate judgments as to damages and proportionate negligence; providing for contribution among joint tort-feasors; providing for the release of one or more joint tort-feasors without releasing them all; and providing for the effect of such releases on other joint tort-feasors.

Section 78-27-37 of the Act does not intend to provide for the characterization of negligence as ordinary negligence or gross negligence in the sense of contributory negligence prior decisions, and specifically states:

> But any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering. As used in this Act, 'contributory negligence' includes 'assumption of the risk.'

It is submitted that any of the parties who exhibit a faulty conduct must be shown to be a proximate cause of the injury before any comparison can be made for the purpose of establishing the proportion of the negligence of each of the parties, and that the faulty conduct of the Act, not the causation, is the basis of a comparison for arriving at a percentage of the comparative negligence of each of the actors.

The Lower Court, in its attempt to make an application of the percent of negligence as to each of the parties, considered the first determination to be made by the Court was the percent considered only from a view of causation (R 142, 143); that the second matter to be arrived at would be to find the degree of fault of each of the parties, and that the final amount of negligence as to each of the parties would be by a combination of fault, causation and application of what the Court considered an equitable

balance of those two considerations in fixing responsibility under Utah's Comparative Negligence Statute.

It is first to be noted that the Court could not have arrived at one hundred percent (100%) of the negligence involved in the matter before the Court, without considering the negligence of Sacco's and Quick Stop in their sale of alcohol to Yost, Hammon and Sill, and that it was the intent of the Statute and of the Legislature by removing the substance of risk and contributory negligence aspects, that all parties that contributed to the ultimate injury to the plaintiff would be required to be assessed by the Court, and that the consumption of twenty-four (24) 12-oz. cans of beer purchased from Sacco's and Quick Stop, and consummed by the three (3) young men cannot be found to have been non-causative or non-faulty as to the injuries or liability of the parties before the Court.

The Supreme Court of Wisconsin was a pioneer in the law of comparative negligence which was established by Judicial decision, and is the oldest jurisdiction in experience and judicial decisions as to comparative negligence, and indirectly the jurisdiction upon which the laws of the State of Utah relating to comparative negligence is founded, in that the State of Idaho used the laws of Wisconsin as a basis for its statutes, and the State of Utah used the Idaho Statutes as a basis for the Utah Statutes. The Wisconsin

Supreme Court in the case of Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105, 113 (1962) stated in reference to the basic goal of the law of negligence as:

> The equitable distribution of the loss in relation to the respective contributions of the faults causing it.

It is submitted to the Court that if "faulty conduct" is a reasonable basis for the determination of the negligence of the appellant, Chris's, it is submitted that sale of a six-pack of beer to Hammon by Chris's sold from inside the premises and not from service window (Dep. at p. 10), is substantially less "faulty" than that of the State Liquor Store in its sale of five (5) one-fifths of wine to Hammon without requiring an ID, and with knowledge that practically all of its trade comes from customers who arrive in motor vehicles, and in the particular instance when the customer entered and left by the rear parking lot door. It is also submitted to the Court that there is a greater duty of care to the State of Utah as a retail dispenser of intoxicant liquors, much more potent than beer, and by the very mandate of the Legislature and the people of the State of Utah, who have allowed the sale of high-percentage alcoholic beverages by the State of Utah believing that the State is more trustworthy as a dispenser of such alcoholic beverages than the regular commercial vendor would be.

It is further submitted that the negligence of Yost considered in the light that:

1. Yost was sixteen (16) years of age at the time of the occurrence of the accident;

2. He contributed to the purchase of the alcohol;

3. That Yost, together with Sills and Hammon planned the drunken spree;

4. That he continued to ride with Hammon, knowing that they were all going to get drunk, and after Yost was aware that Hammon was drunk at the time that the motor vehicle was at rest a Powder Mountain, and was at rest at Chris's, and yet continued to ride with Hammon;

5. That Yost crawled from the cab to the back of the truck to retrieve the beer and wine as it was needed to drink, without the motor vehicle being at rest;

6. That Yost had had driver's training, and was aware of the effects of alcohol, not only upon himself, but upon one who is a driver of motor vehicle;

7. That the evidence relating to Yost, in accordance with the testimony as has been set forth in this Brief, evidenced that he had been on many previous drunken sprees, and was well aware of the effects of alcohol on himself and on Hammon and Sills;

8. That upon leaving Powder Mountain, Yost was standing upright in the back of the truck, unclad with only his

shorts, as evidenced in the previous records set forth in this Brief (R 143, 144, 145).

That notwithstanding the conduct of Yost and his faulty conduct, the Court found that from the causation point of view, Hammon had ninety percent (90%) negligence, Yost four percent (4%), Petersen five percent (5%), and the State of Utah one percent (1%). (R 143)

The Court then found from a fault point of view, that Hammon has fifty percent (50%); Yost ten percent (10%); Petersen thirty percent (30%); and the State of Utah, only ten percent (10%). (R 144).

The Court then found that by combining fault and causation, which the Court considered a "conscionable type of balance", it found the negligence to be Hammon at eighty percent (80%); Yost at five percent (5%); Petersen at ten percent (10%); and the State of Utah at five percent (5%). (R 146).

It is submitted to the Court that the conscionable following of the Wisconsin Rule of Law as set forth in Bielski v. Schulze, supra, and arriving at liability through the "equitable distribution of the laws, in relation to the respective contribution of the faults causing it", are grossly misapplied, as to both the faults attributable to the State of Utah's Clearfield Liquor Store, and as to the

plaintiff, Yost, by a finding that Petersen was twice as faulty as the State of Utah and Yost. It is submitted to the Court that this Court stated in Hindmarsh v. O. P. Skaggs Foodliner, 21 Utah 2d 413, 446 P.2d 410 (Oct., 1968):

> The doctrine of assumption of risk was but a specialized aspect of the defense of contributory negligence. This court has repeatedly declared the law in that respect; that it applies only where the plaintiff knew of and appreciated a danger, and had a reasonable opportunity to make an alternative choice, but never-the-less voluntarily exposed themself to the danger in question.

While the Comparative Negligence Act eliminates the defense of contributory negligence, it was not intended that comparative negligence shall act in the same manner as the Workman's Compensation Act as to the liability of the actors, but if any basis of conscionability and equity is to be used in determining faulty conduct, then surely a determination of the plaintiff's appreciation and knowledge and the danger in which the plaintiff, Yost, had placed himself, and the fact that he had, on a number of occasions, a reasonable opportunity to make an alternative choice and escape from the danger which he knew existed, both from his previous drinking experience, and from his driver training, who never-the-less continued to voluntarily expose himself to the danger in question, must make his contribution to the ultimate injury which he suffered greater than that of

Chris's, or at least as great as Chris's, and particularly so when the Lower Court in is so-called application of equitable principles, found that the State of Utah had only the same degree of negligence as that of Yost, and one-half of that of Chris's.

The decision of the Court is all the more inequitable, in that having found that Hammon has eighty percent (80%) liability, the Court allowed the settlement of the total policy of Hammon in the amount of $15,000.00, as the total liability for Hammon, while assessing him with eighty percent (80%) negligence, the Lower Court found and stated:

> Hammon is, in likelihood, a judgment proof individual.

(R 144)

The hearing before the Court was bifurcated so that only the percent of the comparative negligence was adjudicated, and that a subsequent hearing would determine the money and liability, and the Court, by finding that Hammon had eighty percent (80%) of the negligence with Yost, and the State of Utah having only five percent (5%), then leaves Petersen at ten percent (10%), with liability for all the damages that may be found, and in accordance with the Court's own finding with no likelihood that it can obtain any contribution from Hammon, and is liable for ninety-five percent (95%) of the total liability, with the State of Utah

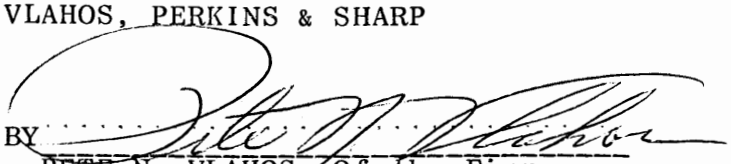
as the contributor of five percent (5%), and with Sacco and Quick Stop as not having been determined to have any percent of liability by the finding of the Court, with Chris's left with the sole liability, and with the requirement of having to pay whatever damages are found, and then seeking its five percent (5%) contribution from the State of Utah; which factual situation renders all the more unconscionable the finding of the Court.

CONCLUSION

It is submitted to this Honorable Court that all of the record being before the Court, and the fact that the Court considered causation as a basis for the determination of the percent of negligence of the parties, together with not ascertaining the percent of negligence of Quick Stop and Saccos, together with the unconscionable finding of the small amount of percentage attributable to the State of Utah Liquor Store, makes unconscionable the percent of comparative negligence attributed to Chris's, and the Court should further consider the fact that the defendant, Chris Petersen, alleged as an affirmative defense, that he is not a principal party in interest, and the affidavit attached hereto evidences that he is not the party in interest, and that no finding should be made as against the defendant, Chris Petersen.

RESPECTFULLY SUMMITTED this 22nd day of July, 1980.

VLAHOS, PERKINS & SHARP

BY 

PETE N. VLAHOS, Of the Firm
Attorneys for Appellant
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401

A F F I D A V I T

STATE OF UTAH)
) ss.
County of Utah)

CAROL PETERSEN, being first duly sworn upon her oath, deposes and says:

1. That she is the wife of Chris L. Petersen.

2. Chris L. Petersen was not the owner, operator or licensee of a business knwon as Chris's, sometimes known as Chris's Saloon, sometimes known as Rocky P. Trading Post, which is located in Huntsville, Utah for the year 1976.

3. That in August, 1976, your affiant, Carol Petersen, was the owner and licensee of the premises hereinabove described, and attached to this Affidavit, a photocopy of Certificate of License, showing that she was the licensee for a Class "B" Beer License, which license authorizes the sale of bottle beer only, which is the subject matter of the lawsuit, and which is attached to this Affidavit and by reference incorporated and made a part hereof.

4. That Chris's is divided into two (2) areas, a front which was leased, operated and licensed to Carol Petersen, and a back portion which was leased out and which had a separate license to one Robert Stack, and attached to this Affidavit, is the License showing that he was a

separate licensee and was the sole owner, operator and lessee of the premises located in the back and designated as Chris's Saloon.

5. This Affidavit is given by your affiant herein in support of Chris L. Petersen's claim that he was not a proper party to the lawsuit instituted in the above-entitled matter by George Kevin Yost.

DATED this 21 day of July, 1980.

Carol Petersen
CAROL PETERSEN, Affiant

SUBSCRIBED AND SWORN to before me this 21 day of July, 1980.

Sheila Loreen Poll
NOTARY PUBLIC FOR UTAH
Residence: Ogden, Utah

My Commission Expires:
7/16/83

Certificate of License

COUNTY OF WEBER No 59

Chris's Saloon
7345 East 900 South Huntsville, Utah

Good Only at Address Specified
No Rebate Allowed
Unincorporated Area Only

BE IT HEREBY KNOWN THAT:
Robert Stack
2481 Van Buren Ave. Ogden, Utah
is licensed to transact business as
Class "C" Beer License

1976 $ 200.00

in Weber County, for the term of 12 months, commencing the 30th day of January, 1976, and ending the 31st day of December, 1976.

Attest:

County License Director
Robert L. Prince

Chairman County Commissioners
Bruce Jenkins

POST IN A CONSPICUOUS PLACE

Certificate of License

COUNTY OF WEBER No 58

Rocking P Trading Post
7345 East 900 South Huntsville, Ut

Good Only at Address Specified
No Rebate Allowed
Unincorporated Area Only

BE IT HEREBY KNOWN THAT:
Carol Peterson
7345 East 900 South Huntsville
is licensed to transact business as
Class B Beer License

1976 $ 200.00

in Weber County, for the term of 12 months, commencing the 1st day of January, 1976, and ending the 31st day of December, 1976.

Attest:

License Director

Chairman County Commissioners

POST IN A CONSPICUOUS PLACE Boyd K. Stacey

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 22nd day of July, 1980, I served a true and correct copy of the above and foregoing Brief of Appellant by placing same in the United States Mail, postage prepaid and addressed to the following:

Mr. Richard Richards
Attorney at Law
2408 Van Buren Avenue
Ogden, Utah 84401
(Attorney for Plaintiff)

And

Mr. Joseph C. McCarthy
Attorney at Law
236 State Capitol Building
Salt Lake City, Utah 84114
(Attorney for the State of Utah)

Lorien Barrett
SECRETARY