1980

George Kevin Yost v. State of Utah et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT FOR 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,	)	
vs.	)	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,	)	
Defendants and Appellants.	)	

BRIEF OF RESPONDENTS

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RESPONDENTS' BRIEF

STATEMENT OF THE NATURE OF CASE

The Plaintiff/Respondent, a minor, sought damages from the defendants for injuries caused by the defendants' illegal sales of alcohol to Respondent and other minors.

DISPOSITION IN LOWER COURT

Judge John F. Wahlquist determined that the defendants were negligent in causing Respondent's injuries, each in the following degrees:

Hammon	80%
Chris's	10%
[illegible]tah	5%

The Lower Court also found Respondent to have been negligent to the extent of 5%. Before the trial, a settlement was reached between Respondent and the defendant HAMMON and the Complaint was dismissed as against HAMMON.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have this Court disregard as unfounded the Appellant's claim of not being a proper party defendant.

Respondent also seeks this Court's affirmance of the Lower Court's finding that all of the defendants were negligent. The Respondent agrees with the appellant in his assertion that the Lower Court under-assessed the State's negligence in this case.

STATEMENT OF FACTS

Respondent will not disagree with the substance of Appellant's statement of facts, except for the following qualifications and additions.

Chris's is a family business, Chris L. Petersen being the father and head of that family. There was no evidence adduced at trial which could reasonably be construed as showing Mr. Petersen to be other than a proper party defendant.

On the date of the accident, Chris's and the State of Utah, as well as the other defendants, illegally sold alcohol to certain minors, the oldest of whom was then eighteen (18) years of age. The District Court concluded that two of the three minors looked significantly younger

than they really were at the time of the illegal sales, and that no reasonable and careful person could have mistaken the ages of any of the boys as being twenty-one (21). As a result of the defendants' illegal sales, they became intoxicated. One of these intoxicated minors drove his vehicle over the side of a canyon road, over turned the truck and his passenger, the Respondent, was very seriously and permanently injured.

ARGUMENT

POINT I

THE APPELLANT, CHRIS L. PETERSEN, IS A PROPER PARTY DEFENDANT.

The Appellant contends that he, Chris L. Petersen, is not a proper party defendant in this action. However, the Respondent in his Complaint sued not only Mr. Petersen as an individual, but also his family business "Chris's."

Mr. Petersen was not a witness in the trial, but his wife, Carol Petersen, did give some testimony which is helpful on this issue:

Q: "In addition to that, do you have any other avocation, other than your chosen profession?"

A: "I work at our family business."

Q: "And is that business known as 'Chris's'?"

A: "Right." (T 190)

Rule 17(d) of the Utah Rules of Civil Procedure states that,

"When two or more persons associated in any business either as a joint stock company,

> a partnership or other association, not a corporation, transact such business under a common name, whether it comprises the names of such associates or not, they may be sued by such common name; and any judgment obtained against the defendant in such case shall bind the joint property of all the associates in the same manner as if all had been named defendants and all had been sued upon their joint liability."

This Rule is controlling here to allow suit against Mr. Petersen and his business.

Moreover, even assuming arguendo that Rule 17(d) does not apply, the Appellant may not now prevail on his claim of being other than a proper party defendant. In his Answer the Appellant raised this claim as an affirmative defense. However, at trial there was no testimony suggesting that Mr. Petersen is not a proper defendant.

This Court in Booth v. Crompton, 583 P.2d 82 (Utah 1978), at Note 2, stated that the proper construction of Rule 8(c) places the burden of proving an affirmative defense on the party asserting it. In failing to adduce the necessary evidence at trial, the Appellant failed to meet his burden. He may not now at this late date attempt to correct this defect by providing this Court with an Affidavit.

Rule 8(f) states,

> "All pleadings shall be so construed as to do substantial justice."

The Respondent's purpose was to sue the entity, Chris's, which had made the illegal sale of alcohol. As father and head of that family, Mr. Petersen was properly made a party defendant.

ARGUMENT

POINT II

THE LOWER COURT PROPERLY FOUND THAT THE DEFENDANTS WERE NEGLIGENT, BUT IT UNDER-ASSESSED THE DEGREE OF THE STATE'S COMPARATIVE NEGLIGENCE.

The appellant's brief points out to this Court some of the important facts surrounding the State Liquor Store's improper and illegal sale of alcohol to the minors. Respondent agrees that the District Court's finding regarding the State Liquor Store's comparative negligence is grossly low when the facts surrounding respondent's injuries are considered.

The basic purpose of the law prohibiting the sale of alcohol to minors is to protect those minors from their own lack of judgment and to protect society as well. The Legislature has invoked the State's police powers to control the dispensation of intoxicating liquors and UCA 32-1-2 (1953) requires that all laws and regulations relating to the sale and use of alcohol be liberally construed so as to protect the public health, peace and morals. As potential sources of alcohol to minors, the vendors have a strict responsibility to ascertain whether or not purchasers are of legal age. If the person seeking to buy alcohol is under the age of 21, the vendor must refuse to make the sale. (See UCA 32-7-15(1); 32-1-39.) Obviously, a prevayor of substances so potentially destructive as alcohol must have and use very good judgment with regard to who may receive the alcohol.

Sometimes a vendor can ascertain the age of the buyer by demanding to see the buyer's identification card. However, whenever the buyer's age may still be in question, the vendor must inquire beyond the allegation of age stated on the identification card and in such cases, the buyer must be required to sign a statement on a form provided by the Commissioner of Public Safety. (See UCA 32-9-9.) The State's negligence in this case was quite extreme in that not even the minimum requirements of law were met--no proof of age was requested of the minors at all. In this omission, the State was clearly remiss since as the District Court found, the young buyers looked even younger than they actually were. (Findings of Fact 1-2.) Of course, other vendors in this case were negligent and the District Court properly made that conclusion.

In making its finding that the appellant was more negligent than was the respondent, the District Court apparently adopted the thinking of the Court in Prevatt v. McClennan, 201 So. 2d 780, 781 (Fla. App. 1967) where that Court said:

> "Here the statute forbidding the sale of liquor to minors was violated and constitutes negligence per se. The statute that makes it a crime to sell intoxicants to minors was doubtless passed to prevent the harm that can come or be caused by one of immaturity by imbibbing such liquors. The very atmosphere surrounding the sale should make it forseeable to any person that trouble for someone was in the making.
>
> "The proximate cause of the injury is the sale rather than the consumption." (Emphasis added.)

In light of the fact that the State Liquor Store sold five (5) "fifths" of wine without requiring ID to boys who looked younger than they actually were, it was quite inconsistent of Judge Wahlquist to find the appellant Chris's twice as negligent as was the State of Utah. By the same token, it was inappropriate for the District Court to hold that the defendant State of Utah was not more negligent than was the young respondent.

The State of Utah and the other defendants were negligent as a matter of both fact and law. It was factually unreasonable for the defendants, including the State, to have sold such a large quantity of alcohol to boys who appeared to be well under the legal age. It was simply unreasonable to think that such boys could find safe and proper use for such quantities of alcohol. Moreover, the mere fact of having made the sale to the minors was negligence as a matter of law. The Legislature has recognized a basic disability of people under the age of 21 in relation to alcohol. This disability is an inherent incapacity to use proper discretion.

Judge Wahlquist's Memorandum Decision shows his attempt at balancing the various factors from which the parties' comparative negligence could be derived. As stated before, it seems unreasonable that the appellant Chris's could have been twice as negligence as was the State. However, it was equally unreasonable that the Lower Court

did not find all of the defendants more negligent than was the respondent.

Several jurisdictions have adopted a view which would have made all of the defendants more negligent as a matter of law than was the respondent in this case. For example, in Soronen v. Olde Milford Inn, Inc., 46 N.J. 582, 218 A.2d 630, (1966), the Court disallowed a claim of contributory negligence where a tavern keeper had negligently sold alcoholic beverages to a physically intoxicated person. The Court held that contributory negligence would not apply in such a situation and its rationale is equally applicable to our case. That Court said at 218 A.2d 636:

> "Since the patron has become a danger to himself and is in no position to exercise self-protective care, it is right and proper that the law view the responsibility as that of the tavern keeper alone."

In our case, since the law's purpose is to impose upon vendors of alcohol the responsibility of protecting minors from their inherent incapacity to take self-protective care, the best view is that the vendors of alcohol must assume full responsibility for injuries caused by the intoxication of their purchasing minors.

Such a policy would very much discourage vendors from making illegal sales and the result would be a safer society. The problems of immature drinkers should be stopped at the main source--the vendors.

In reaching a similar conclusion, one Court has said the following:

> "Nor can it be said that such a rule imposes an undue burden upon the tavern keeper, for, as the Supreme Court observed in Soronen, he 'may readily protect himself by the exercise of reasonable care.'" Aliulis v. Tunnel Hill Corp., 114 N.J. Super. 205, 275 A.2d 751, 753 (1971).

The laws against selling alcohol to minors is in effect a safety law intended to protect minors and society from potential destruction. In Cappa v. Oscar C. Holmes, Inc., 25 Cal.App.3d 978, 102 Cal.Rptr. 207 (1972), the Court dealt with a violation of safety laws on a construction site. Two boys had decided to take a shortcut through a construction site which lacked the necessary fences and railings. The defendant's only precautionary measure was a sign stating, "Danger--Construction Parking Only." Notwithstanding this sign, the boys walked through the uncompleted construction site and one fell several feet, sustaining severe injuries. The Court said,

> "It is clearly the law that the defense of assumption of risk is inapplicable when the action is based on a violation of a safety law intended to protect the class in which a party is a member."

The doctrine of estoppel would also require a finding that each defendant vendor of alcohol was more negligent than was the minor purchaser. This is true because the vendors are the primary and instigating causes of the respondent's injuries and had the illegal sales not been made to the minors, they would not have become intoxicated and consequently injured.

> "It is a maximum in the law of estoppel that where one of two innocent persons must suffer, he whose act occasioned the loss must bear it."

Assicurazioni, 175 Misc. 785, 25 357 (1941).

The respondent does not claim that he was completely innocent of wrong doing in this case, but the vendors were each the more primary violators of the law and they should each bear the greater responsibility for the resulting injuries. None of the defendants, including the State of Utah, is immune from the doctrine of estoppel. See Shafer v. State of Washington, 521 P.2d 735 (1974).

CONCLUSION

Mr. Chris L. Petersen, who does business as "Chris's" is properly a party defendant in this action. This conclusion is grounded on Rule 17(d), Rule 8(f), and this Court's construction of Rule 8(c) as set forth in Booth v. Crompton, 583 P.2d 82 (Utah 1978) at Note 2.

All of the defendants were more negligent than was the Respondent for injuries occurring to Respondent as a result of the defendants' illegal sales of alcohol. This conclusion is true a fortiori with regard to the State of Utah who itself caused the violated law to be enacted and who must now be estopped from claiming any contributory fault on the part of Respondent. It was also unreasonable for the Lower Court to have found the State of Utah only half as negligent as was the appellant Chris's.

It is the vendors who control, in large measure, who ultimately will have access to intoxicants. Holding the vendors fully responsible for negligently selling to minors will greatly increase the likelihood of compliance with the law. Compliance with the law will

society from the minors' lack of judgment with respect to intoxicants.

Comparative negligence should not be allowed to defeat Respondent's claim for recovery as against any defendant who has violated the laws relating to the sale of alcohol.

Respectfully submitted this 8th day of September, 1980.

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I hereby certify that I mailed two copies of the foregoing Respondent's Brief to the following this 8th day of September, 1980:

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