1980

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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GEORGE KEVIN YOST, a Minor, by and through his Guardian Ad Litem, CHARLENE YOST, and CHARLENE YOST, individually,

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,

Defendants and Appellants.

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BRIEF OF RESPONDENT STATE OF UTAH

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APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF WEBER COUNTY, HONORABLE JOHN F. WAHLQUIST, JUDGE

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NATURE OF THE KIND OF CASE, AND DISPOSITION IN THE LOWER COURT

The Appellant's representation of the nature of the case and disposition of the case by the lower court is essentially correct.

RELIEF SOUGHT ON APPEAL

The State seeks affirmation of the judgment; provided that this Court adopts the legal premise of the District

Court in finding liability on the part of the State.

The State, however, does not abandon its claim that it should have been dismissed as a party to this action, and asks this Court to reverse the determination of liability on the part of the State.

STATEMENT OF FACTS

While Appellant's Statement of Fact is correct, it perhaps should be somewhat expanded in order to more accurately treat problems relating to assumptions of risk and comparative negligence. For these reasons, the State will view the facts in a slightly different way.

Kevin Yost, Ronald Sills and Steve Hammon had been friends for about two years, and while all three were minors, they had drunk together and had combined driving and drinking at times prior to the date of the accident (R. 181-184, 256-257). Yost had started drinking when he was thirteen or fourteen and drunk beer, wine and whiskey on prior occasions (R. 256).

After the three young men left the high school parking lot, there is some conflict in testimony as to the time involved and sequence of purchases of beer and wine.

It is apparent that no vendor asked Hammon for I.D. when he made purchases. Apparently, Hammon looked 21 or over according to the testimony of both Sills and

Yost, since each of them had seen Hammon purchase beer and cigarettes on other occasions without being asked for identification (R. 181, 258). Both Sills and Yost had had drivers training and knew the effects of alcohol on drivers (R. 184, 262-263), and Yost made no objection to Hammon's driving and drinking (R. 263). Yost was just having a good time and paid no attention to how Hammon drove. Both Sills and Yost had driven with Hammon when all three were pretty drunk (R. 190).

When the truck arrived at the liquor store, Hammon parked in back of the State store (R. 297). Hammon testified that he had drunk one beer. He went into the State store alone. He asked the clerk (but doesn't remember whether the clerk was male or female) where the wine was, put down his money and the five fifths of wine, picked up his purchase and change and left (R. 297-298). Yost and Sills had waited in the truck which had been parked off to the right side of the door and Yost could not see into the store through the door and did not think there were windows in the back of the store (R. 263).

Yost, Hammon and Sills drove and drank after leaving the State store. Eventually, they arrived at Chris's. Sills testified that he and Hammon entered Chris's while Yost filled the truck with gas. At that time Sills testified he was getting "fairly drunk" and Hammon was getting drunk too

(R. 173, 174). All of "us" were staggering a little bit, and Hammon's speech was worse than it usually was (R. 174). Hammon bought two six-packs at Chris's from a lady who did not ask for any identification.

As Appellant has stated in his brief, an accident later occurred in which Yost was seriously injured.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING THE STATE'S MOTION FOR SUMMARY JUDGMENT.

A. THE STATE HAS NOT WAIVED SOVEREIGN IMMUNITY.

This argument is based on the theory that Utah's method of control of liquor is essentially an exercise of its governmental power and that its "monopoly," which admittedly produces income, is incidental to its exercise of police power.

When we deal with liquor law, we find that every state has adopted methods of imposing regulations for the sale and service of liquor and methods of tapping the liquor trade for money for the benefit of the public fisc. Great variations are found in the laws of the states. Perhaps the two extreme positions can be set forth simply. The first position is that liquor is viewed as is any other business, except that high license fees are imposed on wholesales, bottle stores, and retail outlets where liquor is sold

by the drink. In addition, excise taxes are imposed on bottle sales. The other position completely controls the trade by establishing a state monopoly on whole-sale and bottle-sale outlets. The revenues which are generated by licensing and taxation may then take on the form of sales profit.

We might ask what is the reason for the extreme differences in approach? Clearly, it is not a difference in the ability to produce revenue since licenses and excise taxes can be made high enough to produce whatever liquor revenue is desired. The essential difference is that a state monopoly on the trade permits an easier exercise of the police power.

> This act shall be deemed an exercise of the police powers of the state for the protection of the public peace, health and morals; to prevent the recurrence of abuse associated with saloons; to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages; and all provisions of this act shall be liberally construed for the attainment of these purposes. Utah Code Annotated, Section 31-1-2. (Emphasis added.)

It should be noted that the declaration of purposes set out in Section 31-1-2 does not seek by this legislation to protect public safety. The Legislature has made a choice to enforce the liquor laws by criminal sanction and by revocation of licenses for violations of the statutes and rules of the commission. For example, criminal penalties are provided for violations; and, for example, Section 32-1-32.4,

Utah Code Annotated, provides for revocation or suspension of licenses. If beer is sold to a minor, Section 32-4-17, Utah Code Annotated provides that in addition to any other penalty, the person's license to sell beer will be revoked or suspended for a period of not less than 30 days. Sections 32-7-13 through 32-7-15.5 and 32-7-24 contain the general criminal sanctions. Even advertising by the commission, manufacturers and package stores is prohibited. It should also be noted that purchase by a minor is a Class B misdemeanor. Section 63-30-3, Utah Code Annotated, makes it clear that sovereign immunity is not waived when a governmental entity is engaged in the exercise and discharge of a governmental function.

It is submitted that as a part of the exercise of its police power, the State chose to make sales of liquor in its own stores to prevent various transactions in liquor by private citizens at various stages of the liquor trade.

In Standiford v. Salt Lake City Corporation, 605 P.2d 1230, this Court split three to two in determining whether a municipality was immune from liability in the operation of a golf course. While vastly different views of legislative intent were apparently held by the members of this Court, it seems evident that the operation of a golf course by a city is a much different thing than the control of liquor by the State of Utah.

The majority opinion defines the test for determining governmental immunity to be "... whether the activity under consideration is of such a unique nature that it can only be performed by a government agency or that it is essential to the core of government." 605 P.2d 1237, emphasis added.

Because the Legislature has so declared, only the State Liquor Control Commission can sell wine. Under the now apparently overruled doctrine of distinguishing governmental activity from proprietary activity, the activity remains governmental because no private interests can legally sell liquor (excluding beer), the activity goes to the core of regulating the sale of liquor, and the production of revenue is incidental since equal revenue could be produced from license fees and excise taxes.

Unless the rule in Frank v. State, 613 P.2d 517, can be extended to this fact situation, the State remains immune whatever the liability of its employee may be for making a sale to the minor (which sale will be discussed more hereafter). In Frank there can be no claim that the act was other than ministerial. A State Liquor Store employee is to do several things in making a sale. He is not to sell liquor to a minor nor to an intoxicated person. Other than that, he is to collect money and ring it up.

The first distinction in this case is that an employee who sells liquor to a minor is guilty of a crime. The imputation of a crime, or criminal liability, to a principal is far different than the imputation of negligent acts or omissions. It is respectfully submitted that the commission of a crime is not "... within the scope of his employment..." within the meaning of Section 63-30-10, Utah Code Annotated, 1953. The writer is hard pressed to believe that the State can legally hire a "state hit man," a "state arsonist" or a "state bootlegger."

Whatever the liability of the salesperson may be, crime cannot be imputed to the sovereign on the theory of respondent superior.

B. THE PLAINTIFF, THE PURCHASER AND THE SELLERS OF LIQUOR ARE IN PARI DELICTO AND RELIEF SHOULD BE DENIED.

A review of the record discloses that the three young men involved in this case deliberately set out to violate the criminal law by purchasing liquor and beer in violation of law. If any of the defendants are liable at all, liability arises from selling liquor or beer to minors who had conspired to make such purchases. The record shows that these minors know the effects of alcohol both by education and experience, and had consumed alcoholic beverages together and had driven with Hammon while he had been drinking

on other occasions.

The usual policy of the law is to deny relief inter se to persons in pari delicto as a matter of public policy.

It might be pointed out that one justification for the public policy determination could be that defendants, in cases such as this one, are required to prove negatives, and that the necessity to assemble proof arises long after the incident which underlies the cause of action.

C. CONSUMPTION, NOT SALE, OF LIQUOR WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

Utah, with some limitations, has adopted the common law, Section 68-2-1, Utah Code Annotated, 1953. There is no statute which varies the common law rule, which is that in the liquor-related cases, drinking liquor, not selling liquor, is the proximate cause of intoxication.

Utah has not enacted a dramshop act or imposed statutory civil liability upon any seller of liquor for injuries to a third person caused by a customer, although it would appear obvious that the Utah Legislature has had many sessions in which to enact such legislation had it chosen so to do.

No Utah decision exists which has imposed dramshop liability.

a.

Several jurisdictions have judicially imposed liability upon persons who have served liquor to intoxicated customers who subsequently caused injury to third persons.

In Vesley v. Sager, 486 P.2d 151 (Calif., 1971), the Supreme Court of California stated that the traditional common law rule would deny recovery against a vendor of alcoholic beverages for providing drinks to a customer who as a result of intoxication injures a third person upon the ground that furnishing the alcoholic beverage is not the proximate cause of injury, drinking is the proximate cause. In this case, a tavern owner furnished large quantities of alcoholic beverages to the driver from about 10:00 p.m. until 5:15 a.m. the next morning and "... knew that O'Connell was becoming excessively intoxicated and ... was incapable of exercising the same degree of volitional control over his consumption of intoxicants as the average reasonable person, and ... the only route leaving the Buckhorn Lodge was a very steep, winding and narrow mountain road and that O'Connell was going to drive down that road. Nevertheless, Sager continued to serve O'Connell alcoholic drinks past the normal closing time of 2 a.m. ..." 498 P.2d 151, 154.

The Court pointed out that 20 states had abrogated the common law rule by statute but California had not,

nevertheless California had enacted legislation making it a misdemeanor to sell, serve or give an alcoholic beverage to any habitual or common drunkard or any obviously intoxicated person. The purpose of this legislation was to protect the people of the state. The person serving liquor to an intoxicated person should foresee the risk of harm to others. The Court then overruled prior inconsistent cases. The Court did not rule or indicate a ruling as to whether liability would be similarly imposed on a social host who served liquor to a guest.

In 1976, the California Supreme Court, in Bernhard v. Harrah's Club, 546 P.2d 719, held a Nevada tavern liable which had served liquor to intoxicated customers who drove back to California and had an auto-motorcycle accident in which plaintiff was injured. The conflicts of law question was resolved in favor of the forum state even though Nevada does not impose liability under a dramshop theory because Harrah's advertises for California customers, it is foreseeable that intoxicated customers would drive on California roads, and it is illegal to sell an alcoholic beverage to an intoxicated person in Nevada. Thus, the law of the state which should be applied is that of the state whose interest in the public policy expressed in the law would be more significantly impaired.

In Campbell v. Carpenter, 566 P.2d 893 (1977), the Oregon Supreme Court, in a case in which a bartender continued

to serve beer to a customer after she was visibly intoxicated and had reason to know that after becoming intoxicated she would probably drive away in her automobile, held the tavern owner liable for plaintiff's damages. This was the first Oregon case departing from the common law rule, and the reasoning was essentially the same as the California decisions, that the tavern owner's negligence is in failing or refusing to foresee an unreasonable risk of harm to others.

b.

Other states have had the opportunity to adopt a "common law" rule of dramshop liability but have refused so to do. Some, if not most of the courts that have refused to adopt the California-Oregon theory, have done so on the basis that the courts have no proper function in changing the common law, and if a new liability is to be created, this is for the Legislature to determine. Many of the cases also hold that statutes or ordinances declaring it illegal to serve intoxicated people are to regulate business, not to protect the general public. The cases also follow the common law rationale of proximate causation. A comparison has been made that it is illegal to drive while under the influence of alcohol and that this is the statute designed to protect the public from the drunk. A few illustrative cases are set out as examples.

In a 1971 Wyoming case similar to the facts alleged here, Parsons v. Jow, 480 P.2d 396, plaintiff, a minor, sought recovery from the owner of a bar on the theory that the bartender had sold liquor to another minor who had become intoxicated and drove his car into a school building doing injury to the plaintiff who was a minor. It is illegal to sell liquor to a minor, and the employee's negligence was presumed. Nevertheless, the Court stated the absence of common law liability, referred to the dram-shop statutes in some jurisdictions, and held that whether there should be a change of the common law rule was up to the Legislature.

In Thompson v. Bryson, 505 P.2d 572 (1973), the Arizona Supreme Court held that sale of an alcoholic beverage to an intoxicated person does not in and of itself create a civil liability on the dispenser for injuries sustained at the hands of the customer by a third person. In this case, the defendants had served liquor to a customer, Whitmore, previously unknown to them. Whitmore and another customer, Thompson, had been in an argument, and Thompson had slapped Whitmore. One of the owners broke up the altercation, the customers shook hands and continued to drink. Whitmore left, later returned with a shotgun, and killed Thompson. Arizona declares it illegal to serve liquor to an intoxicated or dis-orderly person or allow him to remain at a licensed premise.

It has no dramshop act or civil damage act. In Collier v. Stamatis, 162 P.2d 125 (1945), the Court had held that the purpose of the statute was to regulate business rather than to enlarge civil liability. The Court noted that California in Vesley v. Sager, supra, had reached a different result. The Court further held that there must be a duty owed to plaintiffs by defendants and that there must also be proximate cause, and an essential element to any liability is foreseeability. It held in these circumstances that foreseeability of Whitmore's conduct was absent, but assuming negligence in selling liquor to Whitmore for his own ingestion, proximate cause could not be established.

In Marchindo v. Roper, 563 P.2d 1160 (1977), the New Mexico Supreme Court considered a case in which the trial court had dismissed plaintiff's claim against a tavern owner who had served liquor to a woman who was allegedly known to defendant as a common drunk and who had a blood-alcohol reading of 0.35% at the time the customer ran down the plaintiff pedestrian. The Court of Appeals overruled Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966), and thus established a "common law dramshop" liability. The Supreme Court determined that the trial court was correct and held that the Legislature should determine whether or not there should be dramshop legislation, not the Court, and that the Legislature had not addressed the issue either affirmatively or

negatively. The Court recognized that the dramshop liability concept has been imposed judicially in many states, and that an equal number of state courts had refused to impose liability. The Court observed, "... being certain that our Legislature must be aware of the many problems of alcohol abuse and will deal with the problem presented here, we are hesitant to act at this time and hope that it will address this issue in the near future, either for or against extending tavern keepers' liability to third persons. We do not, however, feel that it would be improper for the Court to address this issue in the future if the Legislature chooses not to act." 563 P.2d 1160, 1162.

The Nevada Supreme Court in Hamm v. Carson City Nugget, Inc., 450 P.2d 358 (1969), held that civil liability of a tavern keeper who unlawfully sold liquor to a driver should be extended to a third party by a legislative act, if at all, and not by the Court. The Court held that the common law is applicable if not in conflict with constitutional or statutory demands. The common law imposed no dramshop liability, because consumption of liquor, not sale, was the proximate cause of damages. The Court stated that the common law rule had been eroded in recent years and that some courts recognize a cause of action because sale

of liquor initiates a foreseeable chain of events for which the tavern owner may be held liable. The trend has been rejected by other courts. The choice for Nevada (this being a case of first impression) could be supported by case authority either way. It is essentially a public policy choice whether the Court or Legislature should declare the conclusion. The statute making it unlwaful to sell drinks to intoxicated customers is to regulate business since a statute imposes some limited civil liability for selling liquor to a minor, and the legislative intent is clear.

It appears clear that when liability has been imposed on a seller of liquor, the seller has been in a position to control consumption.

Since liquor cannot be consumed in a State store, the State employee cannot control consumption.

D. THE SALE OF FIVE FIFTHS OF WINE IS A WHOLE-SALE, NOT A RETAIL SALE.

Even in states which have imposed dramshop liability, we can find no case in which liability has been imposed on a wholesaler. The only case we have discovered in which a "wholesaler" was liable involved a finding that the wholesaler was actually engaged in retail selling under the Illinois Dramshop Act. In Peterson v. Jack Donelson Sales Co., 281 N.E.2d 753,

4 Ill. App. 3d 792 (1972), the "wholesaler" provided eight one-half barrels of beer for a union picnic in a truck which was set up to chill the beer and serve it. Eight hundred cups and ice were also provided. While the district Court found for the defendant, the decision was reversed, the appellate Court holding that the "wholesaler" set up a dramshop in fact.

The basic justification for dramshop statutes or findings of liability lay decisions is that it is foreseeable by the seller that the customer will become intoxicated and is likely to injure someone as a result. Liability has not been imposed on wholesalers because a wholesaler cannot foresee that a particular individual will drink to excess in the case of a multi-bottle sale, nor can the wholesaler control consumption.

In the circumstances of this case, the clerk could not foresee that Hammon (the only one who came in the store) intended to immediately drink five (5) bottles of wine. There is no evidence that the clerk saw the truck or the other people involved.

E. THE COURT, FOR REASONS OF PUBLIC POLICY, SHOULD NOT CREATE NEW LIABILITY.

It is respectfully submitted that the Courts have a duty to uphold the traditional separation of powers in our

scheme of government and should permit the Legislature to change the law when it perceives a social need to do so.

In this case, unlike many of the cases cited above, the State does not compete with other bars or taverns for customers. It will not make any substantial difference to the profit of its operation if liquor is purchased one place or another since all alcoholic beverages, except beer, are sold for a State-set price. Even if liquor is sold in a restaurant or club, there is no mark-up permitted.

In other States, where liquor is sold in bars or taverns, there may be a substantial profit-motive to sell drinks to intoxicated customers or to minors. The owner of a bar may be motivated by a profit-incentive to serve or permit his employees to serve such customers. A bartender might be motivated by the possibility of tips to make such sales even if the owner (if absent) did not want such patronage. Dramshop Acts, by imposing liability, tend to regulate the business of keeping dramshops.

If an examination is made of cases in which dramshop liability is imposed (whether by statute or not), several factors are uniformly present. The seller has directly sold liquor to a person who is drinking where the seller can observe the consumption of liquor by the customer, and may determine

whether the customer is or is becoming intoxicated. The seller can foresee the probable consequences of the conduct of the person he has served, and the sale, if not the direct proximate cause of injury, can be foreseen as a substantial contributing cause of an injury to the public.

In the jurisdictions imposing liability there is the additional reasoning that the law exists to protect the public safety, as distinguished from the public peace, health and morals, which Section 31-1-2, Utah Code Annotated sets as Utah's reasons for enactment of the Liquor Control Act.

Utah has determined to enforce its liquor laws and regulations by its criminal laws. It would seem apparent that it could have imposed dramshop liability on itself if it chose so to do. However, the method chosen by the State to dispense liquor is obviously inconsistent with the dramshop act approach. The State has no need to impose liability on itself to regulate its sale of liquor. It does not compete with any other proprietor for business and has no competitive profit motive. Its employees are salaried State employees whose income does not depend on the number of sales a clerk rings up, nor do such employees receive tips as do bartenders, waiters or waitresses in bars or taverns. It is illegal to consume alcohol on the premises of a State store (as in

Clearfield), and the clerk has no opportunity to observe consumption, or know where, when or whether a customer will drink the liquor sold after he leaves the store.

While the Legislature has authorized the sale of alcoholic beverages in restaurants and clubs, and has also authorized the sale of beer in restaurants, clubs, taverns and stores of various kinds, to some extent at least there may be some reasons of policy which might prompt the Legislature to impose some dramshop-type liability upon owners of such establishments since they compete for customers and might be in a position to regulate consumption.

POINT II

IF THE STATE IS LIABLE FOR THE INJURY TO YOST, THE TRIAL COURT HAS PROPERLY APPORTIONED RESPONSIBILITY, AND THE JUDGMENT SHOULD BE AFFIRMED.

The State does not hereby abandon its position that the State should not be held liable for the injuries sustained by Yost.

In order to find liability on the part of the State, the trial Court had to find the sale of five fifths of wine to Hammon to be negligent. Plaintiff Yost's attorney at trial did not impute negligence to the State because the sale to a minor was a violation of law (R. 337), rather that the sale

was unreasonable because Hammon did not appear to be of age and I.D. was not demanded (R. 338). Assuming, arguendo, that the sale itself was negligent, the Court had to find that at least to some degree the clerk either did or should have foreseen the possible harm to third persons which might result from the sale to Hammon. It is clear that at the time of purchase at the State store Hammon was not intoxicated, that he entered the store alone, and that his truck was parked in a position which would have precluded the clerk from observing either the truck or the people in the truck. The "foreseeability" of injury in these circumstances would largely be confined to the observation of Hammon only.

By contrast with the situation at the State store, the testimony is clear that two of the three minors entered the premises at Chris's and the other minor, Yost, was immediately outside putting gasoline in the truck. The testimony also shows that by this time Hammon and Sills were both intoxicated. Nevertheless, beer was sold to Hammon under circumstances in which the vendor had to observe Hammon and Sills and knew they were operating a vehicle since gasoline was also purchased. In these circumstances it is submitted that the condition of Hammon at the time of the sale of beer and the knowledge that gasoline had been purchased made it far more foreseeable that further intoxication would make the likelihood of an accident much more probable. The Court

properly found this sale to be an act of gross negligence evidencing a total disregard for the consequences.

There is no real question about the liability of Hammon who admittedly knew that he was intoxicated and was directly responsible for driving off the road.

Yost knew the effects of drinking from three years of personal experience and from education. He willingly entered into the party, and evidenced no effort or desire to leave at any point. He knew what he was doing and assumed whatever risk was involved. Both Yost and Sills contributed money to the purchases made.

The trial Court correctly concluded that the determination of comparative negligence was essentially a question of fact. The Memorandum Opinion (R. 142-147) clearly sets out in its Conclusion the method by which the Court reached its decision. The Court first determined the comparative negligence from the point of view of causation alone (R. 143), then from the point of view of "fault," meaning departure or deviation from expected standards alone (R. 144), and finally from consideration of causation and culpability together (R. 146).

If this Court adopts the negligence theory which is the basis of the decision of the trial Court, the State has no reason to find fault with the apportionment of comparative negligence made by the Court under any of the three methods

of determination so candidly set out in the Memorandum Opinion, and frankly agrees with the balancing test utilized.

CONCLUSION

The State respectfully submits that its Motion for Summary Judgment of Dismissal should have been granted by the trial Court for the reasons set out in Point I.

If this Court concludes that the State is liable, the State believes that the decision of the District Court should be affirmed.

Respectfully submitted this 10th day of September, 1980.

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By 
JOSEPH P. McCARTHY
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This is to certify that two copies of the foregoing Brief were mailed, postage prepaid, to Richard Richards, Attorney for Plaintiffs-Respondents, 2408 Van Buren Avenue, Ogden, Utah 84401, and to Pete N. Vlahos of Vlahos, Perkins and Sharp, Attorneys for Appellant Chris L. Petersen, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401, this 10th day of September, 1980.