

2003

John Miller and Joan Miller v. United States of America : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Edward P. Moriarity, Jeffrey D. Gooch; Spence, Moriarity and Schuster; Attorneys for Plaintiffs/Appellees.

Paul M. Warner; United States Attorney; Jeffrey E. Nelson; Assistant United States Attorney; Attorneys for Defendant/Appellant.

Recommended Citation

Brief of Appellant, *Miller v. United States of America*, No. 20030054.00 (Utah Supreme Court, 2003).
https://digitalcommons.law.byu.edu/byu_sc2/2336

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

JOHN MILLER AND JOAN
MILLER,

Plaintiffs/Appellees,

v.

UNITED STATES OF AMERICA,

Defendant/Appellant.

:

:

:

:

:

:

No. 20030054-SC

OPENING BRIEF OF APPELLANT UNITED STATES OF AMERICA

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, NORTHERN DIVISION

HONORABLE TENA CAMPBELL

PAUL M. WARNER
United States Attorney

EDWARD P. MORIARITY (5622)
JEFFREY D. GOOCH (7863)
Spence, Moriarity & Schuster
Attorneys for Plaintiffs/Appellees
39 Exchange Place, Suite 101
Salt Lake City, Utah 84111
Telephone (801) 521-0811

JEFFREY E. NELSON (2386)
Assistant United States Attorney
Attorneys for Defendant/Appellant
185 South State, Suite 400
Salt Lake City, Utah 84111-1506
Telephone: (801) 524-5682

OURI

IN THE UTAH SUPREME COURT

JOHN MILLER AND JOAN	:	
MILLER,	:	
Plaintiffs/Appellees,	:	No. 20030054-SC
v.	:	
UNITED STATES OF AMERICA,	:	
Defendant/Appellant.	:	

OPENING BRIEF OF APPELLANT UNITED STATES OF AMERICA

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, NORTHERN DIVISION

HONORABLE TENA CAMPBELL

PAUL M. WARNER
United States Attorney

EDWARD P. MORIARITY (5622)
JEFFREY D. GOOCH (7863)
Spence, Moriarity & Schuster
Attorneys for Plaintiffs/Appellees
39 Exchange Place, Suite 101
Salt Lake City, Utah 84111
Telephone (801) 521-0811

JEFFREY E. NELSON (2386)
Assistant United States Attorney
Attorneys for Defendant/Appellant
185 South State, Suite 400
Salt Lake City, Utah 84111-1506
Telephone: (801) 524-5682

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
JURISDICTION	1
ISSUES	1
RELEVANT STATUTE	2
STATEMENT OF THE CASE	2
Proceedings Below	2
Factual Allegations	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. Legal Framework	5
II. Plaintiffs' common-law negligence cause of action does not exist under Utah law	6
III. The United States cannot be held liable under the Dramshop Act because it is a strict-liability statute	8
CONCLUSION	12
CERTIFICATE OF SERVICE	14
ADDENDUM	15

TABLE OF AUTHORITIES

Statutes

28 U.S.C. § 1346(b)	2, 5, 8
28 U.S.C. § 2674	5
28 U.S.C. §§ 2671-2680	2
<i>Utah Code Ann.</i> § 32A-14-101 (1999 Repl.)	2, 15
<i>Utah Code Ann.</i> § 32A-14-101(1)(b)(ii)(A), (D) (1999 Repl.)	11
<i>Utah Code Ann.</i> § 32A-14-101(1)(b)(ii)(B), (C) (1999 Repl.)	11
<i>Utah Code Ann.</i> § 32A-14-101(6) (1999 Repl.)	6, 11
<i>Utah Code Ann.</i> § 32A-14-101(7) (1999 Repl.)	11
<i>Utah Code Ann.</i> § 78-2-2(1) (2001)	1

Cases

<i>Adkins v. Uncle Bart's, Inc.</i> , 1 P.3d 528 (Utah), <u>cert. denied</u> , 531 U.S. 1011 (2000)	6, 7, 10
<i>Ayala v. United States</i> , 49 F.3d 607 (10th Cir. 1995)	5
<i>Dalehite v. United States</i> , 346 U.S. 15 (1953)	5, 8, 9
<i>Laird v. Nelms</i> , 406 U.S. 797 (1972)	5, 9
<i>Mackay v. 7-Eleven Sales Corp.</i> , 995 P.2d 1233 (Utah 2000)	7
<i>Red Flame, Inc. v. Martinez</i> , 996 P.2d 540 (Utah 2000)	9, 10, 12
<i>Rees v. Albertson's, Inc.</i> , 587 P.2d 130 (Utah 1978)	7, 8
<i>Reeves v. Gentile</i> , 813 P.2d 111 (Utah 1991)	9, 10
<i>U.S. v. Orleans</i> , 425 U.S. 807 (1976)	5
<i>Yost v. State</i> , 640 P.2d 1044 (Utah 1981)	7, 8

Other

45 Am. Jur. 2d *Intoxicating Liquors* § 502 (1999) 6

Annotation, *Right of Action at Common Law for Damage Sustained by Plaintiff in
Consequence of Sale or Gift of Intoxicating Liquor or Habit-forming Drugs to Another*,
97 A.L.R. 3d 528 (1980) 6

JURISDICTION

This Court has jurisdiction of the issue of law certified by the United States District Court for the District of Utah pursuant to Utah Code Ann. § 78-2-2(1)(2001).

ISSUES

Judge Tena Campbell of the United States District Court for the District of Utah certified the following issue of law to this Court:

Whether a federal government employee, who ordinarily would be immune from suit in cases of strict liability, may be liable under Utah's Dramshop Act if the Plaintiffs establish negligence.

(Addendum at tab 2.)

The United States submits that the issue as stated comprises two related issues:

1. Whether a person or entity that negligently provides alcohol to an intoxicated person is liable to a third party who is injured by the intoxicated person.
2. Whether the liability created by Utah's Dramshop Act is a form of strict liability that does not require proof of fault, wrongful intent, or negligence.

RELEVANT STATUTE

A copy of Utah's Dramshop Act in effect in 1999, when the relevant events allegedly occurred (Utah Code Ann. § 32A-14-101 (1999 Repl.)), is submitted at tab 1 of the addendum to this brief.

STATEMENT OF THE CASE

Proceedings Below

Plaintiffs John and Joan Miller sued the United States in the United States District Court seeking damages under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680. Plaintiffs allege that an employee of the United States negligently served alcohol to an intoxicated person in violation of Utah's Dramshop Act, and that the intoxicated person caused a motor vehicle accident that resulted in Plaintiffs' injuries.

The United States moved to dismiss Plaintiffs' Complaint on the grounds that (1) Utah law does not recognize a common-law negligence claim against a dramshop for injuries caused by an intoxicated dramshop customer, and (2) the United States cannot be held liable under Utah's Dramshop Act because the FTCA exempts strict-liability claims from its waiver of sovereign immunity. After these issues were briefed and argued, Judge Tena Campbell of the United States District Court certified to this Court the issue of state law set forth above.

Factual Allegations

Since the issue certified to this Court arises in the context of a motion to dismiss, the following is a summary of the allegations of Plaintiffs' Complaint. (U.S. District Court record, document 1.)

Plaintiffs allege that on June 12, 1999, they were seriously injured in a motor vehicle accident caused by Arthur Valle. (Complaint, ¶ 10, 17-18.) Plaintiffs allege that Mr. Valle was intoxicated at the time of the accident and that his intoxication caused him to drive at an excessive speed and collide with Plaintiffs' vehicle. (Complaint, ¶10.)

Mr. Valle was an employee of the United States Air Force. (Complaint, ¶ 5.) Plaintiffs allege that Mr. Valle became intoxicated at the NCO (noncommissioned officer) Club at Hill Air Force Base. (Complaint, ¶ 6-7.) Plaintiffs allege that federal employees of the NCO Club "negligently and carelessly" served alcohol to Mr. Valle when he was "clearly and visibly extremely intoxicated" and allowed Mr. Valle to leave the NCO Club and drive an automobile while he was intoxicated. (Complaint, ¶ 8-9.) Plaintiffs allege that these actions by Air Force employees violated Utah's Dramshop Act. (Complaint, ¶ 9.)

SUMMARY OF THE ARGUMENT

Plaintiffs' Complaint asserts claims for common-law negligence and for statutory liability under Utah's Dramshop Act. The United States is not liable to Plaintiffs under either legal theory.

Plaintiffs' claim for common-law negligence is legally deficient because this Court has consistently held that a third party who is injured by an intoxicated person does not have a cause of action for common-law negligence against the person or entity that served alcohol to the intoxicated person. The injured party's only basis for relief is Utah's Dramshop Act.

Plaintiffs cannot prevail against the United States under the Dramshop Act because Congress has not waived the federal government's sovereign immunity from that claim. The Federal Tort Claims Act waives the government's immunity only in cases of "the negligent or wrongful act or omission" of government employees. This language does not include claims based on theories of strict liability. Since this Court has consistently held that the Dramshop Act imposes a form of strict liability, the United States has not waived sovereign immunity from claims under Utah's Dramshop Act.

ARGUMENT

I. Legal Framework

The Federal Tort Claims Act is a limited waiver of the United States' sovereign immunity. U.S. v. Orleans, 425 U.S. 807, 813 (1976). Under the FTCA, the United States is liable in tort claims to the same extent that a private person would be liable under the law of the forum state. 28 U.S.C. §§ 1346(b), 2674; see Ayala v. United States, 49 F.3d 607, 610 (10th Cir. 1995). The FTCA's waiver of immunity is limited, however, to injuries resulting from "the negligent or wrongful act or omission" of a federal employee. 28 U.S.C. § 1346(b). The United States Supreme Court has consistently interpreted this language to mean that Congress did not intend to waive the federal government's immunity from claims based on theories of strict or absolute liability. Dalehite v. United States, 346 U.S. 15, 44-45 (1953); see also Laird v. Nelms, 406 U.S. 797, 803 (1972) (noting that the Dalehite decision was based "on the Court's determination that the [FTCA] did not authorize the imposition of strict liability of any sort upon the Government.").

Although Plaintiffs' Complaint is not divided into separate causes of action, it appears to allege two claims: (1) common-law negligence (the federal employees "negligently and carelessly" served alcohol to Mr. Valle when he was

“clearly and visibly” intoxicated),¹ and (2) statutory liability under Utah’s Dramshop Act. As discussed below, the United States cannot be held liable under either theory.

II. Plaintiffs’ common-law negligence cause of action does not exist under Utah law.

The Utah legislature enacted the Dramshop Act in 1981. Prior to the enactment of the Dramshop Act, a person or entity that served alcohol to an intoxicated person had no liability to a third party who was injured by the intoxicated person.

In 1981, the Dramshop Act was enacted and created a statutory cause of action, which did not exist at common law, against dramshops. Our legislature, like those of other states, passed dramshop legislation to abrogate the common law rule precluding the liability of a party who sells or otherwise provides alcohol to a person who is intoxicated and injures another.

Adkins v. Uncle Bart’s, Inc., 1 P.3d 528, 532 (Utah), cert. denied, 531 U.S. 1011

(2000). The common-law rule in Utah is consistent with the law in most

jurisdictions. Id. (citing 45 Am. Jur. 2d *Intoxicating Liquors* § 502 (1999) and

Annotation, *Right of Action at Common Law for Damage Sustained by Plaintiff in*

¹The interpretation of Plaintiffs’ Complaint as alleging common-law negligence is corroborated by Plaintiffs’ prayer for damages of “no less than two million dollars,” which exceeds the maximum damages allowed by the Dramshop Act. See Utah Code Ann. § 32A-14-101(6) (1999 Repl.).

Consequence of Sale or Gift of Intoxicating Liquor or Habit-forming Drugs to Another, 97 A.L.R. 3d 528 (1980)). “The legal theory behind the general rule is that when a third party is injured by an inebriated individual, it is the drinking of the alcohol, not the furnishing of it, which proximately causes the injury.” Id. (citing Yost v. State, 640 P.2d 1044, 1046 n.2. (Utah 1981)).

This Court has recognized an exception to this common-law rule only in cases where the alcohol purveyors violated the statute barring the sale of alcohol to minors. Yost, 640 P.2d at 1046; Rees v. Albertson’s, Inc., 587 P.2d 130, 133 (Utah 1978). “These two cases [Yost and Rees] recognize a cause of action in favor of a third person against a vendor of alcohol who sells the same negligently and in violation of a statute to an underage purchaser, who becomes intoxicated and causes injury to the third person.” Mackay v. 7-Eleven Sales Corp., 995 P.2d 1233, 1235 (Utah 2000) (emphasis added). However, “neither [Yost nor Rees] established a common law cause of action in favor of third persons against commercial vendors of alcohol where there was no statutory violation.” Adkins, 1 P.3d at 532.

Plaintiffs’ Complaint alleges that federal employees “negligently and carelessly” served alcohol to Mr. Valle when he was intoxicated. This is precisely the type of common-law claim that this Court has consistently rejected. Mr. Valle

was not a minor, so Plaintiffs' claim does not fall within the narrow exception recognized in Yost and Rees. Consequently, Plaintiffs' common-law negligence claim is deficient as a matter of law.

III. The United States cannot be held liable under Utah's Dramshop Act because it is a strict-liability statute.

The nature of the liability imposed by the Dramshop Act is relevant because, as discussed above, the FTCA is a limited waiver of the federal government's sovereign immunity. Congress waived the government's immunity for injuries resulting from "the negligent or wrongful act or omission" of government employees. 28 U.S.C. § 1346(b). The United States Supreme Court has held that this language does not waive immunity for claims based on theories of strict liability.

In Dalehite v. United States, the plaintiffs claimed, among other things, that the federal government was subject to strict liability in connection with an explosion that occurred during the transportation of a fertilizer compound. The plaintiffs argued that the FTCA's imposition of liability for the "wrongful act" of a government employee should include liability for an allegedly "extra hazardous" activity such as the transportation of explosive fertilizer. 346 U.S. at 44-45. The U.S. Supreme Court disagreed. The Court acknowledged that the plaintiffs' legal

theory was “well known in tort law generally” but nonetheless held that the plaintiffs’ strict-liability claim was barred because “the [FTCA] requires a negligent act.” Id.

The Supreme Court reiterated this interpretation of the FTCA in Laird v. Nelms, where the plaintiffs sought to recover for property damage allegedly resulting from a sonic boom caused by U.S. military aircraft. The Supreme Court rejected this claim because it was based on a strict-liability theory arising from an allegedly “ultrahazardous activity.” 406 U.S. at 800-801. The Court relied on its holding in Dalehite that “the Act did not authorize the imposition of strict liability of any sort upon the Government.” Id. at 803 (emphasis added).

Although the extent of the FTCA’s coverage is a federal question for the federal district court’s determination, that issue depends on the type of liability imposed by Utah’s Dramshop Act. The United States submits that this requires nothing more than a restatement of this Court’s consistent interpretation of the Dramshop Act as a strict-liability statute.

This Court first addressed this issue in 1991. “The dramshop statute imposes strict liability, the effect of which is to make it unnecessary to allege and prove negligence on the part of the dramshop.” Reeves v. Gentile, 813 P.2d 111, 117 (Utah 1991), overruled on other grounds, Red Flame, Inc. v. Martinez, 996

P.2d 540, 543 (Utah 2000). “[T]he clear intent of the legislature was to compensate innocent third parties by making dramshop owners strictly liable without regard to the finding of fault, wrongful intent, or negligent conduct on their part.” Reeves, 813 P.2d at 116. In Red Flame, the Court partially overruled Reeves, holding that a dramshop’s liability under the Act could be apportioned with the liability of the drunk driver. 996 P.2d at 543. Nonetheless, the Court in Red Flame confirmed the premise of Reeves that “the Dramshop Liability Act prescribes a form of strict liability rather than traditional negligence” Id.

In Adkins v. Uncle Bart’s, Inc., this Court again evaluated the nature of the liability imposed by the Dramshop Act and again concluded that it imposes “a form of strict liability.” 1 P.3d at 532. The Court cited with approval the conclusion in Reeves that the legislature’s purpose in enacting the Dramshop Act was to compensate innocent third parties without requiring proof of fault or negligence. Id. (citing Reeves, 813 P.2d at 116).

This Court’s construction of the Dramshop Act is consistent with the Act’s terms. As discussed above, the Utah legislature enacted the Dramshop Act to provide a remedy that did not exist at common law. But the legislature did not simply create a negligence cause of action imposing unlimited potential liability on dramshops. Instead, the legislature placed a cap on a dramshop’s potential

liability, Utah Code Ann. § 32A-14-101(6) (1999 Repl.), and required that any claim be brought within two years. Id. at § 32A-14-101(7) (1999 Repl.). These limitations on the injured party's claim are balanced by the relaxed burden of proof imposed on the injured party. Rather than requiring proof of negligence, the Act allows an injured party to recover damages from a commercial purveyor of alcohol if the purveyor provided alcohol to a person who was "apparently under the influence" of alcohol or who the purveyor "knew or should have known" was under the influence of alcohol. Id. at § 32A-14-101(1)(b)(ii)(B), (C) (1999 Repl.).²

These provisions are consistent with the principle of strict liability.

Although strict-liability claims do not require proof of negligence, they nonetheless arise in the context of some act or event deemed worthy of imposing liability on the actor. Thus, for example, strict products liability is imposed because of a defect in design or manufacture of a product, but does not require the fact-finder to evaluate whether the defendant was negligent in the design or manufacture. Likewise, the strict liability imposed as a result of an "ultrahazardous" activity results from an act of the defendant - - engaging in an

² Liability also exists in cases where alcohol was provided to a person under the age of 21 or to a "known interdicted" person. Utah Code Ann. § 32A-14-101(1)(b)(ii)(A), (D) (1999 Repl.).

inherently dangerous activity - - but does not require an examination of whether the defendant acted with reasonable care.

Utah's Dramshop Act imposes liability in a similar fashion. A commercial purveyor is liable upon proof that it provided alcohol to a person who was apparently intoxicated or who the purveyor knew or should have known was intoxicated. The Act does not, however, require an examination of whether the purveyor was negligent. Thus, the liability imposed by the Dramshop Act is properly construed to be "a form of strict liability." Red Flame, 996 P.2d at 543.

CONCLUSION

The United States is liable under the Federal Tort Claims Act "to the same extent as a private individual." The question, therefore, is the extent of liability of a private person or entity under the facts alleged in Plaintiffs' Complaint. As discussed above, the only liability that could arise from the facts alleged by Plaintiffs is that imposed by Utah's Dramshop Act.

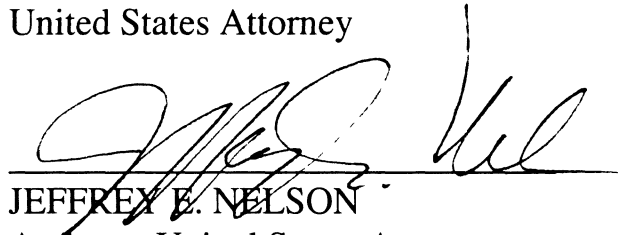
For these reasons, the United States requests that this Court answer the issue certified by the United States District Court as follows:

I. A person or entity that provides alcohol to an intoxicated person is not liable to a third party injured by the intoxicated person under a claim of common-law negligence.

II. The liability imposed by Utah's Dramshop Act is a form of strict liability that does not require proof of fault, wrongful intent, or negligence.

DATED this 6th day of June, 2003.

PAUL M. WARNER
United States Attorney



JEFFREY E. NELSON
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing **OPENING BRIEF OF APPELLANT UNITED STATES OF AMERICA** were hand-delivered this 6th of June, 2003, to the following:

Edward P. Moriarity
Jeffrey D. Gooch
SPENCE, MORIARITY & SCHUSTER
Attorneys for Plaintiffs/Appellees
39 Exchange Place, Suite 101
Salt Lake City, Utah 84111

Ilene Pars

ADDENDUM

Copies of the following documents are attached hereto:

- I. Utah's Dramshop Act in effect at the time of the events alleged in Plaintiffs' Complaint Utah Code Ann. § 32A-14-101 (1999 Repl.).
- II. The Order of United States District Judge Tena Campbell certifying this matter to this Court.

Tab 1

32A-14-101. Liability for injuries resulting from distribution of alcoholic beverages — Causes of action — Statute of limitations — Employee protections.

- (1) (a) Except as provided in Subsection (9), a person described in Subsection (1)(b) is liable for:
- (i) an injury in person, property, or means of support to:
 - (A) any third person; or
 - (B) the heir, as defined in Section 78-11-6.5, of that third person; or
 - (ii) for the death of a third person.
- (b) A person is liable under Subsection (1)(a) if:
- (i) the person directly gives, sells, or otherwise provides an alcoholic beverage:
 - (A) to a person described in Subsection (1)(b)(ii); and
 - (B) as part of the commercial sale, storage, service, manufacture, distribution, or consumption of alcoholic products;
 - (ii) those actions cause the intoxication of:
 - (A) any individual under the age of 21 years;
 - (B) any individual who is apparently under the influence of intoxicating alcoholic products or drugs;
 - (C) any individual 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) any individual who is a known interdicted person; and
 - (iii) the injury or death described in Subsection (1)(a) results from the intoxication of the individual who is provided the alcoholic beverage.
- (2) (a) A person 21 years of age or older who is described in Subsection (2)(b) is liable for:
- (i) an injury in person, property, or means of support to:
 - (A) any third person; or
 - (B) the heir, as defined in Section 78-11-6.5, of that third person; or
 - (ii) for the death of the third person.
- (b) A person is liable under Subsection (2)(a) if:
- (i) that person directly gives or otherwise provides an alcoholic beverage to an individual who the person knows or should have known is under the age of 21 years;
 - (ii) those actions caused the intoxication of the individual provided the alcoholic beverage;
 - (iii) the injury or death described in Subsection (2)(a) results from the intoxication of the individual who is provided the alcoholic beverage; and
 - (iv) the person is not liable under Subsection (1), because the person did not directly give or provide the alcoholic beverage as part of the commercial sale, storage, service, manufacture, distribution, or consumption of alcoholic products.
- (3) Except for a violation of Subsection (2), an employer is liable for the actions of its employees in violation of this chapter.

(4) A person who suffers an injury under Subsection (1) or (2) has a cause of action against the person who provided the alcoholic beverage in violation of Subsection (1) or (2).

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

(6) The total amount of damages that may be awarded to any person pursuant to a cause of action under this chapter that arises after January 1, 1998, is limited to \$500,000 and the aggregate amount which may be awarded to all persons injured as a result of one occurrence is limited to \$1,000,000.

(7) An action based upon a cause of action under this chapter shall be commenced within two years after the date of the injury.

(8) Nothing in this chapter precludes any cause of action or additional recovery against the person causing the injury.

(9) (a) An employer may not sanction or terminate the employment of an employee of a restaurant, airport lounge, private club, on-premise beer retailer, or any other establishment serving alcoholic beverages as a result of the employee having exercised the employee's independent judgment to refuse to sell alcoholic beverages to any person the employee considers to meet one or more of the conditions described in Subsection (1).

(b) Any employer who terminates an employee or imposes sanctions on the employee contrary to this section is considered to have discriminated against that employee and is subject to the conditions and penalties set forth in Title 34A, Chapter 5, Utah Antidiscrimination Act.

(10) This section does not apply to a general food store or other establishment licensed under Chapter 10, Part 1, to sell beer at retail for off-premise consumption.

History: C. 1953, 32A-14-1, enacted by L. 1985, ch. 175, § 1; 1986, ch. 177, § 3; 1989, ch. 240, § 1; renumbered by L. 1990, ch. 23, § 178; 1996, ch. 240, § 38; 1997, ch. 94, § 1; 1997, ch. 375, § 28.

Amendment Notes. — The 1996 amendment, effective July 1, 1997, in Subsection (8)(b) substituted the citation at the end for "Title 34, Chapter 35, the Utah Antidiscriminatory Act."

The 1997 amendment by ch. 375, effective July 1, 1997, substituted "Title 34A" for "Title 35A" in Subsection (8)(b).

The 1997 amendment by ch. 94, effective January 1, 1998, rewrote the section.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

NOTES TO DECISIONS

ANALYSIS

Applicability.

—Third persons.

Construction.

Comparative negligence.

Military base.

Purpose.

Applicability.

When the principal provisions of the Dramshop Act, as it existed prior to amendment by Laws 1997, ch. 94, are read in context with the definitions provided by that Act, the Act is not ambiguous. The statute's plain language explicitly limits liability to persons who provide alcoholic beverages "at a location allow-

ing consumption on the premises[.]" Conspicuously absent from the definition of "premises" is the word "house" or "private residence." *Sneddon v. Graham*, 821 P.2d 1185 (Utah Ct. App. 1991).


Alcohol purchased by various people and made available to everyone at a party was not supplied for a commercial purpose; thus, the Dramshop Act was inapplicable and the trial court correctly granted summary judgment in favor of employer and one of its employees for actions of another of its employees who was intoxicated, in plaintiff's action for damages based on assault and battery, intentional infliction of emotional distress, and violation of the Utah Dramshop Act. *D.D.Z. ex rel. M.T.Z. v.*

Tab 2

FILED
CLERK U.S. DISTRICT COURT

-3 JAN 03 PM 3:51

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

BY: 
DEPUTY CLERK

JOHN MILLER and JOAN MILLER,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

Case No. 1:02CV37TC

The United States District Court for the District of Utah, on its own motion, pursuant to Rule 41 of the Utah Rules of Appellate Procedure governing the certification of questions of law by United States courts, hereby submits to the Utah Supreme Court the following certified question of Utah law which is determinative of certain of Plaintiffs' claims in the above-captioned matter now pending before this court, but which does not appear to be clearly answered under Utah statutory law and controlling precedent:

Whether a federal government employee, who ordinarily would be immune from suit in cases of strict liability, may be liable under Utah's Dramshop Act if the Plaintiffs establish negligence.

Background¹

On June 12, 1999, Plaintiffs John and Joan Miller ("the Millers") were seriously injured

¹ Because this action is before the court on Defendant's motion to dismiss, the background facts are accepted as true and viewed in a light most favorable to Plaintiffs.



in a car accident caused by Arthur Valle. Mr. Valle was intoxicated and driving at an excessive speed when his car collided with the Millers' car.

Mr. Valle was an employee of the United States Air Force and had been drinking at the NCO Club at Hill Air Force Base on the night of the accident. The Millers contend that the employees of the NCO Club "negligently and carelessly" served alcohol to Mr. Valle when he was "clearly and visibly extremely intoxicated." The employees of the NCO Club then allowed Mr. Valle to leave the NCO Club in his car.

As a result of the accident, the Millers were seriously injured. Joan Miller required extensive medical treatment and will continue to require medical treatment in the future. She is disabled and unable to work. John Miller suffered several injuries, including a right pneumothorax and a fractured ankle. Mr. Miller missed work because of his injuries and the need to assist in his wife's recuperation. The Millers have extensive medical expenses as a result of the accident.

The Millers allege that the government is liable for damages they suffered under the Federal Tort Claim Act ("FTCA" or "the Act") (28 U.S.C. § 1346(b)), in part, for negligently selling alcohol in violation of Utah's Dramshop Act, UTAH CODE ANN. § 32A-14a-101, et seq. The government moves to dismiss the case for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Discussion

The FTCA waives the government's sovereign immunity with respect to claims based on "the negligent or wrongful act or omission" of a government employee. 28 U.S.C. § 1346(b).

The United States Supreme Court has held, however, that this language does not waive immunity for claims based on theories of strict liability. See Dalchite v. United States, 346 U.S. 15, 45-46. (1953); see also McKay v. United States, 703 F.2d 464, 472 (10th Cir. 1983) (“Nor does the FTCA authorize actions against the government based on strict tort liability.”); Laird v. Nelms, 406 U.S. 797, 798-799 (1972) (liability cannot be imposed under the FTCA absent some negligence or wrongful act or omission). “Accordingly, liability [under the FTCA] cannot be imposed without a finding of the presence of negligence or some other recognized misfeasance or nonfeasance on the part of the government.” Id. (citing Laird, 406 U.S. at 799). In this case, the Millers have alleged, in part, negligent acts by employees of the Air Force, which they claim violate Utah’s Dramshop Act.

The government contends that Utah’s Dramshop Act is a strict liability statute and is the exclusive remedy for acts within its coverage. See Adkins v. Uncle Bart’s, Inc., 1 P.3d 528, 532 (Utah 2000) (stating that Utah’s Dramshop Act imposes strict liability). The government argues that because a claim of negligence against purveyors of alcohol is unavailable, the Millers cannot avail themselves of the Dramshop Act against the government to pursue what is, essentially, a negligence action. See Gilger v. Hernandez, 997 P.2d 305, 310 (Utah 2000) (“[N]egligence is preempted insofar as it may impose liability for acts that the Dramshop Act reaches.”); Adkins, 1 P.3d at 532 (stating that Utah has never had a common law claim against one who furnishes alcohol to a person who subsequently injures a third person due to drunkenness and that “Dramshop acts are enacted to fill [this] void. . . .”).

The Millers, however, point to the decision of the Seventh Circuit in Smith v. Pena, 621

F.2d 873 (7th Cir. 1980), a case factually similar to the one here. In Smith, the court found that if plaintiffs could prove that under Illinois law the Army employees were negligent in serving drinks to an intoxicated person, and thus establish the required causation, their FTCA action could be maintained. Id. In making this determination, the court reasoned that:

Absolute liability exists under the Dram Shop Act because the Illinois legislature wished for both penal and remedial purposes to impose liability on more tavern operators, not fewer, than if a negligence standard were used. It would be incongruous if in circumstances where the state has cast its net wider than in a traditional negligence action, a Government employee is automatically excused from liability even if his negligence can be proved.

Id.

In the interest of cooperative judicial federalism, this court believes that the question of Utah law presented in this case is best answered by the Utah Supreme Court. See Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974).


Conclusion

This court concludes that the question outlined herein is unsettled under existing Utah law. Accordingly, the clerk of this court shall transmit a copy of this Certification to counsel for all parties to the proceedings in this court. The clerk also shall submit to the Utah Supreme Court a certified copy of this Certification, together with the briefs filed in this court and any portion of the record before this court that may be required by the Utah Supreme Court. Pursuant

to Rule 41(f) of the Utah Rules of Appellate Procedure, this court orders that the fees and costs of this Certification shall be apportioned equally between the parties.

DATED this 3 day of January, 2003.

BY THE COURT:

A handwritten signature in black ink that reads "Tena Campbell". The signature is written in a cursive, flowing style.

TENA CAMPBELL

United States District Judge

tsi

United States District Court
for the
District of Utah
January 7, 2003

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 1:02-cv-00037

True and correct copies of the attached were either mailed, faxed or e-mailed
by the clerk to the following:

James D. McCalla, Esq.
SPENCE MORIARTY & SCHUSTER
15 S JACKSON ST
PO BOX 548
JACKSON, WY 83001

G. Scott Ray, Esq.
SPENCE MORIARTY & SCHUSTER
39 EXCHANGE PL STE 101
SALT LAKE CITY, UT 84111

Mr. Jeffrey E Nelson, Esq.
US ATTORNEY'S OFFICE
, 84111
EFAX 9,5245985