

1988

Larry Horton v. The Royal Order of the Sun and Concept Clubs : Brief of Appellee

Utah Supreme Court

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BRIEF

880490

IN THE UTAH SUPREME COURT

LARRY HORTON,

Plaintiff/Appellant

vs.

THE ROYAL ORDER OF THE SUN
and CONCEPT CLUBS, INC.,
d/b/a STUDEBAKER'S,

Case No. 880490

Defendants/Appellees

BRIEF OF CONCEPT CLUBS, INC.,
d/b/a STUDEBAKER'S,

Appeal from the Judgment of the
Third Judicial District Court of Salt Lake County,
the Honorable David S. Young presiding

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OCT 17 1990

Clerk, Supreme Court Utah

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STATEMENT OF JURISDICTION

This is an appeal from the final judgment of the district court. The Utah Court of Appeals does not have original appellate jurisdiction. The Utah Supreme Court has appellate jurisdiction pursuant to Utah Const. Art. VIII, § 3; Utah Code Ann. §§ 78-2-2(3)(i) (1953). This matter is transferable to the Utah Court of Appeals. Utah Code Ann. § 78-2-2(4) (1987).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

In simple terms, the primary issue on appeal is whether plaintiff can state a claim against the defendants for injuries allegedly caused by his voluntary intoxication. This is a purely legal issue.

STATEMENT OF THE CASE

Plaintiff alleges that on May 21, 1987 he was a patron of Studebaker's, a private club. He alleges he drank to excess and became intoxicated. He alleges Studebaker's negligently continued to serve him drinks at his request, though he was obviously drunk. He alleges he left Studebaker's and traveled to another private club, the Sun. He alleges employees of the Sun negligently served him more drinks at his request, despite his obvious drunken state. He alleges he literally became falling down drunk and hit his head. He seeks to recover for injuries which resulted from his own excessive drinking.

Studebaker's denies each and every allegation of the Complaint and can barely resist expounding upon the sordid and colorful facts. However, the matter before the court is the

review of the trial court's grant of a rule 12(b)(6) motion to dismiss. This court is therefore "obliged to construe the complaint in the light most favorable to the plaintiff and to indulge all reasonable inferences in [his] favor." E.g., Arrow Indus. v. Zions First Nat'l Bank, 767 P.2d 935, 936 (Utah 1988). Thus, despite the Appellant's unnecessarily inflammatory recitation of "facts," rather than "allegations" contained in the complaint, Studebaker's will follow the rules and standards of review as it understands them.

There is one fact which is very relevant because it relates to the procedure followed in the district court. Page 2 of Mr. Horton's brief states: "Memoranda of counsel was timely filed" That statement of fact is incorrect. Plaintiff's memoranda was not filed timely.

SUMMARY OF ARGUMENTS

1. Plaintiff waived his opposition to the motion to dismiss by failing to timely file a memorandum opposing the motion. Plaintiff failed to preserve his right to appeal.

Plaintiff's memoranda to the trial court was untimely under the rules of practice of the district court. He should not be heard for the first time on appeal. Such a procedure can only encourage sloth and subject this court, the trial court and the parties to unnecessary expense and delay.

2. Plaintiff's recovery is preempted by the Utah Dramshop Act.

The Utah Dramshop Act, Utah Code Ann. § 23A-14-1 et. seq., (1953) ("the Act") gives third parties who are injured by an intoxicated person a limited recovery. The Act preempts recovery for injuries caused by a person's own intoxication. At least the following rules of statutory construction dictate this conclusion:

A. Courts will not inflate, expand, stretch or extend statutes to matters not falling within their express provisions. Allowing Horton to recover in this case would effectively expand the statute by judicial fiat.

B. All terms in an Act must be given meaning. The legislature used the terms "third person" when describing those who may recover, rather than simply "person." The term "third" is a term of limitation and exclusion and must be given meaning.

C. The primary consideration in interpreting statutes is the purpose and intent of the legislature. Express legislative purposes of the Act include limiting recovery, prohibiting recovery against state agencies or employees and requiring actions to be brought within two years. If this court adopts a common law recovery for the excessive drinker, that claim will be unlimited, may be brought against the state and will ordinarily be subject to a four year limitations period. Such a result is inconsistent with express legislative intent.

D. Statutory interpretations which are unjust or absurd must be avoided. As described above, a common law cause of action in favor of the drunkard would give the drunkard greater rights than an innocent third party would have, an unjust and absurd result.

E. The expression of one thing in a statute excludes by implication things not expressed. expressio unius est exclusio alterius. Third party recovery is expressly allowed by the Act. The Act is silent on the topic of the recovery by the intoxicated person.

F. The legislature is presumed to know existing common law and intended to change that common law only as clearly indicated. There was no dramshop type recovery at common law when the Act was passed. There was no reason for the legislature to expressly say "those who drink to excess cannot recover for injuries caused by their own intoxication." The legislature understood this was already Utah common law and so it merely stated the corollary, it described those who could recover.

G. Where the legislature amends a portion of a statute, leaving a portion intact, the legislature is presumed to have been satisfied with prior judicial constructions of the unaltered portions of the statute and to have adopted those constructions as consistent with its own intent. The Dramshop Act was passed in 1981. Later that same year this court stated there was no dramshop recovery, except under the statute, and third parties only could recover. In 1985 the Act was repealed and reenacted.

The language limiting recovery to third parties was retained. In 1986, the statute was again amended, but the language limiting recovery to third parties was retained. In 1986, this court stated once more there was no dramshop recovery except by statute. In 1989 the Act was again amended, but the language limiting recovery to third parties was retained. There was simply no need for the legislature to expressly state that "drunks may not recover under the statute." This court said it. The legislature by its actions agreed.

H. This court has the duty to render such interpretation of the statutes of Utah as will best promote protection of the public. Compensating those who drink to excess and injure themselves will only encourage behavior which endangers the health and well being of excessive drinkers and innocent citizens alike.

3. By statute, Utah common law is the common law of England, which would allow no recovery.

Utah common law is the common law of England--except where repugnant to the state or federal constitutions or laws, or inconsistent with the natural and physical condition of the state or the necessities of the Utah people. Until very recently, there was no dramshop recovery under English or American common law, particularly for the person who is injured by his or her own excessive drinking. This common law rule is not repugnant to the state or federal constitutions or laws, or inconsistent with the

natural and physical condition of the state or the necessities of the Utah people.

4. Plaintiff should not be compensated for injuries which directly result from his own crimes.

It was a crime if Mr. Horton purchased alcoholic beverages while under the influence of intoxicating beverages or drugs. It was also a crime if Mr. Horton became intoxicated to a degree that he endangered himself or others. Mr. Horton should not now benefit from his own criminal conduct.

5. As a matter of law, plaintiff's fault was greater than that of the defendants.

Plaintiff may not recover if his own fault was equal to or greater than that of the defendants. The effects of alcohol vary with the age, weight, physical condition, health, experience, genetic makeup and emotional state of the person who is drinking. They also vary with the quantity of alcohol consumed, the speed at which it is consumed, and the nature and quantity of food, water, drugs or other substances consumed before, during and after the consumption of alcohol. Plaintiff alone was in a position to know all of those factors and judge the effects of the alcohol before he became visibly intoxicated. As a matter of law, no reasonable juror could conclude that Mr. Horton's fault was less than that of the defendants.

6. Allowing plaintiff to recover for his own excessive consumption of alcohol will encourage such excess, to the detriment of the health of Utah citizens and contrary to strong public policy.

Intoxication to the point that a person becomes a threat to his or her safety or the safety of others is unquestionably against strong public policy. Allowing a drunkard to recover for injuries caused by his or her own excess can only encourage such excess and cause untold pain and suffering of the drunkard and the innocent alike.

7. There is no justification for altering traditional and longstanding rules regarding duty.

An essential element of a negligence action is a duty owed to the plaintiff by the defendant. The law imposes upon one party an affirmative duty to look after another's safety only when certain special relationships exist. These relationships arise when one assumes responsibility for another's safety or deprives another of his or her normal opportunities for self-protection. Those who provide liquor do not assume responsibility for their patrons' safety, nor do they deprive their patrons of their normal opportunities for self-protection. There is no justification for imposing duties upon the defendants which are inconsistent with longstanding rules regarding duty.

8. If this court allows the plaintiff to recover, it must arbitrarily limit recovery or open the flood gates to trivial and speculative claims.

If this court carves out a special duty to drunks, it must arbitrarily limit recovery or the courts will be flooded with trivial claims or claims where causation and damages are speculative. What if Horton had not passed out, but had suffered from nausea, vomiting and insomnia? Will it be compensable? What if the nausea and vomiting offended a boss or business associate, will the drunk be entitled to recover for a lost job, a lost business opportunity? Should the drunk recover for property damage, a soiled suit or carpet? Property damage to his car? What about the drinker who suffers the effects of chronic, long-term exposure to alcohol? What about the drinker who claims that excessive drinking on one or two occasions at the local tavern resulted in his addiction to alcohol?

9. The legislature is in the best position to regulate the sale and consumption of alcohol and the liability from the sale and consumption of alcohol.

The legislative and executive branches control the sale and consumption of alcohol as dictated by complex rules, regulations and statutes, to serve competing, and sometimes inconsistent, goals. The rules governing the sale and consumption of alcoholic beverages, and liability for the same, have unique impact upon tourism, a major Utah industry, the state's revenue and the moral views and physical health of Utah citizens. The legislature is

best suited to deal with these competing interests through the political process, with the benefit of input from physical and mental health professionals, the liquor commission, the tourism industry, and the public. This is an area where judicial activism is particularly inappropriate.

ARGUMENT

POINT I

PLAINTIFF WAIVED HIS OPPOSITION TO THE MOTION TO DISMISS BY FAILING TO OPPOSE THE MOTION TIMELY, AS REQUIRED BY LOCAL RULES. PLAINTIFF FAILED TO PRESERVE HIS RIGHT TO APPEAL.

Studebaker's motion to dismiss and supporting memorandum was mailed on October 10, 1988. Under rule 2.8(b) of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah as they existed then, Mr. Horton was required to file a responsive memoranda within ten days. Utah Rule of Civil Procedure 6 added three days because the motion had been mailed:

The responding party shall file and serve upon all parties within ten (10) days after service of the motion, a statement of answering points and authorities and counter-affidavits.

The filing of a responding brief was not elective. That the mandatory "shall" was used was no accident. Rule 2.8(c), sets a time limit for filing the reply memoranda of the moving party. There the term "may" is used to indicate that the moving party is not required to file a reply brief, but if one is to be filed it must be filed timely.

It should be pointed out the on October 30, 1988, the Code of Judicial Administration became effective. Rules 4-501(2) and 4-501(3) of that code are identical to rules 2.8(b) and 2.8(c).

The hearing notice was mailed on October 13, 1988 (R.26), so plenty of forewarning had been given. At no time did Horton seek an extension of time in which to respond. At no time did Horton provide the court with an excuse which justified the violation of the rules.

This court has repeatedly held:

For a question to be considered on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon; we cannot merely assume that it was properly raised. The burden is on the parties to make certain that the record they compile will adequately preserve their arguments for review in the event of an appeal.

Busch Corp. v. State Farm Fire & Cas. Co., 743 P.2d 1217, 1219 (Utah 1987) (quoting Franklin Financial v. New Empire Dev. Co., 659 P.2d 1040, 1045 (Utah 1983)).

The reason for the rule is axiomatic, longstanding, hornbook law. The trial court must be given an effective opportunity to correct an error. A party who has not properly raised an issue where it can be addressed most quickly and economically should not be entitled to complain and thereby consume the time and resources of this court and other parties. Any other rule would give an obstreperous party endless potential for repeated appeals and delay. Any other rule would defeat completely the goal of efficient administration of justice. This court cannot assume the issue was raised at the trial level.

This rule is a mere technicality unless this court gives substance and meaning to the qualifiers "timely" and "sufficient."

Until the promulgation of the Code of Judicial Administration, local rules were essential to assure the orderly, impartial and efficient administration of justice. Local rules must be enforced to be effective.

It was a reasonable exercise of the inherent powers of the district court to require that those opposing a motion brief the issues before the court or accept the granting of the motion.

The plaintiff failed to timely and sufficiently preserve his right to appeal.

POINT II

THE UTAH DRAMSHOP ACT PREEMPTS AND PRECLUDES COMMON LAW RECOVERY BY A DRUNK FOR INJURIES CAUSED BY THE DRUNK'S OWN INTOXICATION.

The Utah Dramshop Act, Utah Code Ann. § 32A-14-1 (1953) states:

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

(a) who is under the age of 21 years or

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

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

(d) who is a known interdicted person and by those actions causes the intoxication of that person, Is liable for injury in person, property, or means of support of any third person, or to the spouse, child, or parent of that third person resulting from the intoxication

(emphasis added).

As this court observed:

The Dramshop Act allows third parties to recover from those improperly providing liquor, but does not allow the intoxicated person to recover from the provider. Therefore, one injured as a result of his or her own voluntary but unlawful intoxication would appear to be without remedy against the provider of the alcohol, either under the Dramshop Act or under common law.

Beach v. University of Utah, 726 P.2d 413, 417, n.3 (Utah 1986).

The tenth circuit has gone further and held that the Utah Dramshop Act preempts and precludes any common law recovery of a person for injuries caused by his or her own voluntary intoxication. Tovar v. Lee, Civil No. 84-1540 (10th Cir. 1984) (attached as Appen. A). The tenth circuit decision is supported by at least the following important rules of statutory construction:

A. Courts will not inflate, expand, stretch or extend statutes to matters not falling within their express provisions.

It is axiomatic that the role of the judiciary in interpreting and applying statutes passed by the legislature is to discern the intent of the co-equal legislative branch of government. "This Court's primary responsibility in construing legislation is to give effect to the intent of the legislature." American Coal Co. v. Sandstrom, 689 P.2d 1, 3 (Utah 1984). It is

not the role of this court to critique or rewrite legislation or second guess decisions of public policy reached through the political process. It is for this reason that courts will not inflate, expand, stretch or extend statutes to matters not falling within their express provisions. E.g., City of Phoenix v. Denofrio, 99 Ariz. 130, 407 P.2d 91, 93 (1965) (en banc).

Horton asks this court to do exactly that. He would like this court to substitute its judgment for that of the legislature and supplement the Dramshop Act with a remedy for the drunkard when the legislature did not see fit to do so.

B. All terms used in a statute must be given meaning.

Utah courts have often held that all of the terms used in a statute must be given meaning. In construing legislative enactments, the reviewing court assumes each term in the statute was used advisedly. "This Court therefore interprets and applies the statute according to its literal wording unless it is unreasonably confused or inoperable." E.g., Horne v. Horne, 737 P.2d 244, 247 (Utah App. 1987).

The terms "third persons" are not unreasonably confused or inoperable. They were used to describe those who could recover for injuries caused by the drunkard that was improperly served alcohol. Had the legislature intended that the drunkard recover for his or her own injuries, it would not have gone to the trouble of including the term "third." That term is a term of limitation and exclusion and should be given meaning.

C. The statute must be interpreted in light of its purposes.

This court has repeatedly held that a statute must be interpreted in light of its legislative purposes. "Where statutory language is plain and unambiguous, this Court will not look beyond the same to divine legislative intent." Brinkerhoff V. Forsyth, 779 P.2d 685, 686 (Utah 1979). According to the plain language of the statute, the express purposes of the legislature in enacting the Dramshop Act include limiting recovery. In addition, the legislature wished to exclude any liability of the state or its agencies or employees. Finally, the legislature intended any dramshop action be commenced before two years.

If this court adopts a common law recovery, these purposes will be destroyed. The excessive drinker will be given unlimited recovery against private and governmental persons and entities alike. The claim for non-fatal injuries will be subject to a four year limitations period. Utah Code Ann. § 78-13-25(3) (1953).

D. Statutory interpretations that produce unjust or absurd results must be avoided.

A sound rule of statutory interpretation is that a statute is presumed not to be intended to produce absurd consequences and that where possible it will be given a reasonable and sensible construction.

Curtis v. Harmon Elec., Inc., 575 P.2d 1044, 1046 (Utah 1978).

If the Dramshop Act does not preempt and preclude a common law recovery for the drunkard for injuries caused by his own

excesses, and if this court accepts Horton's invitation to adopt one, then the drunkard will have much greater rights than an innocent third party as described above. This result is nothing short of unjust and absurd.

E. Expressio unius est exclusio alterius. The expression of one thing in a statute is taken to exclude by implication things not expressed.

This is not a hard and fast rule to be blindly applied. Rio Grande Motorway, Inc. v. Public Service Commission, 21 Utah 377, 445 P.2d 990, 992 (1968). It is a matter of common logic and intuition. This fundamental principal of human understanding does not need a fancy name, latin or otherwise. The men's room door says simply "men." It does not say: "men. Not women." No one would question the fact that the second sentence is by implication intended by the first. No one needs a rule of construction to understand that the expression of one thing ordinarily excludes another.

F. It is presumed that the legislature was familiar with common law as it existed when a statute was enacted.

It is presumed that the legislature is familiar with the state of the common law at the time of enacting a statute. That common law becomes part of the statute, except as it is expressly changed by the statute. See, E.g., Horne v. Horne, 737 P.2d 244, 248 (Utah App. 1987).

Before the late seventies and early eighties, only a small number of states had recognized common law dramshop recovery of

any kind. In the late seventies and early eighties, a small number of state courts started to change longstanding common law rules and allow third parties to recover. See, the appendix in Ling v. Jan's Liquors, 237 Kan. 629, 703 P.2d 731, 739 (Kan. 1985) which lists the status of the law in all fifty states as of 1985.

It was against this background that the Utah Dramshop Act was passed in 1981. The legislature understood that common law allowed no recovery. It changed the no recovery rule for a limited recovery rule with respect to third parties only. It intended to incorporate the common law rule of no recovery with respect to the intoxicated person. The legislature having done so, this court is not free to adopt a common law recover for Mr. Horton by judicial fiat.

G. Where the legislature amends a portion of a statute, leaving other portions unamended, the legislature is presumed to have been satisfied with prior judicial constructions of the unaltered portions of the statute and to have adopted those constructions as consistent with its own intent.

This court has repeatedly held:

Where the legislature amends a portion of a statute, leaving other portions unamended, or re-enacts a portion without change, absent substantial evidence to the contrary, the legislature is presumed to have been satisfied with prior judicial constructions of the unaltered portions of the statute and to have adopted those constructions as consistent with its own intent.

American Coal Co. v. Sandstrom, 689 P. 1, 3 (Utah 1984). See also, Christensen v. Indust. Comm'n, 642 P.2d 755, 756 (Utah 1982).

The Utah Dramshop Act was initially enacted in 1981, effective May, 1981. 1981 Utah Laws, ch. 152. Before the statute there had been no common law dramshop recovery in Utah by the drunkard or anyone else. Later that same year, this court stated:

Prior to trial, defendants filed motions for summary judgment seeking, inter alia, a determination that there can be no cause of action against one who furnishes liquor in favor of those injured by the intoxication of the person so furnished. The trial court properly refused to adopt by judicial fiat remedies commonly available under so-called "civil damage" or "dramshop" acts.

Yost v. State, 640 P.2d 1044, 1046 (Utah 1981) (footnotes omitted). This court has called this dicta.

This court noted:

The reason usually given for this general rule at common law is that the drinking of the liquor, and not the furnishing of it, is the proximate cause of the injury.

Id. at 1046, n.2 (citation omitted).

In 1985, the act was repealed and reenacted. Beach v. University of Utah, 726 P.2d 413, 417, n. 3 (Utah 1986); 1985 Utah Laws, ch.175. The language limiting recovery to third parties was retained without change.

In 1986, this court decided Beach v. University of Utah, 726 P. 413 (Utah 1986). There this court stated:

The Dramshop Act allows third parties to recover from those improperly providing liquor, but does not allow the intoxicated person to recover from the provider. Therefore, one injured as a result of his or her own voluntary but unlawful intoxication would appear to be without remedy against the provider of the alcohol, either under the Dramshop Act or under common law.

Id. at 417, n. 3 (citation omitted). This is apparently dicta.

In 1989 the Act was amended again, but the language limiting recovery to third parties was retained unchanged. 1989 Utah Laws, ch. 240.

It is much too late for this court to believe the slate is clean. This court has interpreted the statute and common law and the legislature has agreed. The drunkard cannot recover for injuries cause by his own intoxication.

G. This court has a duty to render such interpretation of the statutes of the state as will best promote protection of the public.

"This Court recognizes its duty to render such interpretation of the laws as will best promote the protection of the public." Curtis v. Harmon Elec., Inc., 575 P.2d 1044, 1046 (Utah 1978).

A rule of liability here could have no other possible effect upon patrons than to encourage them to excessive liquor consumption at taverns. Forthwith upon the announcement of a rule of law which permits a drunken patron to recover damages for his own injuries from the tavern keeper, patrons who have heretofore felt concern for their own safety should they become overly intoxicated will relax their personal efforts, for three readily apparent reasons. First, because they will assume that the bartenders will exercise greater care on their behalf; second, because they very naturally will feel that if they are hurt they will be compensated for such hurt; and third, because we will

in effect have encouraged their over indulgence, by pampering their delinquency. It cannot be otherwise. The already tragic statistics which so horribly describe the slaughter of innocent persons by drunk drivers will immediately increase, to society's further disadvantage.

Tovar v. Lee, Civil No. 84-1540 at 4-5 (10th Cir. 1984) (quoting Rindt v. Kauffman, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603, 611-12 (1976)).

This court has said:

The fact of common knowledge that the drinking driver is the cause of so many of the more serious automobile accidents is strong evidence in itself to support the need for all possible means of deterring persons from driving automobiles after drinking, including exposure to awards of punitive damages in the event of accidents.

Johnson v. Rogers, 763 P.2d 771, 775 (Utah 1988) (quoting Taylor v. Superior Court of Los Angeles Co., 24 Cal.3d 890, 897, 598 P.2d 854, 857, 157 Cal.Rptr. 693, 697 (1979)).

The same rationale supports a rule that makes the excessive drinker responsible for his own actions and his own injuries. If there is any possibility that there will be a deterrent effect, this court should adopt the rule that will best deter drunk drivers. That rule is one that makes the drunk liable for injuries caused to others and injuries caused to himself. The drinker is in the very best position to prevent injury to himself and others.

If the dramshop proprietor was held liable for injuries of the drunk in addition to injuries to third parties, precious little additional deterrent would be provided.

This court would certainly not be alone if it held that a state dramshop act which allowed recovery to third persons precluded recovery by the intoxicated person. E.g., Connally v. Conlan, 371 N.W.2d 832, 833 (Iowa 1985); Meany v. Newell, 367 N.W.2d 472, 474-75 (Minn. 1985). Nor would this court be alone if it ruled that a state dramshop act did not preclude common law recover. E.g., Kowal v. Hofher, 181 Conn. 355, 436 A.2d 1, 2 (1980). It is not, however, a question of which group of sheep to follow. Each state presumably has a relatively unique statute, with unique legislative history and perhaps even unique rules of statutory construction which must be followed. The issue is whether the Utah Dramshop Act was intended to preclude common law recovery. It was.

POINT III

BY STATUTE, UTAH COMMON LAW IS THE COMMON LAW OF ENGLAND, WHICH WOULD PRECLUDE PLAINTIFF'S RECOVERY.

The Common Law of England, so far as it is not repugnant to, or in conflict with, the Constitution or laws of the United States, or the Constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state.

Utah Code Ann., § 68-3-1 (1953).

There is no question that the exceptions and qualifications to the rule are many and broad. Nor is there any dispute that portions of Utah common law should evolve predictably and orderly in light of changes in societies norms and the needs of Utah's

people. This does not mean, however, that the statute can be ignored altogether, as if it did not exist. Such a notion would be inconsistent with the fundamental fabric of the state constitution's balance of power.

The very basic and time honored principles of law in this case have not changed, nor should they. Mr. Horton seeks to recover for injuries he claims were caused in part by the negligence of others, hardly a novel or new concept given birth by changing times, changing societal norms or the unique situation in Utah. It would be silly to assume that problems associated with the consumption of alcohol are novel or new.

If anything, the increased potential for physical injury afforded by the widespread use of the automobile and power machinery, the increased awareness of Utah's citizens to the physical, economic, and emotional costs of excessive consumption of alcohol, and the moral convictions of a large portion of the state's population should compel this court to demand more responsibility of those who drink, not less.

There simply is no justification for modifying the common law rule precluding dramshop recovery of a drunk for the injuries his own behavior causes him.

POINT IV

PLAINTIFF SHOULD NOT BENEFIT FROM HIS OWN CRIMINAL BEHAVIOR.

The brief of plaintiff suggests he should be excused for his behavior, that of excessive consumption of alcohol, for the very

reason that he drank to excess. Horton claims that under the law he has no responsibility to monitor or limit his consumption of alcohol. The poor dear should be excused, coddled, pitied and most of all held immune and harmless.

Such a position is patently inconsistent with Utah law. It was a class C misdemeanor if, as he alleges, Horton was under the influence of intoxicating liquor to a degree that he endangered himself or others in a public place. Utah Code Ann. § 76-9-701(1) (1953). It was a class B misdemeanor for Horton to purchase alcohol while under the influence of alcohol. Utah Code Ann. § 32A-12-210 (1953) (formerly Utah Code Ann. § 32A-12-13.3; 1985 Utah Laws, ch. 82, § 2).

Contrary to plaintiff's position, he is not excused by reason of intoxication:

Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of an offense; however, if recklessness or criminal negligence establishes an element of an offense and the actor is unaware of the risk because of the voluntary intoxication, his unawareness is immaterial in the prosecution for that offense.

Utah Code Ann. § 76-2-306 (1953). Recklessness is a sufficient mental state to establish plaintiff's criminal behavior. Utah Code Ann. § 76-2-104 (1953).

This court has found that the drunk may be guilty of recklessness in a civil context. Johnson v. Rogers, 763 P.2d 771, 775-76 (Utah 1988).

It violates strong public policy to compensate someone for the results of his or her own serious criminal behavior.

POINT V

AS A MATTER OF LAW, THE PLAINTIFF WAS MORE
NEGLIGENT THAN THE DEFENDANTS.

If plaintiff was as negligent, or more negligent, than the defendants, his recovery is barred. Utah Code Ann. § 78-27-37 (1953).

Ordinarily, negligence is a question for the trier of fact. However, when reasonable minds cannot differ, the court must rule as a matter of law. Reasonable minds cannot differ as to whether the person who gets so intoxicated that he passes out and hurts himself is at least as negligent as the person who sold him the liquor.

The effects of alcohol on a particular individual vary as a function of the following factors:

- (1) age and weight;
- (2) genetic and chemical makeup;
- (3) amount of alcohol consumed;
- (4) speed at which the alcohol is consumed;
- (5) ingestion of other substances such as prescription and non-prescription drugs;
- (6) experience;
- (7) the amount of food and nonalcoholic fluids consumed with or before the alcohol;
- (8) physical condition; and
- (9) emotional state.

The plaintiff knew best his tolerance for alcohol based upon age, weight, experience, condition and emotional state. The plaintiff, alone, knew what he ingested before entering Studebaker's. The plaintiff alone could gage the effects of alcohol by how he felt, before the alcohol effected his actions. It was plaintiff, alone, who ordered alcohol and decided whether, how much and how fast to consume it. Plaintiff was responsible to monitor the alcohol consumption of only one person. The defendants were required to monitor the consumption of many. It was plaintiff alone who left Studebaker's to go to another tavern to consume more alcohol. At that point Studebaker's had no ability to prevent him from consuming alcohol. When he arrived at the Sun, they had no knowledge of his prior ingestion of alcohol, food, or other substances.

The plaintiff's voluntary intoxication does not excuse his negligence or modify his duty to act reasonably to protect himself from harm. E.g., Tome v. Berea Pewter Mug, Inc., 4 Ohio App. 3d 98, 102, 446 N.E.2d 848, 853 (Ohio App. 1982). The plaintiff had the same duty of care as a sober person under the same circumstances.

As a matter of law, reasonable people could not find that Horton's own negligence was less than that of the defendants.

POINT VI

ALLOWING PLAINTIFF TO RECOVER FOR HIS OWN
EXCESSIVE CONSUMPTION OF ALCOHOL WILL
ENCOURAGE SUCH EXCESS, TO THE DETRIMENT OF
THE HEALTH OF UTAH CITIZENS AND CONTRARY TO
STRONG PUBLIC POLICY.

This is not just a rehash of the same argument as that raised with regard to the interpretation of the Dramshop Act. If this court decides that the Act does not preclude commonlaw recovery, it must then decide if Utah recognizes such common law recovery for the drunkard. Drunk driving is a very serious problem. This court has recognized there is a "trend to maximize punishment and deterrence of impaired drivers." Johnson v. Rogers, 763 P.2d 771, 775 (Utah 1988). It would be inappropriate indeed to give drunk drivers the mixed signal that they will be criminally punished, held responsible in civil cases for injuries they cause by drinking and driving and even punished in civil cases, but, if they manage to injure themselves, the state will give them a forum and incur great cost to see that their loss is passed along to someone else.

POINT VII

THERE IS NO JUSTIFICATION FOR ALTERING
LONGSTANDING RULES REGARDING DUTY. THE
DEFENDANTS DID NOT OWE PLAINTIFF A DUTY TO
PROTECT HIM FROM HARMING HIMSELF.

An essential element of a negligence claim is a duty owed to the plaintiff by the defendant. E.g., Owens v. Garfield, 784 P.2d 1187, 1189 (Utah 1989); Beach v. University of Utah, 726 P.2d 413, 415 (Utah 1986).

Ordinarily, a party does not have an affirmative duty to care for another. Absent unusual circumstances which justify imposing such an affirmative responsibility, "one has no duty to look after the safety of another who has become voluntarily intoxicated and thus limited his ability to protect himself." Benally v. Robinson, 14 Utah 2d 6, 9, 376 P.2d 388, 390 (1962). The law imposes upon one party an affirmative duty to act only when certain special relationships exist between the parties. These relationships generally arise when one assumes responsibility for another's safety or deprives another of his or her normal opportunities for self-protection. Restatement (Second) of Torts § 314A (1962). The essence of a special relationship is dependence by one party upon the other or mutual dependence between the parties.

Beach v. University of Utah, 726 P.2d 413, 415-16 (Utah 1986)

(footnote omitted).

Plaintiff seems to argue that criminal statutes regulating the sale of alcohol were intended to protect a drunk from the effects of consuming too much alcohol. The plaintiff cites to no legislative history for this proposition. More importantly, a careful analysis of the statutes would seem to indicate that they were intended to protect third parties, not drunks. For example, it is not illegal to sell an apparently sober person copious amounts of alcohol to be consumed at home. Plaintiff can purchase numerous twelve packs of beer at one time at nearly any store. He can purchase large quantities of hard liquor at a state store. There is no statute that requires the seller to inquire concerning who will consume it or when. The seller does not have an obligation to follow the purchaser home to watch and see it is not consumed too quickly. The dramshop operator must only monitor plaintiff's drinking in a public place. Nor is it

illegal for plaintiff to drink until he is falling down, passed-out drunk if he chooses to do so at home. The only prohibition is drinking in a public place. It would appear that the legislature was concerned only about excessive drinking in public. The only logical explanation is that when someone drinks to excess in public they must at some time go home, a process that can maim and kill innocent third parties if the drunk decides to drive.

Studebaker's simply owed plaintiff no special duty to protect him from his own excesses.

POINT IIX

IF THIS COURT ADOPTS A COMMON LAW RECOVERY IN FAVOR OF THOSE WHO DRINK TO EXCESS AND INJURE THEMSELVES, IT MUST ARBITRARILY LIMIT RECOVERY OR OPEN THE FLOOD GATES TO TRIVIAL AND SPECULATIVE CLAIMS.

It is one thing to protect a drunk from serious personal injury. Not all personal injuries are serious. If the plaintiff becomes nauseated and vomits, technically that is personal injury. Will the drunk recover under the proposed new Utah common law? What about the drunk who's excesses cause him to sleep late and lose a job, will the dramshop operator be responsible? What about the drunk that only bangs his car up getting it home, will the dramshop operator be responsible for property damage? What about recovery for a soiled suit or carpet?

What about chronic exposure to alcohol? Will the plaintiff have a claim against every dramshop that served him alcohol throughout his lifetime?

The potential for fraudulent claims and the difficulties with proving proximate cause are enormous. A patron injures himself in a one car accident, but delays seeking medical attention for several days. No blood alcohol level is ever taken. Was the accident a product of simple negligence that would have occurred in any event, or was it proximately caused by the consumption of alcohol? What if the claim is not brought for four years? The dramshop operator is not likely to remember, and the only witness is likely to be the drunk.

This highlights a glaring paradox in plaintiffs theories. The drunk is too drunk to act reasonably or make reasonable judgments about his ability to drive, etc. He is however competent and likely the only witness who can give his judgment as to whether he was apparently drunk such that the dramshop operator should not have served him more alcohol. He is competent to give his judgment as to whether the accident would have happened, but for the alcohol. He is competent to judge the actions of others, but not competent to judge or control his own.

POINT IX

THE LEGISLATURE IS IN THE BEST POSITION TO
REGULATE THE SALE AND CONSUMPTION OF ALCOHOL
AND THE LIABILITY FROM THE SALE AND
CONSUMPTION OF ALCOHOL.

Plaintiff maintains that half of the states have accepted recovery for drunks, the other half have rejected it. That does appear to be roughly correct. See, Annotation, Liability of Persons Furnishing Intoxicating Liquor for Injury To or Death of Consumer, Outside Coverage of Civil Damage Acts, 89 A.L.R.3d 1230 (1980) and the cases cited therein. There does not appear to be a clear consensus that common law recover for drunks is desirable. Such a fact would seem to caution against a rule imposes by the judiciary. Close questions are better handled through the democratic process.

This state earns much of its revenue from the sale of alcohol and maintains a monopoly on its sale. The legislative and executive branches control the sale and consumption of alcohol as dictated by complex rules, regulations and statutes.

The rules regarding the sale of alcohol effect tourism, a major industry in Utah.

The sale and consumption of alcohol has particularly acute moral overtones in this state.

This state has a small population that is spread throughout a wide geographic area, most of which is not served by any means of public transportation. This makes the problem of the drunken driver particularly acute.

As in other states the sale and consumption of alcohol effects the physical and mental health of Utah's citizens.

Plaintiff's brief makes grandiose, unsupported statements about the drunk's ability for self control. This court is not well suited to judge that.

This court is particularly poorly suited to weighing all of these many competing interests. It should be left to democratic government where the public has a voice and the legislature has access to a broad spectrum of comment from economists, physical and mental health care professionals, the tourism industry and the general public.

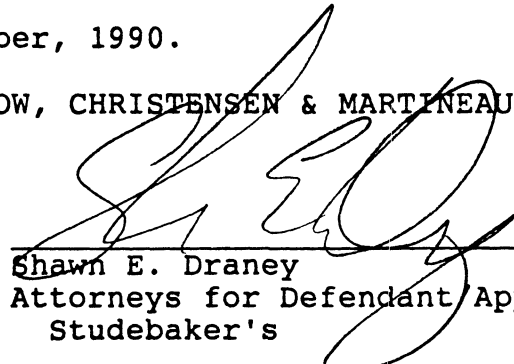
CONCLUSION

For the foregoing reasons, the trial court's dismissal of plaintiff's complaint should be affirmed.

DATED this 16th day of October, 1990.

SNOW, CHRISTENSEN & MARTINEAU

By



Shawn E. Draney
Attorneys for Defendant Appellee
Studebaker's

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

NOV 20 1984

HOWARD K. PHILLIPS
Clerk

RICHARD JESSE TOVAR,
Plaintiff-Appellant,
v.
MERLIN EVAN LEE, d/b/a
101 Rancho Service, Virgin,
Utah,
Defendant-Appellee.

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No. 84-1540
(D.C. Civil No. C-83-1077J)
(D. Utah, Central Division)

ORDER AND JUDGMENT

Before BARRETT, DOYLE, and McWILLIAMS, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

The issue is whether, under Utah law, an intoxicated person has a cause of action against a dram shop owner for personal injuries sustained in a motorcycle accident caused by such person's voluntary consumption of intoxicating beverages in the dram shop. The district court held that under Utah law there was no such cause of action. We agree.

From the complaint we learn that Richard Jesse Tovar, an adult, became intoxicated in a tavern owned by Merlin Evan Lee. In this regard, it is alleged that Lee, or his agents and employees, negligently permitted Tovar to become intoxicated and that thereafter, while still in an intoxicated condition, Tovar drove his motorcycle off the road and sustained serious personal injuries and is now, in fact, a quadriplegic. Tovar sought general damages from Lee, the dram shop owner, in the amount of \$10,000,000. Federal jurisdiction is based on diversity of citizenship. 28 U.S.C. § 1332.

In his answer, Lee first pled that the complaint failed to state a claim upon which relief could be granted. Later, Lee moved for judgment on the pleadings. Lee's position is that under the Utah Dram Shop Act only a third party who sustains injuries because of the acts of an intoxicated person has a cause of action against the dram shop owner who permitted his patron to become intoxicated, and that the Act does not create a cause of action against the dram shop owner on behalf of an intoxicated patron who himself sustains injury as a result of intoxication. Utah Code Ann. § 32-11-1, et seq. (Supp. 1983). At this juncture, Tovar sought to amend his complaint so as to include a separate claim against Lee based on a Utah statute relating to the maintenance of a common or public nuisance.

The district court denied Tovar's motion to file an amended complaint and granted Lee's motion for judgment on the pleadings. A judgment of dismissal followed. Tovar appeals. We affirm.

The Utah Dram Shop Act creates, in so many words, a cause of action in favor of a third party, who sustains injury at the hands of an intoxicated person, against the dram shop owner who permitted his patron to become intoxicated. Utah Code Ann. § 32-11-1 (Supp. 1983). However, that statute does not create any such cause of action in favor of the intoxicated person against the dram shop owner.

Lee's position is that the Dram Shop Act is preemptive and that the only cause of action created by that statute is one in favor of an injured third party against the dram shop owner.

Tovar's position is that the statute is not preemptive and that Tovar, under Utah law, has a common law cause of action against Lee, the dram shop owner, or, in the alternative, that he has a cause of action under Utah statutory law pertaining to the maintenance of a public nuisance. As indicated, the district court sustained Lee's position and entered judgment in his favor.

This is another diversity case which turns on a federal judge's understanding of local state law. It would appear that the Utah Supreme Court has not yet addressed the precise issue here involved. In such circumstance, the view of a resident federal district judge on an unsettled question of local state law is entitled to some deference by a federal appellate court, and, on review, should not be overturned unless the appellate court has a rather firm view that the federal district judge erred. See Colonial Park Country Club v. Joan of Arc, ____ F.2d ____ (10th Cir. 1984) (No. 83-1333); Budde v. Ling-Temco-Vought, 511 F.2d

1033 (10th Cir. 1975). We have no such feeling in the instant case.

Our attention has not been directed to any Utah case which would support Tovar's contention that he has a common law cause of action against Lee. The Utah Dram Shop Act creates a cause of action in favor of an injured third party against the dram shop owner, but creates no corresponding cause of action in favor of an intoxicated person who injures himself. We are disinclined to disturb the district court's belief that the Utah Dram Shop Act is preemptive. In this regard, in *Miller v. City of Portland*, 288 Or. 271, 604 P.2d 1261, 1265 (Or. 1980), the Oregon Supreme Court (Or. 1980), considering a dram shop act similar to the Utah statute, spoke as follows:

This court has never previously recognized a common law cause of action in favor of a person who suffers injury resulting from his or her own consumption of alcohol. Nor have most other courts. Because it would be contrary to apparent legislative policy, we also consider it inappropriate to create a common law cause of action for physical injury to minors caused by their illegal purchase of alcoholic liquor.

For a general discussion of the policy considerations militating against creating a cause of action against a tavern owner in favor of one who voluntarily gets intoxicated, see *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976). In that case, the court stated:

A rule of liability here could have no other possible effect upon patrons than to encourage them to excessive liquor consumption at taverns. Forthwith upon the announcement of a rule of law which permits a drunken patron to recover damages for his own injuries from the tavern keeper, patrons who have heretofore felt concern for their own safety should they become overly intoxicated will relax their personal efforts, for three readily apparent reasons. First, because they will

assume that the bartenders will exercise greater care on their behalf; second, because they very naturally will feel that if they are hurt they will be compensated for such hurt; and third, because we . . . will in effect have encouraged their over indulgence, by pampering their delinquency. It cannot be otherwise. The already tragic statistics which so horribly describe the slaughter of innocent persons by drunk drivers will immediately increase, to society's further disadvantage. Id. at 611-12.

As stated above, the district court refused to allow Tovar to amend his complaint so as to include a separate claim based on the local statute pertaining to a public nuisance, and such is now assigned as error. Although leave to amend shall be freely granted when justice so requires, leave to amend need not be granted where the "futility of amendment" is apparent. *Mountain View v. Abbott Laboratories*, 630 F.2d 1383, 1389 (10th Cir. 1980). Believing, as we do, that the Utah Dram Shop Act is preemptive, there can be no cause of action in favor of Tovar based on any public nuisance theory.

Judgment affirmed.


HOWARD K. PHILLIPS, Clerk

PROOF OF SERVICE

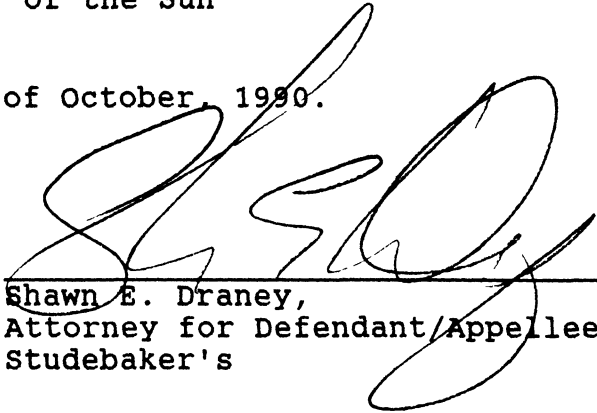
This will certify that I caused four (4) copies of this Brief of Concept Clubs, Inc. d/b/a/ Studebakers, Appeal No. 880490 to be mailed, first-class, postage prepaid, to each of the following on the 16th day of October, 1990:

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DATED this 16th day of October, 1990.



Shawn E. Draney,
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