1984

A. B. Christenson. Personal Representative of the Estate of Michael Lance Christenson, Deceased v. N. D. (Pete) Hayward, Sheriff Of Salt Lake County; Roger F. Taylor, Deputy Sheriff, Salt Lake County; Michael M. Davis, Deputy Sheriff, Salt Lake County; Michael Stewart; Bart Barker; Tom Shimizu, Board Of Commissioners, Salt Lake County : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

A. B. CHRISTENSON, Personal Representative of the Estate of Michael Lance Christenson, Deceased Plaintiff/Appellant -vs- N. D. (PETE) HAYWARD, Sheriff of Salt Lake County, ROGER F. TAYLOR, Deputy Sheriff, Salt Lake County, MICHAEL M. DAVIS, Deputy Sheriff, Salt Lake County; MICHAEL STEWART; BART BARKER; TOM SHIMIZU, Board of Commissioners, Salt Lake County Defendants/Respondents.	*	Case No. 19391

RESPONDENTS' BRIEF

Appeal from the Order of the
District Court of Salt Lake County
Honorable Dean E. Conder, Judge

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RESPONDENTS' BRIEF

Nature of the Case

Plaintiff sues the defendants Sheriff, Deputy Sheriff and County Commissioners of Salt Lake County alleging damages for the death of plaintiff's son, when the motorcycle the intoxicated decedent was operating, failed to negotiate a curve in the road.

Disposition In Lower Court

The Honorable Dean E. Conder, Third Judicial District Court, granted defendants Motion to dismiss under 12(b)(6) U.R.C.P,.

Facts

Inasmuch as the Lower Court granted defendants' Motion to dismiss on the grounds that the Complaint fails to state a cause of action (R-14) the only facts for review are those stated in the complaint.

The appellants' interjection of additional facts (the make and weight of the motorcycle, the distance to decedent's home, etc.) are not properly included in appellant's Brief. However, we will engage in the same impropriety by replying that defendants' proof would establish that decedent indicated he would push his motorcycle to a friend's home a short distance away.

The above alleged additional facts are not material to the dispositions of this appeal.

The Complaint establishes that the officers never saw decedent while he was operating his motorcycle (background facts, R-4). Their first contact with him was in the parking lot relative to a disturbance.

The decedent was not taken into custody by the officers. "Despite Christenson's . . . intoxication, both deputies failed to arrest him" (Par 18,R-4). The deputies "told" decedent to walk his motorcycle away from that location" (Par 16, R-4).

The decedent, while driving his motorcycle failed to negotiate a curve and later died from the injuries he sustained.

ARGUMENT

POINT I.

The Defendants Owed No Duty To Decedent To Protect Him From His Own Negligence.

Not one case cited by appellant involves the facts here. All of the cases in point involve subsequent accidents resulting in injuries or death of third parties, caused by the drunk driver, after the officiers had observed him driving while intoxicated, and failed to arrest him.

Inasmuch as no member of the general public was injured by decedent's act in driving a motorcycle while intoxicated, the appellant's entire Brief is based on an argument of facts in a different case, which the Honorable Court need not here decide.

For Example: Ryan v. State 656 P.2d 616 (Arz 1982) (Appellant's Brief, Pg. 5) is obviously not in point. There a dangerous inmate escaped from a youth center and later shot plaintiff. The trial court granted Summary Judgment based on Governmental Immunity, and the Arizona Supreme Court reversed.

Adams v. State 555 P.2d 235 (Alaska, 1976)(Appellant's Brief Pg. 5.), involves the duty of the state in conducting fire safety inspections and is not germaine to the issues here.

Shore v. Town of Stonington 444 A 2.d 1379 [Conn. 1982 (Pg. 7)] officers failed to arrest a drunk driver whom they had previously stopped, but failed to arrest, was later involved in an accident resulting in serious injuries and death of third parties. The officers had warned the drunk to drive carefully, and the accident occurred 10 minutes later.

Tomkins v. Kenner Police Dept. 402 So. 2.d 276 (La 1981), Appellant's Brief Page 8 does not involve a failure to arrest a drunk. Rather the officers, during an investigation of an accident, negligently failed to discover a seriously injured party in the accident, and he died as a result.

Mach Co. v. Rensselar Water Co. 247 N.Y. 160, 159 N.E. 896 (1928) (Pg. 9, Appellant's Brief), simply holds that a contract by a water works company to furnish water to a city, does not give an individual resident of the city a cause of action against the water company when the resident's house burns and the hydrant pressure was not sufficient to extinguish the fire.

Stone v. Arizona Highway Commission. 381 P2.d 107 (Ariz. 1963) (Pg. 12 Appellant's Brief), involves the incorrect highway markings on a state highway which confused the driver resulting in an accident. The Court abolished the defense of Governmental Immunity. The case, therefore, is clearly not in point.

The Respondent's Position is clearly announced by this Honorable Court in Benally v. L. G. Robinson 14 Utah .2d 6, 376 P.2d 388, 1964 (Appellant's Brief Pg. 11). "Ordinarily

one has no duty to look after the safety of another who has become voluntarily intoxicated and thus limited his ability to protect himself. But that absence of duty ended when Officer Robinson took Benally into custody".

In the case at Bar the officers did not take the decedent into custody. The appellant complains that the officers did not arrest him.

In Parvi v. City of Kingston (N.Y.) 362 N.E.2d 960 (1977) (Pg. 15 Appellant's Brief) the officers responded to a call of a disturbance, and upon arrival found three intoxicated men. The police told them to leave but were advised they had no place to go. The officers then transported them to a park where they could "sleep it off". Two of the men wandered on to a near-by freeway and were struck by cars.

The Majority Court held that when the men were placed in the police car, they were then in custody. The court held that Summary Judgment was not proper as it would "negate the very duty imposed on police officers when they took Parvi . . . into custody." (emphasis added).

The better reasoned dissenting opinion denied the findings of custody, under the facts, and then states Page 966:

> "Plaintiff's negligence claim is equally without merit. The police officers had no duty to leave Parvi absolutely free from danger in any form. Instead, they owed plaintiff only a duty to exercise ordinary care. If Perchance, he was in search of more drinks, there was no chance of giving him absolute safety except by locking him up. It should not be the rule, common to an era long well past, that every drunkard must be locked up on being observed as intoxicated in public."

"The police . . . are not sisters of charity or baby sitters."

In Stout v. City of Porterville 196 Cal. Rept'r 301 (1983) where officers questioned a pedestrian who was intoxicated, but did not arrest him, and the pedestrian was later struck by a car, the pedestrian's complaint against the officers and the city was dismissed.

The Appellate Court affirmed, and states, Page 304:

"The only additional duty undertaken by accpeting employment as a police officer is the duty owed to the public at large."

The Stout Court points out that "As a rule, one has no duty to come to the aid of another."

The Court there cited considerable precedent pointing out that until a "special relationship" is established by an affirmative act by the officer "which places the person in peril or increases the risk of harm" there arises no duty on the officer to protect an individual.

The Court then concludes:

"Appellants did not allege that Officer Semonious assured Michael Stout he would take care of him or by his words or conduct induced him to rely on the officer's protection. Appellants did not allege that the officer in any way induced him into a false sense of security. In sum, appellants failed to allege a common law legal duty owed to them by City and/or Officer Semonious."

In the case at bar, there is no allegation that the defendant officers took any affirmative action to place decedent under their custody, or that they in any way took any action which would have led decedent into a feeling of

security, or that any action on their part increased the posibility of harm to decedent.

Quite to the contrary, had decedent complied with his agreement to "walk" the motorcycle and not ride it, no accident would have occurred.

We, refer also to precedents cited in Defendant's Memorandum Pg. R-17-19.

POINT II.

The Decedent's Negligence, as a Matter of Law Under Comparative Negligence, Was Equal to or Exceeded Any Possible Negligence on the Part of These Defendants.

It is inconceivable that intoxication while driving a motor vehicle can be advanced as an excuse for negligence, as proposed by appellant.

It is even more ludicrous to submit that decedent who was grossly intoxicated while driving a motorcycle without the permission or knowledge of the defendant officers was less negligent than the officers.

Reasonable minds cannot differ but that under the facts alleged here, the decedent's negligence was certainly the sole cause of the accident and his death.

But assuming arguendo that there was some passive negligence on the part of the officers, the decedent's negligence as a matter of law far outweighed any such negligence on the part of the officers.

Am Jur. 2.d, New Topic Service, Comparative Negligence at page 65.

> ". . . the comparative negligence statute did not attempt to take from the court the right, where no other inference could be drawn from the evidence by reasonable men, to decide as a question of law that negligence on the part of the plaintiff equaled or exceeded that of the defendant."

65A C.J.S., Negligence, §262, page 905:

> "Where the facts are undisputed and conclusively establish that the degrees of negligence were equal or that plaintiff's negligence exceeded that of defendant, . . . the question of defendant's liability should not be submitted to the jury."

CONCLUSION

It would be insurmountable and impossible task to require police officer to protect all inebriates from the possibility of injuring them selves which is the contention of appellant.

No duty to do so exists, and none existed under the facts alleged in the complaint here.

And when a highly intoxicated person drives a motor vehicle, contrary to law and reason, he can blame himself for the obviously foreseeable consequences.

The Order of Dismissal should therefore be affirmed.

Respectfully Submitted

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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Respondents Brief to Walter R. Ellett, Attorney for Plaintiff/Appellant, 5085 South State Street, Murray, Utah 84107, postage prepaid this 17th day of April, 1984.