

ORAL ARGUMENT - 1/15/97
95-1314
FRIESENHAHN V. RYAN

LAWYER: Honorable Justices. The TC in this matter, Justice Spector, correctly determined that there was no duty owed to the plaintiffs who were the respondents before this court. Based upon that correct finding she entered summary judgment on behalf of my clients. The SA CA reversed that summary judgment basically attempting to carve out two new duties that did not exist. Both of which I believe, one of which clearly the other most probably in conflict with this court's ruling in the Graff v. Beard case. The SA court in their opinion I believe attempted to say that while there is no social host liability where we are dealing among all adults, where there's a minor involved, in this case the injured party was a minor, the injured party was the drinker, that in some way that would present either some exception or some new doctrine of social host liability where one had previously not existed. Additionally, in a matter that was raised for the first time in oral argument at the CA, the SA court said that there could be a cause of action for negligence per se based upon a violation of the Alcoholic Beverage Commission.

I want to review the reasons why I believe both of the statements by the SA court are in contravention of this court's rulings, why no such duties do exist, can exist either under the facts of this case. As a matter of law there would be evidence to support those duties. But in a broader sense that just generally based upon sound propositions of law, those duties should not exist.

CORNYN: Shouldn't the trial court have at least given the plaintiff an opportunity to amend after she sustained your special exceptions?

LAWYER: There were 2 reasons I think that that did not occur. One was the pleading abatement was done to allow this court to address Graff v. Beard. No one knew what level of duty if any might come out of this court on social host. In fact, there was none so there was nothing to replead. And additionally with regard to alcoholic beverage code provisions nothing ever prevented the plaintiffs from pleading that. In fact they pleaded alcoholic beverage code violations against the retail defendants that were in the case at the time.

CORNYN: But they never pled that your client served the alcohol to the minor?

LAWYER: That's correct.

CORNYN: How are we to assume that they could not have pled that if they had been given the full time to replead?

LAWYER: Perhaps they could have pled it. But the summary judgment evidence before the the TC which is unrefuted, the deposition excerpt testimony of Erik Johnson on page 34, he says and it was not refuted that my client did not serve or provide the alcohol, that the theory was one step further removed from actually having provided.

CORNYN: So it doesn't make any difference that they weren't given the full time to replead?

LAWYER: I don't believe so. I don't believe there is anything they could have pled. There's not a duty they could have pled based on the laws that came out of Graff v. Beard plus the evidence that was before Judge Spector at the time.

CORNYN: And that was because even if they did plead that they served the minor alcohol you're saying there's no duty?

LAWYER: That's correct. In addition that would be moot to even to have been able to replead that. There would still not be a social host duty simply by virtue of changing the individual status from an adult to a minor. And in addition in this case bear in mind that the injured party is not an innocent third party. We have in fact the drinker here as the party who was injured.

GONZALEZ: I am confused. Special exceptions were granted?

LAWYER: Yes.

GONZALEZ: But before there was an opportunity to replead, whatever theory, whatever else they wanted to plead, summary judgment was granted in your favor?

LAWYER: Not exactly. What happened was the special exceptions were granted and an abatement to pleadings to allow a resolution of Graff v. Beard, that was going to end based upon a trial setting. The trial setting then evaporated. We went forward with the summary judgment.

GONZALEZ: I am confused about the state of the record with regard to a statement you made that the plaintiffs could not in good conscience plead that the liquor was provided by the Friesenhahns because there is testimony that they in fact did not; and what is that testimony?

LAWYER: It's page 34 of Erik Johnsons' deposition and excerpt of which was part of the summary judgment proof at the TC level.

BAKER: Who is Erik Johnson?

LAWYER: He was the young man who accompanied the deceased to the party and was with her

and watched her exit the party.

GONZALEZ: What does he say?

LAWYER: He says that the Friesenhahns, my client, did not provide the liquor. He says that she brought her own alcohol, that she may have gotten some from some other third parties, and that as she was existing the party, the Friesenhahns, my clients, were attempting to stop motor vehicles and take car keys away from intoxicated persons, and that the decedent drove around them and out the gate to her death.

And the court's question has brought up I think some of the key distinctions again. If we are going to start there are two premises here: 1) can there be social host liability; the other can there be negligence per se liability? I want to be sure to have time to address the issue of negligence per se. But on the social host aspect of the case this court has held that among adults there is no social hosts liability. Simply changing the individual status to that of a minor doesn't change the biggest issue, which is right to control. There still is no right to control.

CORNYN: As the CA pointed out if it's illegal to serve minors alcohol in any amount, and so do you even get to right of control because they've already violated the law by providing alcohol to a minor in the first place?

LAWYER: That would be under the negligence per se argument. And my belief there is that it's also illegal as a minor to possess and consume the alcohol. So you have two equal actors with criminal culpability in the case. And if we are going to base a civil action upon criminal culpability we've now moved into an area where we've got the injured party, in this case unfortunately a deceased party, potentially deriving a civil benefit from having violated the law - possessing and consuming alcohol. Bear in mind this is not an innocent third party case. I can see a distinction if we had all of the facts that the court asked and we had an innocent third party. I think we might have a different situation. There's a case out of Houston that talked a little bit about that. But in this specific case we've got the person who was the injured party, deceased party, her estate would derive a civil benefit from being able to bring a cause of action based on her violation of the law.

CORNYN: Why isn't that handled under comparative negligence?

LAWYER: It could be. But again we would have negligence per se. It would be the only negligence per se scenario. I've not been able to find another where the person seeking to take advantage of criminal liability to their own benefit is also a criminal actor. I guess basically I am saying I think that the dual culpability should move us away from the negligence per se and should leave us strictly in the civil law with the social host issues.

In following on with that with just strictly the social host issues we've got all of the elements of social

host that this court has not found. The only thing that has changed in this case is we have a minor. And then we do have the right to control which Justice Cornyn asked about a distinction, because of the violation of criminal law which I think I have addressed. But in addition in this case we are not seeking to benefit an innocent third party or seeking to find a remedy for an innocent third party. It is the drinker herself who was involved.

HECHT: It does look like the control issue goes away though because if you serve alcohol to an adult, which you are entitled to do, you can't control the adult. But if you serve alcohol to a minor, which you are not entitled to do, maybe you can't control the minor but it doesn't matter if you haven't served it in the first place.

LAWYER: I don't completely disagree with that. On a general basis first and then I want to answer as to the facts of this case as the record stands. On a general basis we still don't have a right to control a minor simply because it's a minor. A parent certainly does. And the government certainly does to degrees. But I don't believe you and I do simply because that person is a minor. And the fact that we have served that person there is a case out of Houston, I cannot pronounce the appellants name but the respondent is O'Brien, it's out of the Houston CA, where a minor was served and beyond even that point car keys were taken away, more alcohol, and then later on the adult in the case says basically I've changed my mind, here's your car keys back, get in your car - drive home drunk. What the Houston court did is not try to go social host liability with that but said there is a situation where someone affirmatively created a dangerous condition. Now the duty ought to arise out of that as opposed to just the broader framework of failing to allow.

Now specifically in this case, to home down on those facts again, you say the right to control goes away. But as this court said in the Graff case, what level should the duty rise to? Does it include taking away car keys? taking possession of the automobile? That was particularly pointed words to me because the summary judgment proof establishes my clients in fact tried to do that and failed.

HECHT: The argument on the other side, I know your evidence is that you didn't provide it, but had you provided it, the argument on the other side is the goal and knowledge which were the underpinnings of Graff don't matter, because you never should have given them the alcohol in the first place. You don't have to know. You don't have to be able to know, you don't have to be able to control, just don't give them the alcohol. You can't do that with adults because they are entitled to it and then knowledge and control issues arise. But they don't arise with minors.

LAWYER: Correct your honor and I think if we had an innocent third party who was the one that was seeking to make that very argument I would be hard pressed to disagree at least as strenuously as I am.

HECHT: If an adult actually affirmatively provided alcoholic beverages to say a 17 year old just

to make it as clear as we can, then it is very difficult to make a Graff argument?

LAWYER: If it's an innocent third party. Now if it's the 17 year old themselves who later then goes and becomes injured, then I think that...

HECHT: Dual culpability?

LAWYER: Yes, sir.

CORNYN: But that doesn't mean necessarily there is no duty does it? I don't understand why the duty that you are willing to concede may exist that an innocent third party goes away. As under the facts of this case it's the illegal drinker who is hurt?

LAWYER: I guess it partially goes to foreseeability and cause in fact. The duty I think goes away in part because the drinker themselves is a participant. We've got a different level of foreseeability what's liable to happen, where we have this person themselves, the minor who is committing the illegal act, participating in the act. We have a co-participant. Just among themselves I think no duty arises. The reason the duty arises as to the third party...

CORNYN: That's part of the risk of giving underage drinkers or anybody alcohol when they are intoxicated is that they will kill other people. But certainly one of the risks is they will kill themselves.

LAWYER: Then in that case I think what the court would be saying is that if we take away duty and take away right to control those issues basically we create a strict liability upon the providing of the alcohol. That I think is just too stringent a standard because that allows no fact interpretation whatsoever. If we have created strict liability strictly by assuming the court were to be 17 and I hand you alcohol, I fixed my liability.

GONZALEZ: It's not strict liability, but negligence per se.

LAWYER: It would be a form of negligence per se, but it wouldn't even permit a comparable argument I don't believe at that point. Because the drinker is a minor, the mere providing of that alcohol then forecloses the need to find duty, forecloses the need to address right to control, establishes conclusively all issues of foreseeability, that rings of strict liability at that point and none of these other issues such as the culpability of the drinker themselves that this court says we should continually focus on.

GONZALEZ: Let me see if I can summarize your argument. You're saying that even if the Friesenhahns had provided liquor to the minor, who is now deceased, that Graff v. Beard controls this case and says there is no liability?

LAWYER: Yes, to that point because of no duty, lack of control.

GONZALEZ: How does we analyze the statute 106?

LAWYER: That it's illegal to provide alcohol to a minor. The way that has to be looked at is that that is in fact a criminal violation to provide alcohol to the minor. It is likewise a criminal violation to possess and consume it by the minor. To excuse the minor's criminal conduct to allow the minor to assert a civil claim under a negligence per se theory, I think is going to an extreme that should not be permitted.

PHILLIPS: Why couldn't there be comparative causation?

LAWYER: There could your honor but it would have to also then I think include an analysis of comparative criminality. I can't get passed the point that...then we're saying their both negligent per se, and then you're saying just compare the acts themselves with respect to causation. Again my problem with that is that the plaintiff or the decedent in this case has committed a criminal act it is benefitting from the ramifications of the criminal act.

CORNYN: In the Seul case and I can't remember the whole style of the case where we applied the dram shop act to a guy who had gone to a bar and I think had 4 pictures of beer and drove into a telephone pole on the way home. We said under our statutorily construction the dram shop act that his heirs had a cause of action against the commercial provider for serving an obviously intoxicated driver, although his bad acts had to be compared against the provider's bad acts under a comparative negligence analysis. Why wouldn't that apply?

LAWYER: I think it wouldn't apply because we hold commercial establishments that profit financially from serving alcohol to a higher standard and the court's own resuscitation of that standard adding some elements. Obviously intoxicated there are things about it, the words may not be precisely right but reasonably and prudent provider of alcohol and _____ should recognize those things and is in a superior position to prevent those from actions occurring.

PHILLIPS: Why wouldn't we say that an adult is in a superior position to a minor in terms of knowing the law and knowing the consequences of serving alcohol to someone that the state has made a policy choice should not have it and it's a duty that we all share to see that they don't have it?

LAWYER; I agree that that is correct. But still it takes it to the point that the difference being the other party is also aware in knowing in the adult when consuming alcohol is not violating the law as the minor is in that point. And I think that that becomes a valid distinction if we are going to base civil liability upon a criminal violation.

ABBOTT: I have a question for you about a case that you label as the O'Brien case out of

Houston. I looked in your brief and didn't find that. Would you later provide us a case cite for that?

LAWYER: I can do that right now. I just can't pronounce the plaintiffs name. But it is 909 S.W.2d 236, Venetoulas, and that's the case I addressed where the alcohol was provided, the keys taken away, then the person pushed in the car. The court did not find a social host duty. They found a duty not to affirmatively create the situation.

ABBOTT: And that's my question for you. The way you stated it the first time you said that the court said that the defendants in that case affirmatively created a dangerous condition?

LAWYER: Yes your honor.

ABBOTT: Why would it not be affirmatively creating a dangerous condition when adults host a party for minors where they say BYOB? We are not going to provide you alcohol but we are going to provide the place, the environment, the atmosphere for you to come here and get drunk and then drive home.

LAWYER: First off your honor that's not the facts of this case. But as a general proposition of law, that still does not rise to the level of affirmative creation in the case that I cited. I realize it's a matter of degree. It does potentially create a dangerous situation. Limited to the facts of the O'Brien case, the facts are a great deal more egregious. And again I would point out in this case, the adults did not host the party. The first part of the court's hypothetical is inapplicable here.

ABBOTT: But the adults knew about the party?

LAWYER: After it started. And as I've said on page 39 of Mr. Johnson's deposition, which is part of the summary judgment record, they attempted to stop intoxicated people - adults and minors both from leaving their party, from leaving their premises. They were taking car keys. At the time they were taking car keys, the decedent went around out and died shortly thereafter.

* * * * *

RESPONDENTS

LAWYER: May it please this honorable court. Although ordinarily facts may not be discussed overly before the court, I will give a brief encapsulation of the facts of this case. I differ with my esteemed colleague in that I am also hampered by the fact the record can't be do up fully because procedurally we couldn't plead. But I will get to that in a minute. The operative facts of this case are quite simple. This was a rural setting in East Bexar county, with approximately 160 acres, homestead of the Friesenhahn family. Todd Friesenhahn, the son, invited some people over for a BYOB party. They were all high schoolers. Depending on whose opinion you want to believe, there were either 75 or 150 children here - all minors.

Very few adults other than the Friesenhahns, if any. Alcohol was freely consumed and passed for a period of time. The record is clear Mr. Friesenhahn, the father, mingled amongst the youngsters drinking alcohol. The evidence is not so clear as to Mrs. Friesenhahn. The evidence is clear Todd Friesenhahn was the instigator along with 3 other boys of this party. This was not necessarily the first party there. It was a BYOB party for highschoolkids. It was a Friday night football BYOB party. That is the basic scenario.

This is not mom and pop invited somebody's highschool buddy to drink a beer at the barbeque.

GONZALEZ: How about Erik Johnson's testimony that the Friesenhahns did not provide the alcohol to the minor?

LAWYER: That was to his knowledge. Again your honor there were 75 to 150 people.

GONZALEZ: Is there anything to conflict with that? Did anybody say the Friesenhahns provided the alcohol?

LAWYER: Under the present state of the record I cannot tell this court that there is first hand knowledge that they handed my deceased client a drink, no sir.

HECHT: And if your BYOB theory is right, it wouldn't make any sense that they did?

LAWYER: No, sir. Well there is evidence from Mr. Johnson who is an objective witness in the sense that he is not a party plaintiff or defendant and he was in her Sabrina Ryan's presence for some time, that alcohol was freely exchanged amongst the youngsters, including some youngsters giving Sabrina I believe it was some Budweiser beer.

ABBOTT: Let's assume that the evidence is that the Friesenhahns, the adults/owners of the property did not provide alcohol to any of the minors. They didn't hand them a beer; they didn't bring the beer to be distributed. There could be no argument made whatsoever that they provided alcohol to the minors. What duty is it that you are saying should exist on the part of these homeowners?

LAWYER: I don't need to answer obtusely, but this may not be characterized in certain ways as a social host case. I think this court called Graff a social host case differentiated from the dram shop El Chico and those case, commercial vendors. There is no right for someone under the Texas Alcohol Beverage Code to furnish alcohol to a minor unless that is your child or your legal guardian in their presence. So they provided this dangerous condition. These are children. This is no true _____ material. These aren't people of equal standards. These are adults verses teenagers. Their perception and their responsibility is not _____ material. They invited these people over for alcohol.

GONZALEZ: Providing the opportunity to drink...

LAWYER: Well sir it is also our position in support of the 4th CA's decision that TABC Code which I believe is §106.045 and .046 which has to do with possession, consumption and providing.

GONZALEZ: Doesn't that deal with criminal penalties though?

LAWYER: My point is we argue the Friesenhahns one, two or all three of them are guilty in the law of parties. Technically we think they are guilty of a misdemeanor.

ABBOTT: Under 106 they have to have provided the alcohol and there is no evidence they provided the alcohol?

LAWYER: If the court means literally hand a person a drink, I would have to answer that is correct. We are not sure. The record wasn't fully developed because procedurally we got into special exceptions and summary judgment. But getting back to the argument of the penal code 7.02 of criminal responsibility _____ and other, if a person with requisite intent aids, assist and encourages an offense, they are guilty of that offense too.

GONZALEZ: But that's criminal liability. How do you make the jump from criminal liability to civil liability?

LAWYER: Because it's a violation of statute triggering negligence per se. Sabrina Ryan is in a protective class. Minors can't drink unless they are in the presence of their parents. We had 75 to 150 minors drinking, except for Todd Friesenhahn, they were not in the presence of their parents. They invited people over to drink on their premises. If that's not encouraging the violation, possession and consumption of alcohol by minors, I submit it doesn't exist.

ENOCH: So does that run headlong into Mr. _____ argument that Steven and Sandra Ryan are coparticipants in this criminal offense that their daughter did because they permitted her to go to this party which was BYOB and so therefore they ought to be estopped from bringing this claim on behalf of the estate because you've got dual participants: you've got the parents of Todd who had a beer party, you have the parents of Sabrina who allowed her to go to a beer party and so we ought to just call it quits.

LAWYER: Yes, sir. If I understood Mr. Clawson's point he was attaching the criminal liability to Sabrina, ie a participant in a criminal act.

ENOCH: But under the law of parties, you want to attach the Friesenhahns to the environment that permitted the drinking. So I am saying under the law of parties that would also bring Steven and Sandra wouldn't it, the parents of Sabrina?

LAWYER: Yes your honor, the deposition testimony in this case is that they just knew she was going to a party. They did not know alcohol would be there.

OWEN: Was discovery complete?

LAWYER: No, ma'am.

CORNYN: Todd Friesenhahn invited these kids to the Friesenhahn's property is that correct?

LAWYER: Yes sir. It was around Judson highschool and every "knew" and everybody talked about it.

CORNYN: And there is no evidence that Mr. & Mrs. Friesenhahn tendered that invitation, but they were present; is that correct?

LAWYER: It was one of the two and I can't recall testified in deposition that they knew Todd as coming over with 4 friends. Later because word had gotten around 75-150 people showed up. Mr. Friesenhahn was down there mixing and mingling with the kids as they were drinking.

CORNYN: So how long did the mixing and mingling go on?

LAWYER: I think for different estimates of 45 minutes to a couple of hours.

CORNYN: I guess what I am getting at is if Mr. or Mrs. Friesenhahn objected to minors drinking on their property, were they in a position...is there any evidence that they were in a position to stop it?

LAWYER: I think under proper conditions they could have excluded the...to be fair to petitioners from the limited discovery that we have, Mrs. Friesenhahn testified she didn't know about it accept for Todd's friends coming over. Mr. Friesenhahn by Mr. Johnson's deposition was down there walking amongst the kids and drinking and having a good time. They were playing music and there was a big party, and Todd was down there too with his friends and the 75-150 kids drinking and having a good time too. It was a beer bust.

GONZALEZ: What was the testimony with regard to their efforts to take keys from kids and keep kids from leaving their premises?

LAWYER: That testimony as I recall and I differ with counsel did not come from Mr. Johnson. I think Mrs. Friesenhahn testified that she went to the gate and tried to take bottles from people as they were leaving.

GONZALEZ: Is there any testimony about taking keys away?

LAWYER: Certainly not from Sabrina Ryan.

GONZALEZ: I am talking about the Friesenhahns, their effort to take away from drivers they knew were inebriated?

LAWYER: Your honor I don't recall an instance where keys were taken. I recall testimony that they took some bottles or told the kids don't take your bottles on the road. There was some general indication TABC was "looking for this party," because they had heard about it.

ABBOTT: Is there any evidence that Todd actually provided alcohol to anyone at the party?

LAWYER: Yes, but again I cannot say that Todd handed Sabrina Ryan an alcoholic beverage.

ABBOTT: Let me go back to my initial question to you, that is what duty is it that you are asking us to create? The way I wrote down some of your comments you are asking us to create a common law duty upon homeowners not to encourage the consumption of alcohol?

LAWYER: In retrospect as I thought about this case, and since I could never decipher the index of TJ 3, I went back to TJ 2nd and read up on General Liability and there is a pattern dating back decades of special attention children. That's evolved from premise liability where it was not on adults onto instructions for tender years and so forth.

I am not so sure I am asking the court to create something brand new. I would say this is not a social host duty case because social host is just a term. You don't have a right to invite children over who are going to drink and violate the law. There's no section. That's not a social gathering. That's an illegal gathering. So I am asking the court to enforce what is the law, the application of new facts admittedly before this court I think.

I would like the court to create a common law duty in the sense of recognizing that you cannot encourage the violation of law and be scott free.

OWEN: What about the minor? Is there a difference when a minor provides alcohol to another minor?

LAWYER: I think technically all of the minors who provided any alcohol to these party _____ they simply were not for _____ reasons. There was over 150 people to keep track of.

OWEN: But from a broad perspective of the law should there be a different rule of law?

LAWYER: I don't think so.

OWEN: Why not?

LAWYER: It's an offense for a minor to possess alcohol period. So if you can't possess it how can you possess it to hand it to somebody? Plus that's a _____ violation too I think under 106.06.

GONZALEZ: So Sabrina was violating the law when she consumed the alcohol that she either brought herself or somebody gave her?

LAWYER: That's correct. She was in violation of the law. She was possessing and consuming alcoholic beverages. I had circled that Sewell case. It's behind 202 in the TABC Code. This court held there is first party recovery under the dram shop. A drunk man sitting at a bar went out and hit the tree, and you gave him some recovery. Now it might have been under instructions to the jury on the _____. But certainly this is not a precedent setting in that regard.

BAKER: Will you tell me what you think the court meant when it said in connection with the 106 discussion: Furthermore the social host may control the minor. _____ there's a special relationship analogous to that of parent/child, which seems to be one of the bases for holding the Friesenhahn's liable at least by the San Antonio court?

LAWYER: I submit the rationale is similar to that. Otis Engineering case which on its face is a worker's compensation case. I don't think the TABC Code provides for a liberal interpretation. I don't think the term "providing" as such means you have to literally handing of one to another. In any event, 104 and 105 possession and consumption certainly Todd Friesenhahn, Mr. Friesenhahn, were parties under 702 of the Penal Code; aid, assisted and encouraged. Had they not invited people BYOB my client would probably well be alive today. Certainly not have been killed that night leaving the party.

BAKER: That also leaves out what you have already said that you think that she was provided alcohol by other minors. So that might have still happened even if she had not brought her own. Isn't that true?

LAWYER: It would not have happened on those premises though. It might have happened in a different location.

BAKER: If she hadn't gone to the party, period, it wouldn't have happened. There's a lot of ifs and buts. So what's the special relationship that the court based part of their opinion on?

LAWYER: Well it's certainly not the parents _____. It's not parent/child. But I submit that if you are inviting a minor onto your premise in which you know the minor is going to be violating the law by ie, consuming alcohol, possessing alcohol, that you have created a dangerous condition. And leaving the statute aside, having created that dangerous condition I suggest you should have liability for it.

BAKER: So your argument really more akin to the Houston case?

LAWYER: Actually I think the Houston case is in support of our position.

CORNYN: Is there evidence Sabrina was intoxicated at the time of her death?

LAWYER: Yes sir, she had a 1 car rollover and the autopsy showed a level well in excess of the legal limit of .010. Her cause of death was the car rollover.

ABBOTT: If her parents knew that she was drinking, do you contend that her parents should not also be held liable?

LAWYER: Assuming this court holds as a cause of action, the TC may well hold some parent type instruction might attach to the parent. Their right really to recover is largely derivative of Sabrina Ryans under the common law negligence which the estate brought and the statutory wrongful death.

HECHT: And that's because they are negligent or because they are in violation of the statute or both?

LAWYER: Both sir.

HECHT: So that every parent who knows his child is drinking is in violation of the statute?

LAWYER: Not necessarily. If you know your child is drinking and you haven't encouraged, aided, assisted or _____ you are not a party to the offense you child is an actor, but you are not.

ABBOTT: What would be the difference though for the Friesenhahns if they knew these kids were drinking but didn't do anything to aid, assist or prevent it?

LAWYER: Well they did. They had the invitations. They had music out there. People were socializing and handing beer out. Mr. Friesenhahn was mingling amongst minors drinking. There was some indication this was not the first party of this nature out there. It was very sizable.

GONZALEZ: Who's party was it? His sons or Mr. Friesenhahn's party?

LAWYER: It was the son's party sanctioned by the parents as I recalled the testimony. In other words, they knew what was going to happen.

Before the 4th court argument, I read Graff over and over trying to truly understand. And at one point footnote 2 on page 919, I noted that the court said that this is not the case involving minors. It is not a social host case in that regard. I don't think this court is going to establish there is a social host case where you are violating the law. You're not a social host. You are violating the law besides being

negligent. You can't invite minors over to your house to drink. I don't think you can create that as a social host doctrine. It's clearly distinguishable I think from Graff.

GONZALEZ: Well the CA whose judgment and opinion you want us to affirm treats this as a social host case?

LAWYER: Yes sir, but again that may be just terminology. What's underlined and what's important are long standing rules in Texas of negligence.

GONZALEZ: The CA says under the pled facts a jury could find the Friesenhahns as adult social hosts, allowed invitations to a beer party, etc., and that's the basis of the liability.

LAWYER: Yes sir. I am not going to argue with you sir or Justice Richhoff on his terminology. But I am trying to explain my perception of underlying principles of law that distinguish and differentiate this case from Graff.

On the procedural points, the reason there were amendments against the....there were some commercial vendor defendants who were severed out later. There were no orders saying we couldn't amend. So we amended as to the special exceptions. This hearing where we were precluded from amending our petition was only between the Friesenhahns and the Ryans, the only participants in that hearing, the order only pertaining to those two parties.

GONZALEZ: Are there any basis and fact for you to plead that the Friesenhahn's provided alcohol?

LAWYER: There's enough to plead subject to further discovery and proof.

CORNYN: How long had the case been pending at the time summary judgment was granted?

LAWYER: Certainly a year maybe 2. I don't honestly recall. It's been so long in the system that exact timetables are hard to recall. But the order precluded us from any. I asked: I said may I have 60 days or at least 30, which I thought he would give me to plead. And he said: No sooner than 25 days before trial, and no later than 8. Whether one likes that order or not, that's the order we were under in our pleadings with the Friesenhahns.

ENOCH: Mr. Johnson's affidavit that at least ostensibly says that adult Friesenhahns didn't provide Sabrina the alcohol. Who provided that affidavit and who filed it, and how did it get in the court record?

LAWYER: I think that might be an excerpt from a deposition.

ENOCH: Regardless of whether you were permitted time to replead or not, would you not have a burden to go forward in responding to that deposition excerpt to create a fact issue on whether or not the Friesenhahns provided the alcohol?

LAWYER: I submit that the word “provide” is broader based under the mandate of the liberal interpretation of the TABC Code, which is in its very provisions. And they provided, they created the atmosphere. They had the party and the invitations. They created their own atmosphere of dangerous condition.

ENOCH: So it’s your point that the affidavit does not set up as a matter of law? I mean it doesn’t set up as a conclusive fact that the Friesenhahns didn’t contribute, didn’t hand deliver the alcohol to Sabrina? And even if it did do that, you are saying that the duty is broader than that...I mean just merely having the place where the party is, knowing about it, is the same thing as providing?

LAWYER: That’s probably a fair statement.

HECHT: Your argument would apply equally if she were 19, or not?

LAWYER: It would apply equally if she were 19 to the extent it was a violation of law when you talk about not strict liability but negligence per se and consequential damages.

HECHT: The special care argument that you’ve made gets hard to make in this area where for some purposes you’re a minor for other purposes you’re not?

LAWYER: Yes sir, but clearly here it is a minor. Clearly it’s a violation of TABC besides the common law arguments. And I think either way it’s a 2 way street for _____.

BAKER: On the 106 claim, you’re trial petition was your third or at least the petition was 3rd amended, and it doesn’t appear that there is any direct allegation that comes close to being a 106 claim against the Friesenhahns although these specifically were the same allegations against this third party. And the issue has been made about you didn’t have the opportunity to amend _____ special exceptions which was the thrust of that order. Can you make that same argument on your 106 situation where you never pleaded it in the first place, and you had already pleaded the same claim against commercial providers _____ and so forth?

LAWYER: That was subsequent to the court order on the Friesenhahn’s special exceptions.

BAKER: But that’s an August 1992 pleading which was after this order was entered wasn’t it?

LAWYER: Yes sir, but we were precluded from amending in the court order until 28 days before

the trial.

BAKER: You could still raise it in your answer to their summary judgment. Did you do that? They assert that that argument was not made until oral argument before the CA; is that correct?

LAWYER: I believe that's assertion. But when you talk about a violation of a statute your honor, if I understand the law, you are talking about a form of common law negligence. In other words, a breach of duty of a protected class ie minor, and therefore, the consequential damages. So when you talk about violating a statute, you are really talking just about an expansion of the common law from the ordinary negligence common law.

BAKER: As pointed out by earlier question, the results are different because it's negligence per se. There's no specific claim of negligence per se against the Friesenhahn's in your _____ petition as there were against these other parties. And at the time they heard the summary judgment you would have had the opportunity to meet that by raising that in your response. Did you raise it in your response _____ summary judgment?

LAWYER: I don't recall that was raised that way. I did ask that we _____ of replead. I did ask for time to replead which I understood is what you do in that situation. I was _____ or not to amend. So I asked the legal court to amend.

BAKER: So if I understand your answer your response to their summary judgment contained no answer to the effect that they likewise were liable per se because they were in violation of 106.6?

LAWYER: That was in effect your honor repleading, which is was precluded from. I did ask for time to replead.

BAKER: You answered my question, thank you.

* * * * *

REBUTTAL

LAWYER: Justice Hecht, your question regarding a 19 year old has been addressed by the Tyler court. The case of Collin Smith v. Margaret Merrit. I do not have the S.W. cite. Apparently it's too recent. It's come out of my computer. But in that case, the Tyler court decided that although the 19 year old was a minor.

CORNYN: It's pending counsel.

LAWYER: But I wanted to point that out. That issue has been addressed.

CORNYN: Whether or not we would decide that violation of the alcoholic beverage code would give rise to a cause of action for negligence per se, we still have to consider whether there ought to be a common law duty in this context, do we not?

LAWYER: Yes, your honor.

CORNYN: Would you explain to me if the legislature has decided as a matter of public policy that it is bad for people under the age of 18 to drink, and has created criminal liability for serving people under the age of 18, why shouldn't the civil law reenforce that attempt to deter that kind of conduct?

LAWYER: To deter under age drinking?

CORNYN: Correct.

LAWYER: The very way the civil law can do that is by not finding a duty. Because if a duty is found in this type of circumstance, a social host duty to a minor, then this court and the law will defeat that social purpose by taking the responsibility away from the drinker. And under facts like we have here even away from the people who actually provided the alcohol in taking yet one step further back. It defeats that goal.

CORNYN: I presume one thing that occurred to the legislature in making underage drinking illegal is the lessened ability of a minor to determine the affects of alcohol. The CA mentioned that in its opinion. So are we really comparing apples and apples?

LAWYER: Yes sir because there are other cases, and I believe one out of this court where with respect to alcohol manufacturers warning on the danger of alcohol, that minors are not presumed to have this lesser knowledge and are presumed to be possessed as the same knowledge the rest of us have of the affects of alcohol. So I think we still are comparing apples to apples.

CORNYN: But under your theory of this case, an adult could serve all the alcohol that the minor was willing to drink with civil and punitive?

LAWYER: No, sir. I think that alcohol can be served without social host liability. The court takes it a step further to the point of affirmatively creating a situation such as out of the Houston case where there are more egregious facts where not a social host situation is created, where the mere serving of the alcohol creates the liability. But other facts create. Clearly I do believe that there is a fact situation where as this court suggested if alcohol is served with _____ and just to take the hypothetical a step further, the minor is clearly intoxicated, leaves, gets in the car, the adult does nothing. I think there was a duty to act affirmatively there. I don't think it's a social host duty. While it's a very fine line, I think it's there.

CORNYN: How would you classify it?

LAWYER: A duty having affirmatively created the dangerous condition, the duty to act as opposed to passively having allowed it to exist. Justice Gonzalez I mixed up a little bit on the key issue and also to respond to Justice Enoch a little bit. Erik Johnson is not an affidavit. It was a deposition that Mr. Mock attended and cross examined, done in Sept. 1991, more than a year after the case was filed, more than a year before the motion for summary judgment was granted. There was full opportunity to cross examine. The key testimony was that Erik Johnson said he took the keys at one point from the deceased, the Friesenhahns did not.

He was asked: What were, they being the Friesenhahns, the Friesenhahns were at the gate? I believe so.

What were they trying to do? I believe they were stopping people that had been intoxicated or had been drinking from driving home.

So the key part, I don't want to mislead the court, but the key part was in the different area. But they were trying to stop people from going home.

GONZALEZ: How did she slip around?

LAWYER: Well that's even hereto. She took off pretty fast. A car came in, went off to the side, she ran someone off the road, otherwise there would have been a wreck, and you know just a quick stop and then she took off again. Do you know if the Friesenhahn's tried to stop her or tried to talk to her? No, I don't know. Do you know if they could have under the circumstances? I don't believe they could have. I really don't. Why is that? Just the way she went through.

Again, just to close, this would be a case where we do not have an innocent third party, we do not have a right to control. We do have a violator of the law. A social host duty under these facts would be creating a duty to protect the deceased not only from herself, but from her peers.