IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRIS SISNEY AND MELISSA PLEMMONS, INDIVIDUALLY AND AS SPECIAL CO-ADMINISTRATORS OF THE ESTATE OF JESSICA SISNEY, DECEASED,
Appellants,
vs.
JILLIAN PROVENZA; STEPHEN PROVENZA; AND MARILYN PROVENZA,
Respondents.

No. 47100

FILED

OCT 22 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a wrongful death action. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

Appellants Chris Sisney and Melissa Plemmons (the Sisneys), the parents of deceased Jessica Sisney, brought a wrongful death action against respondents Stephen, Marilyn, and Jillian Provenza alleging claims for premises liability, negligent or intentional wrongful conduct, negligence per se, negligent entrustment, and wrongful death. The Sisneys assert that, on June 20, 2004, Jillian Provenza, the daughter of Stephen and Marilyn Provenza, provided Jessica with a combination of drugs and alcohol from her parents supply, and thereafter the Provenza's failed to take any action to help Jessica avoid death.

Pursuant to NRCP 12(b)(5), Jillian filed a motion to dismiss. In her motion, Jillian argued that established Nevada case law prevented the Sisneys from demonstrating that her actions were the proximate cause

of Jessica's death. Stephen and Marilyn Provenza filed a joinder to that motion, arguing for dismissal on the same basis. The district court granted the motion to dismiss with prejudice.

In this appeal, the Sisneys argue that the district court erred in dismissing their case because, as a matter of public policy, this court should not allow adult social hosts to escape liability when they make drugs and alcohol available to minors. The Sisneys further argue that the Provenzas should be subject to common law liability for making drugs and alcohol available to minors.[1]

We conclude that the arguments raised by the Sisneys do not compel overturning our prior decisions, which decline to recognize a cause of action arising out of the sale or furnishment of intoxicating substances. We further conclude that, under the controlling legal authority in effect at the time of the events that gave rise to this case, common law liability cannot exist because the act of providing or making drugs and alcohol available is too remote to establish proximate cause.[2] Rather, it is the

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[1]The complaint asserts that Jillian Provenza had unfettered access to drugs and alcohol at the home and was allowed or encouraged to provide alcohol to her friends.

[2]In 2007, the Nevada Legislature created a statutory duty for those who knowingly serve or furnish alcohol to any person who is less than 21 years of age. NRS 41.1305(2) (2008). Until that date, the former provisions of the statute remained in force. Moreover, there is no indication that the Legislature intended the amendment to apply retroactively. Therefore, because Jessica's untimely death occurred in 2004, the 2007 amendment to NRS 41.1305(2) does not apply.

consumption of drugs and alcohol that is said to be the proximate cause of any resulting injury.

Public policy considerations

The Sisneys first argue that this court should reverse the district court's order and impose liability on the Provenzas because there is a growing public policy concern surrounding underage drinking and substance abuse. A similar argument was addressed fifteen years ago in Hinegardner v. Marcor Resorts[3] and then more recently in Snyder v. Viani.[4] In both cases, the court was divided on whether these public policy concerns justified creating liability for those who provide alcohol to minors.[5] The majority opinions, both authored by Justice Young, rejected the public policy argument in favor of the common law rule.[6] The division among the court in this case is no different.

As a preliminary matter, we must note that any departure from the controlling legal authority would require a significant shift in public policy as to the issues presented for our consideration. After careful review of the policy arguments raised in this case, we conclude that the Sisneys have failed to demonstrate such a significant shift in public policy.

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[3]108 Nev. 1091, 1093-94, 844 P.2d 800, 802-03 (1992).

[4]110 Nev. 1339, 1342-43, 885 P.2d 610, 613 (1994).

[5]Id. at 1346-47, 885 P.2d at 614-15; Hinegardner, 108 Nev. at 1098-110, 844 P.2d at 805-06.

[6]Hinegardner, 108 Nev. at 1094-95, 844 P.2d at 803; Snyder, 110 Nev. at 1341-42, 885 P.2d at 612-13.

Therefore, we cannot say that the circumstances involved here warrant our departure from either Hinegardner or Snyder. Accordingly, in light of the controlling legal authority in effect at the time of Jessica's death, we decline to extend liability to those who provide intoxicating substances to minors.[7]

The Sisneys also argue that the Legislature's recent amendment to NRS 41.1305 signals Nevada's change in public policy in favor of creating civil liability for those who provide drugs or alcohol to minors.[8] As neither party raised any issue regarding NRS 41.1305 below, that issue is waived on appeal.[9]

Common law liability

The Sisneys also argue that the Provenzas should be subject to liability under the common law of negligence. A claim for common law

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[7]See supra text accompanying note 1. While our call for legislative change in this area has been answered by recently amended NRS 41.1305(2), the Legislature did not make the amendment retroactive. Accordingly, without any significant change in public policy, we are bound to follow the controlling legal authority as it existed at the time of Jessica's death.

[8]NRS 41.1305(2) (2008) (amended in 2007 to provide that a person who knowingly serves or otherwise furnishes an alcoholic beverage to a minor is liable).

[9]See Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 777 n.16, 121 P.3d 599, 604 n.16 (2005) (concluding that, when respondent failed to raise the issue in the district court, the issue was waived on appeal).

negligence must be based on: "(1) an existing duty of care, (2) breach, (3) legal causation, and (4) damages."[10] We conclude that this argument is without merit because the Sisneys have failed to demonstrate that the Provenzas' negligence in furnishing or making drugs and alcohol available to Jessica by the actions of Jillian was the proximate cause of her death.

"'Proximate cause is any cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred.'"[11] "At common law, courts refused to recognize a cause of action arising out of the sale or furnishing of intoxicating beverages . . . [because] drinking the intoxicant, not furnishing it, was the proximate cause of the injury."[12] "Nevada subscribes to the common law rule."[13]

Despite this court's adherence to the common law rule, the Sisneys argue that the Provenzas' actions were the proximate cause of Jessica's death. The issue of common law liability for alcohol related injuries was first addressed by this court in Hamm v. Carson City Nugget,

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[10]Jordan v. State, Dep't of Motor Vehicles, 121 Nev. 44, 74, 110 P.3d 30, 51 (2005).

[11]Taylor v. Silva, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980) (quoting Mahan v. Hafen, 76 Nev. 220, 225, 351 P.2d 617, 620 (1960)).

[12]Hinegardner v. Marcor Resorts, 108 Nev. 1091, 1093, 844 P.2d 800, 802 (1992).

[13]Id.

Inc..[14] In Hamm, we adopted the common law rule and concluded that a merchant who furnished alcohol to an adult could not be held liable for an injury resulting from the negligent conduct of the purchaser of the drink.[15]

In this case, the Sisneys attempt to distinguish the underlying reasons for this court's adherence to the common law rule from the facts of the instant case. First, the Sisneys note that the facts here are more egregious because both alcohol and drugs were made available to Jessica. Second, they assert that the intoxicating substances were made available by a private party, rather than by a merchant. Finally, the Sisneys suggest that Jessica's capacity as a minor must be considered. Based upon these factors, the Sisneys argue that the traditional common law reasons for finding no proximate cause do not apply. We disagree.

First, while our case law in this area deals primarily with alcohol related injuries, we conclude that the same reasoning applies to drug related injuries. In addition, the notion that drugs and alcohol were furnished or made available by a private party, rather than by a merchant, is immaterial to our analysis because the common law rule refuses to recognize a cause of action for merchants who sell or private individuals who furnish intoxicating substances.[16] Finally, Jessica's

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[14]85 Nev. 99, 450 P.2d 358 (1969).

[15]Id. at 101, 450 P.2d at 359.

[16]Snyder v. Viani, 110 Nev. 1339, 1342-43, 885 P.2d 610, 613 (1994) (concluding that "courts refused to recognize a cause of action arising out of the sale or furnishing of intoxicating beverages").

capacity as a minor is unavailing because, as we have previously explained, the imposition of civil liability on those who furnish alcohol to minors "should be the result of legislative action rather than judicial interpretation."[17]

This "attempt to make these exceptions the rule . . . has not prevailed, nor should it; for the purpose of the law is to make the nearest practicable approach to justice in all cases; and that can only be attained by the preservation of fundamental principles."[18] Accordingly, we decline to depart from this court's longstanding adherence to the common law rule. Therefore, we conclude that the Sisneys have failed to set forth allegations sufficient to establish a viable claim against the Provenzas, and thus, the district court properly dismissed the Sisneys' causes of action.

Additional considerations

The Sisneys also contend that the Provenzas breached an existing statutory duty to refrain from providing Jessica with drugs or alcohol.[19] This court has previously recognized that, in certain

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[17]See Hinegardner, 108 Nev. at 1096, 844 P.2d at 804.

[18]Boylan v. Huguet, 8 Nev. 345, 358 (1873).

[19]Under Nevada law, it is unlawful to give away a controlled substance or to knowingly furnish alcohol to any person under the age of 21. NRS 453.321; NRS 202.055. In addition, it is unlawful for a person to knowingly obtain a controlled substance from one practitioner without disclosing the fact that they are receiving controlled substances from another practitioner. NRS 453.391.

circumstances, the violation of a statute may constitute negligence per se.[20] However, we have refused to make a recognition in cases such as this "since to do so would subvert the apparent legislative intention."[21] For example, in Hamm, this court rejected the argument that the violation of NRS 202.055, regulating the sale of alcohol to minors, constituted negligence per se.[22] Likewise, we conclude that the violation of NRS 453.333, and the remaining statutes cited by the Sisneys, do not constitute negligence per se.

Conclusion

After careful examination of the arguments raised by the Sisneys, we refuse to depart from this court's longstanding adherence to the common law rule. We also conclude that the Provenzas should not be subject to common law liability because their actions were not the proximate cause of Jessica's death. Finally, we conclude that any violation

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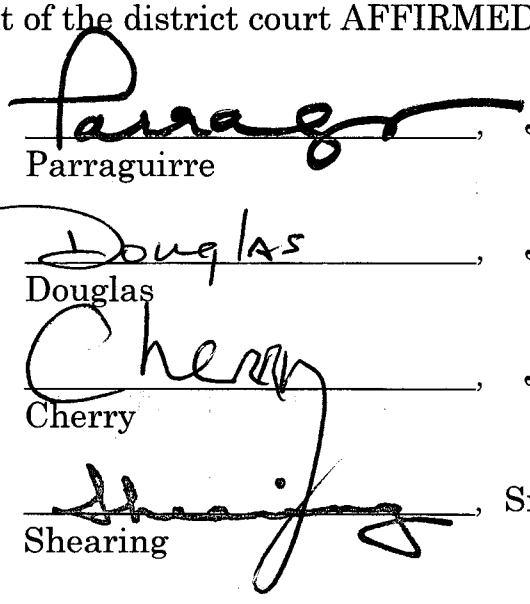
[20]See Southern Pacific Co. v. Watkins, 83 Nev. 471, 491-92, 435 P.2d 498, 511 (1967); Ryan v. Manhattan Big Four Mining Co., 38 Nev. 92, 100, 145 P. 907, 910 (1914).

[21]Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 102, 450 P.2d 358, 360 (1969).

[22]Id.

of Nevada's penal code in this case does not constitute negligence per se.[23] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[24]



_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, Sr.J.
Shearing

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[23]The Sisneys also argue that the district court erred in dismissing the action because the Provenzas were under a duty to render aid after creating a dangerous situation. See Lee v. GNLV Corp., 117 Nev. 291, 295-96, 22 P.3d 209, 212 (2001). In Nevada, "strangers are generally under no duty to aid those in peril." Id. at 295, 22 P.3d at 212. However, "where a special relationship exists between the parties, such as with an innkeeper-guest, teacher-student or employer-employee, an affirmative duty to aid others in peril is imposed by law." Id. In this case, the Sisneys fail to demonstrate that any special relationship existed between Jessica and the Provenzas. Accordingly, we conclude that this argument is without merit.

The Sisneys additionally argue that if this court were to reverse the district court's order and reinstate the negligence claims, this court should also reinstate the punitive damages claim. Because we are affirming the district court's order, we need not address this issue.

[24]The Honorable Miriam Shearing, Senior Justice, was appointed by the court to sit in place of the Honorable Nancy Saitta, Justice. Nev. Const. art. 6, § 19; SCR 10.

cc: Eighth Judicial District Court Dept. 18, District Judge
Richard F. Scotti, Settlement Judge
Lewis & Roca, LLP/Las Vegas
Lemons Grundy & Eisenberg
Lewis Brisbois Bisgaard & Smith, LLP
Porter & Terry, LLC
Eighth District Court Clerk

HARDESTY, J., with whom, GIBBONS, C.J. and MAUPIN, J., agree, dissenting:

The majority concludes that the circumstances in this case do not warrant departure from this court's decisions in Snyder v. Viani[1] and Hinegardner v. Marcor Resorts.[2] I dissent because I would take this opportunity to revisit Nevada's common law rule shielding social hosts who furnish alcohol or controlled substances to minors from liability.[3] Our prior decisions rest on the reasoning that consuming alcohol, rather than furnishing it, is the proximate cause of alcohol-related injuries.[4] We have held that the choice to consume alcohol, which results in injury to the consumer or a third party, is an intervening cause that cuts off liability to the party that furnished the alcohol.[5] I believe, however, that when a minor consumes alcohol or controlled substances, furnished by a social host in violation of state law, the minor's choice does not cut off the host's liability for injury to the minor or others.[6]

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[1]110 Nev. 1339, 885 P.2d 610 (1994).

[2]108 Nev. 1091, 844 P.2d 800 (1992).

[3]I use the term "minors" to refer to those under the legal drinking age with respect to alcohol consumption and to refer to those under age 18 with respect to consumption of controlled substances.

[4]See Snyder v. Viani, 110 Nev. at 1343, 885 P.2d at 613; Hinegardner v. Marcor Resorts, 108 Nev. at 1093, 844 P.2d at 802.

[5]Id.

[6]See, e.g., Estate of Hernandez v. Bd. of Regents, 866 P.2d 1330, 1341 (Ariz. 1994); Ely v. Murphy, 540 A.2d 54, 58 (Conn. 1988) ("In view of the legislative determination that minors are incompetent to assimilate responsibly the effects of alcohol and lack the legal capacity to do so, logic

continued on next page . . .

"'Proximate cause is any cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred.'"[7] An intervening cause is one that supersedes the actual cause and becomes "the natural and logical cause of the harm."[8]

Under the majority's rule, the individual who consumes intoxicants is solely responsible for injuries caused as a result therefrom on the reasoning that the voluntary consumption of intoxicants is an intervening cause that releases the party who provided the intoxicants from liability. Other jurisdictions have recognized that this reasoning is better applied to adults than it is to minors because "[t]he proposition that intoxication results from the voluntary conduct of the person who consumes intoxicating liquor assumes a knowing and intelligent exercise of choice."[9]

As a society, we recognize that minors are less capable of making informed decisions, especially regarding controlled substances.

. . . *continued*

dictates that their consumption of alcohol does not, as a matter of law, constitute the intervening act necessary to break the chain of proximate causation.").

[7]Taylor v. Silva, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980) (quoting Mahan v. Hafen, 76 Nev. 220, 225, 351 P.2d 617, 620 (1960)).

[8]Thomas v. Bokelman, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970).

[9]Ely, 540 A.2d at 57.

Not only are minors prohibited from possessing alcohol,[10] a substance adults may legally choose to consume, but the Legislature has criminalized the furnishing of alcohol to a minor.[11] By these enactments, the Legislature has recognized the decreased ability of minors to recognize and appreciate the consequences of intoxication. This reasoning applies equally to the unauthorized distribution of controlled substances, which is also a criminal act,[12] to minors. In light of our Legislature's recognition that minors are legally prohibited from choosing to become intoxicated, I conclude that the consumption by minors of alcohol or controlled substances is not a sufficient intervening cause to break the chain of proximate causation. Rather, the furnishing by a social host of the alcohol or controlled substance to a minor is the proximate cause of resulting injury.

For this reason, I dissent.

_____, J.
Hardesty

We concur:

_____, C.J.
Gibbons

_____, J.
Maupin

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[10]NRS 202.020(2).

[11]NRS 202.055.

[12]NRS 453.321.