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SOCIAL HOST LIABILITY IN MISSOURI

*Childress v. Sams*¹

Childress v. Sams is the most recent Missouri Supreme Court case to deal with social host liability in Missouri. Social host liability issues arise where a social host supplies alcohol to a guest who subsequently injures himself or a third party.

In *Childress*, defendants Sams and Hulsey bought a half-barrel of beer from Aro Gas for a party, dividing the cost evenly between Sams, Hulsey and Mike Kloth.² At the party, Kloth collected a cover charge of \$3.00 from each male guest and \$2.00 from each female guest. This generated a profit over the cost of the beer.³ One of the party-goers, Beckering, drank approximately ten to twenty 10-12 ounce cups of beer within two hours.⁴ Not surprisingly, he became quite intoxicated.

Dawn Childress discovered that Beckering had driven to the party and asked him for a ride home.⁵ During the drive, Beckering ran a red light, swerved to avoid oncoming traffic and struck an electrical signal pole.⁶ Childress suffered a broken neck, multiple fractures of her right leg and lacerations.

Dawn Childress and her parents sued Sams, Hulsey and Aro Gas.⁷ The trial court sustained Sam's motion for summary judgment,⁸ as well as Hulsey and Aro's motions for dismissal.⁹

The court of appeals affirmed summary judgment as to the social hosts Sams and Hulsey, but reversed dismissal of the seller Aro Gas.¹⁰ Subsequently, the Missouri Supreme Court held that the individuals who gave the party were social hosts and as such could not be held liable, and further decided the seller Aro Gas also was not liable.¹¹

This Note will examine Missouri's decision to deny social host liability and will consider situations where liability is imposed upon other suppliers of

1. 736 S.W.2d 48 (Mo. 1987) (en banc).

2. *Id.* at 49.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 48.

alcohol.¹²

The oldest Missouri case dealing with the liability of alcohol suppliers is *Skinner v. Hughes*.¹³ In *Skinner*, the owners of a store furnished alcoholic beverages to a slave who ultimately died of alcohol poisoning. The Missouri Supreme Court held that the slave's owners could recover damages because the store owners' provision of alcohol to the slave caused his death.¹⁴

But in 1934, Missouri's Dram Shop Act¹⁵ was repealed. Statutory liability imposed on the furnishers of alcoholic beverages ceased to exist and the common law principle that the *consumption* of the alcoholic beverages and not the furnishing of the alcoholic beverages was the proximate cause of any subsequent injuries returned as the law of the state.

Three Missouri appellate decisions, however, looked beyond this common law rule and found that liability could be imposed upon commercial establishments which sold alcoholic beverages to persons whose subsequent negligent actions caused physical injury or death to themselves or to third parties. This trend began with *Sampson v. W.F. Enterprises, Inc.*¹⁶ In that case the Missouri Court of Appeals for the Western District held that a minor's parents stated a cause of action for wrongful death against two taverns in alledging that the taverns negligently served alcoholic beverages to the minor who was later killed when his pick-up truck overturned.¹⁷ The court found that under section 311.310 of the Revised Statutes of Missouri,¹⁸ which prohibits the sale of alcohol to minors, a minor who is injured after becoming intoxicated with

12. See generally Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLIAMETTE L.J. 561 (1980); Comment, *Tort Liability for Suppliers of Alcohol*, 44 MO. L. REV. 757 (1979); Comment, *Social Host Liability for Furnishing Alcohol: A Legal Hangover?*, 10 PAC. L.J. 95 (1979); Comment, *Social Host Liability and Missouri Tort Law*, 29 ST. LOUIS U.L.J. 509 (1985); Note, *Social Host Liability: Am I My Brother's Keeper?*, 21 NEW ENG. L. REV. 351 (1985-86); Annotation, *Common-Law Right of Action for Damage Sustained by Plaintiff in Consequence of Sale or Gift of Intoxicating Liquor or Habit Forming Drug to Another*, 97 A.L.R.3d 528 (1980).

13. 13 Mo. 440 (1850).

14. *Id.* at 443.

15. MO. REV. STAT. § 4487 (1929) (repealed by § 44 of C.S.S.B. 6, 21, 22, 23, 24, & 25. MO. LAWS, Extra Session 1933-34 at 92).

16. 611 S.W.2d 333 (Mo. Ct. App. 1980).

17. *Id.* at 337.

18. MO. REV. STAT. § 311.310 (1986) states:

Any licensee . . . who shall sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever to any person under the age of twenty-one years, or to any person intoxicated or appearing to be in a state of intoxication, or to a habitual drunkard, and any person whomsoever except his or her parent or guardian who shall procure for, sell, give away or otherwise supply intoxicating liquor to any person under the age of twenty one years, or to any intoxicated person or any person appearing to be in a state of intoxication, or to a habitual drunkard, shall be deemed guilty of a misde-

liquor sold by a tavern can state a cause of action against the tavern.¹⁹ It imposed a duty on the tavern not to furnish alcoholic beverages to minors. This duty was based on the rationale that one of the purposes of section 311.310 was to protect persons under twenty-one.²⁰

The following year, the court, relying on its previous *Sampson* decision, held in *Nesbitt v. Westport Square Ltd.*²¹ that a passenger who is injured in an automobile accident while in a car driven by a minor who had been served alcoholic beverages in a tavern could state a cause of action against the tavern for her injuries.²²

In 1983, the Missouri Court of Appeals, Eastern District, held in *Carver v. Schafer*²³ that plaintiffs stated a cause of action against an Illinois tavern for negligence in the death of police officer Reifschneider. Schafer struck Reifschneider with his car and killed him. At the time, Schafer was driving under the influence of alcohol served to him at a tavern.²⁴

The court stated that a standard of ordinary care imposed a duty upon the defendant tavern owner to avoid serving Schafer intoxicating liquor once it became apparent Schafer was intoxicated.²⁵ The court reasoned that this standard was supported by the well-documented foreseeability of accidents caused by drunken drivers and the statutory policy of section 311.310.²⁶

After *Carver*, one writer opined "the current configuration of both Missouri tort doctrine and the political environment of Missouri appear very favorable to the allowance of a cause of action against a social host for negligent dispensing of alcoholic beverages. . . ."²⁷ The Missouri General Assembly, however, cut short the groundwork of *Carver*, *Nesbitt*, and *Sampson* upon which a possible extension of liability to social hosts would be based. The recent enactment of section 537.053 of the Revised Statutes of Missouri²⁸ specifically abrogated *Carver*, *Nesbitt*, and *Sampson*.²⁹ But the statute does permit

19. *Sampson*, 611 S.W.2d at 336-37.

20. *Id.* at 337.

21. 624 S.W.2d 519 (Mo. Ct. App. 1981).

22. *Id.* at 519-20.

23. 647 S.W.2d 570 (Mo. Ct. App. 1983).

24. *Id.* at 572-73.

25. *Id.* at 575.

26. *Id.*

27. Comment, *Social Host Liability and Missouri Tort Law*, 29 ST. LOUIS U.L.J. 509, 522 (1985).

28. MO. REV. STAT. § 537.053 (1986) (enacted September 28, 1985). Section 537.053(1) states:

Since the repeal of the Missouri Dram Shop Act in 1934 . . . , it has been and continues to be the policy of this state to follow the common law of England . . . to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

29. MO. REV. STAT. § 537.053(2) (1986) states:

The legislature hereby declares that this section shall be interpreted so

a very narrow scope of potential liability. If certain factors are met, it allows a cause of action against: 1) any person licensed to sell intoxicating liquor by the drink for consumption on the premises; 2) who has been convicted pursuant to section 311.310 of the sale of intoxicating liquor to a minor or an obviously intoxicated person; and 3) if the sale of such intoxicating liquor is the proximate cause of personal injury or death.³⁰

In its subsequent decision of *Harriman v. Smith*³¹ the Missouri Court of Appeals for the Eastern District ended any speculation about the likelihood of social host liability in Missouri. *Harriman* was the first case which dealt directly with the issue. In this case, Harriman, a passenger in a vehicle driven by a minor, Paul Morard, was killed in an automobile collision. Defendants had provided alcoholic beverages to Morard.³² Harriman's petition, which the trial court dismissed for failure to state a claim, sought to impose social host liability by extending the holding of *Carver v. Schafer*.³³ *Carver* had held that an injured party could sue a tavern owner in common negligence where the tavern owner negligently served an intoxicated person alcohol and that person subsequently injures a third party.³⁴ The court disagreed with Harriman that the rationale of *Carver* equally applied to the *Harriman* facts.³⁵ The court reasoned that to accept Harriman's view would place upon a social host the duty

Enterprises, Inc. . . .; and *Nesbitt v. Westport Square, Ltd. . . .* be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages, to be the proximate cause of injuries inflicted upon another by an intoxicated person.

30. MO. REV. STAT. § 537.053(3) (1986). Section 537.053(3) states:

Notwithstanding subsections 1 and 2 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises who, pursuant to section 311.310, RSMo, has been convicted, or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person.

31. 697 S.W.2d 219 (Mo. Ct. App. 1985).

32. *Id.* at 220. Harriman's petition alleged that:

1) Respondents' actions of causing, allowing and permitting alcohol to be served to obviously intoxicated persons and minor persons, which categories included Morard, were negligent and the direct and proximate cause of the collision;

2) Respondents had a history of such activities in permitting alcoholic beverages to be served to minors and that minors living in the neighborhood and area were aware of these activities; and

3) Respondents negligently, in violation of § 311.310 RSMo 1978, caused, allowed, and permitted alcoholic beverages to be served to minors, including Morard, and that these violations directly caused the death of appellant's son.

Id.

33. *Id.*

34. *Id.*

35. *Id.* at 221.

owed to business invitees.³⁶

The court differentiated between the rationale underlying the imposition of liability on a business dispenser from that of a non-business dispenser, the social host.³⁷ The court noted that the language in section 311.310 does not provide a civil claim for relief against social hosts.³⁸ The court concluded that it is for the legislature to determine if social hosts are subject to this type of duty.³⁹

The Missouri Supreme Court applied the court of appeal's logic in *Harriman* to *Andres v. Alpha Kappa Lambda Fraternity*.⁴⁰ In *Andres*, a fraternity member's parents sued the local fraternity for the wrongful death of their twenty-year old son.⁴¹ He died of acute alcohol intoxication following a mixer where the fraternity furnished alcoholic beverages to its members without restriction as to age.⁴²

Andres argued that the prior holdings of *Sampson*, *Nesbitt*, and *Carver* should be logically extended to find that the local fraternity, a social host, had a duty under section 311.310 or at common law not to furnish alcoholic beverages to the decedent.⁴³ The court found that while it was unlawful for the local fraternity to furnish alcoholic beverages to persons under twenty-one, for civil liability to be imposed *Andres* must establish: "1) a civil duty not to furnish decedent with intoxicating liquor; 2) breach of that duty; and 3) the furnishing of alcoholic beverages to decedent was the proximate cause of his death."⁴⁴

The local fraternity argued that in section 537.053 of the Missouri Revised Statutes the legislature determined that the proximate cause of injuries connected with the provision of alcoholic beverages is the consumption, not the provision of the beverages, regardless of whether the setting is social or commercial.⁴⁵ But the court specifically emphasized that the language of section

36. *Id.*

37. *Id.* The *Harriman* court stated several significant differences between tavern owners and social hosts:

1) Tavern owners realize a profit from dispensing alcohol to the public which insures against risk of loss as a cost of doing business, whereas the social host derives no pecuniary gain nor any particular benefit from the amount of alcoholic beverages consumed; 2) The government supports the statutory requirement that business vendors of alcohol be licensed, whereas social hosts are not required to be licensed; 3) A licensed vendor's exercise of control in addition to his expertise in determining intoxication is "vastly superior" to the social host's control and expertise. *Id.*

38. *Id.* at 223.

39. *Id.* at 222. The court defined the difficulties in making this determination as: "1) classifications of business vendors and social hosts; 2) recognition of intoxication; 3) predictability of the conduct of an intoxicated person; 4) imposition of a duty of inquiry upon social hosts; and 5) the spread of the cost of liability." *Id.*

40. 730 S.W.2d 547 (Mo. 1987) (en banc).

41. *Id.* at 548.

42. *Id.* at 547-48.

43. *Id.* at 550.

44. *Id.*

45. *Id.* at 551.

537.053 addressed only commercial vendors of intoxicating liquors and not social hosts.⁴⁶ It took this specific language as evidence of the legislature's intent to protect a particular class of commercial vendors of alcoholic beverages and not social hosts from civil liability.⁴⁷

Upon finding that the legislature had not addressed the issue, the court adopted the *Harriman* analysis. It agreed with *Harriman's* rationale that: 1) "imposing liability on social hosts would have 'a substantial impact on . . . everyday social and family affairs' and therefore the parameters of any duty imposed on social hosts should be determined by the legislature;" 2) "unlike commercial vendors, social hosts do not realize any pecuniary gain from the furnishing of alcoholic beverages and . . . have no incentive to encourage excessive consumption;" 3) the typical social host lacks the expertise required to evaluate the quantity of alcohol a guest can safely consume;" and 4) "commercial vendors are able to insure themselves against the risks of furnishing alcoholic beverages while such protection is not presently available to social hosts."⁴⁸

Based on the holding in *Harriman*, the Missouri Supreme Court concluded that Andres failed to state a claim for relief against the local fraternity.⁴⁹

In other jurisdictions, however, courts have have imposed social host liability. For example, the New Jersey Supreme Court in *Kelly v. Gwinnell*⁵⁰ held that where a social host served liquor to an obviously intoxicated *adult* guest who the host knew would later drive, the host would be liable to a third party injured in a head-on collision caused by the negligence of the intoxicated guest.⁵¹ The court reasoned that public policy supported the placement of a duty of due care upon social hosts when dispensing alcoholic beverages.⁵²

Most courts, however, find social host liability only when a *minor* is served liquor and subsequently injures a third party. In *Koback v. Crook*,⁵³ the Supreme Court of Wisconsin, in finding social host liability, relied on the rationale of an earlier Wisconsin case, *Sorenson v. Jarvis*.⁵⁴ *Sorenson* held that a vendor of alcohol may be liable to a third party for negligently furnishing alcohol to a minor when the alcohol supplied is found to be a substantial factor in causing injuries to the third party.⁵⁵

46. *Id.*

47. *Id.* at 551-52.

48. *Id.* at 553 (quoting *Harriman*, 697 S.W.2d at 221).

49. 730 S.W.2d at 553.

50. 96 N.J. 538, 476 A.2d 1219 (1984).

51. *Id.* at —, 476 A.2d at 1219.

52. *Id.* at —, 476 A.2d at 1222-23. For a discussion of the *Kelly* case and other jurisdictions' considerations of this issue, see Comment, *Social Host Liability and Missouri Tort Law*, 29 St. Louis U.L.J. 509, 511-21 (1985).

53. 123 Wis. 2d 259, 366 N.W.2d 857 (1985).

54. 119 Wis. 2d 627, 350 N.W.2d 108 (1984).

55. *Koback*, 123 Wis. 2d at 153/366 N.W.2d at 859.

In *Koback*, the defendants supplied alcohol to Crook, a seventeen year old, who became intoxicated and drove his motorcycle with Leslie Koback as a passenger. Crook's motorcycle struck a parked car and Koback was severely injured when thrown to the pavement.⁵⁶

As in *Sorenson*, the *Koback* court applied the statutory prohibition against furnishing liquor to a minor as the basis for finding negligence per se.⁵⁷ As to negligence in furnishing liquor to minors, the court concluded that any distinction between social hosts and commercial vendors was a "distinction without a legally relevant difference—certainly, no difference in respect to minors. . . . Neither occupies a status that, viewed in terms of public policy, warrants immunization from liability once negligent conduct has been proved to be a cause of injury."⁵⁸

Thus, the court determined that, whether commercial vendor of liquor or social host, the same traditional principles of tort law apply: "if either acts in a manner evincing a lack of ordinary care in the circumstances, liability may follow."⁵⁹

Most recently, the Supreme Court of Connecticut in *Ely v. Murphy*⁶⁰ found social host liability may be imposed when liquor is supplied to a minor. The court, in overruling prior Connecticut case law, held that the *consumption* of alcohol by a minor was not an intervening cause sufficient to insulate the social host from liability for subsequent injury to the minor or a third party.⁶¹

56. *Id.* Plaintiff's complaint for negligence read as follows:

Mr. and Mrs. Cecil Brooks and Paul Brooks were negligent in the following respects:

- (a) in causing and permitting intoxicating beverages to be served to Michael Crook and the other minors at the party;
- (b) in permitting Michael Crook to leave the party with Leslie Koback, when they knew or should have known that he had consumed intoxicating beverages and it was his intention to operate his motorcycle with Leslie Koback as his passenger;
- (c) in failing to ascertain and to warn Leslie Koback of the intoxicated condition of Michael Crook;
- (d) in failing to properly supervise the party so as to have prevented minors from consuming alcoholic beverages and so as to have prevented guests at the party from being transported by persons with whom it would be unsafe to ride;
- (e) in failing to provide a safe means of transportation from the party when they knew or, in the exercise of reasonable care should have known, that such transportation was necessary.

Id. at 858-59.

57. *Id.* at 860.

58. *Id.* at 861-62.

59. *Id.* at 863. The intoxicated driver remains a joint tortfeasor, and may be jointly and severally liable. *Id.*

60. 207 Conn. 88, 540 A.2d 54 (1988).

61. *Id.* at —, 540 A.2d at 54-55. For other jurisdictions which consider the possibility of social host liability for negligent service of alcohol to minors, see *Macleary v. Hines*, 817 F.2d 1081 (3d Cir. 1987); *Sutter v. Hutchings*, 254 Ga. 194, 438 S.E.2d 811 (Ga. 1988).

The court reasoned that Connecticut statutes imposing criminal liability upon one who gives liquor to a minor reflect a "continuing and growing public awareness and concern that children as a class are simply incompetent by reason of their youth and experience to deal responsibly with the effects of alcohol."⁶²

But Missouri has not changed its position on denying social host liability. The plaintiffs attempted in *Childress* to convince the court that the defendants were *not* social hosts. One of the factors the Missouri Supreme Court relied on to not impose liability on social hosts in *Andres* was that, unlike commercial vendors, social hosts don't realize any monetary gain from serving alcoholic beverages and have no incentive to encourage excessive consumption.⁶³

Therefore, in *Childress v. Sams*,⁶⁴ the plaintiffs attempted to distinguish the defendants in *Childress* from the defendants in *Andres* by alleging that the *Childress* defendants were not social hosts in that they charged a fee for furnishing the alcohol.⁶⁵ The Missouri Supreme Court, however, found that even though the social hosts in *Childress* charged a nominal fee, the "fee was not intended to generate a profit" and "the single cover charge provided no incentive for the hosts to encourage excessive alcoholic consumption, rather it gave incentive to discourage excessive consumption."⁶⁶ The court further held that the fee was merely to defray expenses of the party and therefore found no commercial motive.⁶⁷

The court, therefore, categorized defendants Sams and Hulsey as social hosts. Applying the *Harriman* rule, as adopted by *Andres*, it found that the trial court properly sustained Sams' motion for summary judgment and Hulsey's motion to dismiss.⁶⁸

Section 537.053 of the Revised Statutes of Missouri⁶⁹ allows civil liability for suppliers of alcohol in very limited situations. The Missouri legislature has clearly stated, however, that imposing liability on commercial suppliers of alcohol as in *Carver*, *Nesbitt*, and *Sampson* is not to be allowed in Missouri.

327 S.E.2d 716 (1985); *Langemann v. Davis*, 398 Mass. 166, 495 N.E.2d 847 (1986); *Traxler v. Kopusky*, 148 Mich. App. 514, 384 N.W.2d 819 (1986); *Batten v. Bobo*, 218 N.J. Super. 589, 528 A.2d 572 (1986); *Montgomery v. Orr*, 130 Misc. 2d 807, 498 N.Y.S.2d 968 (1986); *Congini v. Portersville Valve Co.*, 504 Pa. 157, 470 A.2d 515 (1983); *Langle v. Kurkul*, 146 Vt. 513, 510 A.2d 1301 (1986); *Harmann v. Hadley*, 128 Wis. 2d 371, 382 N.W.2d 673 (1986). *But see Kirkland v. Johnson*, 499 So. 2d 899 (Fla. Dist. Ct. App. 1986).

62. *Ely*, 207 Conn. at —, 540 A.2d at 57.

63. *Andres*, 730 S.W.2d at 553 (quoting *Harriman*, 697 S.W.2d at 221).

64. 736 S.W.2d 48 (Mo. 1987) (en banc).

65. *Childress*, 736 S.W.2d at 49. The facts of the case indicate that the funds raised by the admission price to the party exceeded the price of the beer. *Id.*

66. *Id.* at 50.

67. *Id.*

68. *Id.*

69. MO. REV. STAT. § 537.053 (1986). Portions of the statute are found *supra*

The *consumption* of alcoholic beverages, rather than the *furnishing* of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

Although recently other jurisdictions have decided that there is no distinction between commercial vendors of alcoholic beverages and social hosts, and further that traditional tort concepts of negligence apply to both; the Missouri Supreme Court in *Childress* unanimously held that such a distinction does exist between commercial suppliers of alcohol and social hosts. Accordingly, the Missouri Supreme Court has announced that, regardless of the trend in other states, social hosts will not be held liable to third parties injured by their intoxicated guests.

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