S189577

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FAIEZ ENNABE,

Plaintiff and Appellant,

vs.

CARLOS MANOSA, ET AL.,

Defendants and Respondents.

From a Decision by the Court of Appeal, Second Appellate District, Division One, 2nd Civil No. B222748

AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFFS AND APPELLANTS FAIEZ ENNABE, ET AL.

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization which has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: September 5, 2011

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SHARON J. ARKIN

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STATEMENT OF INTEREST OF THE *AMICUS*

The Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent consumers in personal injury cases, Consumer Attorneys is interested in the significant issues presented by the *Ennabe* opinion. In fact, Consumer Attorneys' interest in the issue of liability for provision of alcohol to minors is so great that it co-sponsored AB 2486 with Mothers Against Drunk Drivers, which was signed into law last year and which imposes social host liability on adults who knowingly provide alcohol to minors in the home, pursuant to Civil Code section 1714(d).

LEGAL ARGUMENT

PUBLIC POLICY CONCERNS ABOUT UNDERAGE DRINKING WARRANT IMPOSITION OF LIABILITY IN THIS CASE

"In California, a majority of high school age minors have consumed alcohol. Underage drinking is a leading cause of death for those under twenty-one years of age; it increases the likelihood of future alcohol dependency and is linked to violent youth crime." (Joseph Fabel, *Extending Social Host Liability: Chapter 154 Seeks to Hold Adults Accountable for Serving Alcohol to Minors*, 42 McGeorge L.Rev. 499, 499-500 (2011) ("Fabel").)

The parties' briefing in this case provides a pinpoint focus on various statutes and the intricacy of the wording in each statute. And as the parties' briefing demonstrates, that intricate, narrow, focused analysis can – with varying success – support each side's legal position. But taking a step back – looking at what the legislative and public policy purposes are in the "big picture" – results in only one conclusion: Charging an "entry fee" or "cover

charge" and serving alcohol to obviously intoxicated minors imposes liability. That is what happened in this case and that is why liability lies.

A. The clear legislative intent is to punish those who serve alcohol to obviously intoxicated minors.

As has been discussed by both parties in their briefs, after this Court's decisions in *Vesley v. Sager* (1971) 5 Cal.3d 153, *Bernhard v. Harrah's Club* (1976) 16 Cal.3d 313 and *Coulter v. Superior Court* (1978) 21 Cal.3d 144, the California Legislature acted to eliminate the so-called "dram shop liability" imposed in those cases. But one thing the Legislature also did was to consistently carve out a single exception to that liability: Service of alcohol to obviously intoxicated minors.

The first inroad to total immunity was Business & Professions Code section 25602.1. That section originally established an exception from the general immunity for service of alcohol to obviously intoxicated minors by licensees under the code, military vendors and "sellers."

There was a loophole in the statute however. Because it was limited to vendors who were ***actually*** licensed, as opposed to those who ***should have been licensed***, but were not, it provided immunity to scofflaws. (*Zieff v. Weinstein* (1987) 191 Cal.App.3d 243; *Cully v. Bianca* (1986) 186

Cal.App.3d 1172.) The Legislature closed that loophole in 1986 by amending section 25602.1 to provide that immunity is not available to a licensee ***or anyone who is required to be licensed***, and who sells alcohol to an obviously intoxicated minor. (Stats. 1986, c. 289, § 1.)

Most recently, the Legislature reaffirmed its policy of protecting those injured as the result of serving alcohol to minors by enacting the "Teen Alcohol Safety Act of 2010." (Stats. 2010, c. 154 (A.B. 2486), § 1.) That enactment added subdivision (d) to Civil Code section 1714, providing that an adult who knowingly furnishes alcohol at their residence to any minor can be liable for resulting injuries.

This evolution of legislative action on the issue of serving alcohol to minors confirms that the "California Legislature has a demonstrated policy of keeping minors away from alcohol." (Fabel, at 502.)

B. <u>Because Manosa sold alcohol to an obviously intoxicated minor, the applicable statutes should be construed to impose liability rather than to preclude liability</u>.

As extensively discussed by the parties, Business & Professions Code section 25602.1 expressly excepts certain "persons" from the dram shop immunity established in section 25602 and imposes liability on them.

There are two classifications under section 25602.1 that are relevant to the analysis in this case: (1) A person who is "required to be licensed" pursuant to section 23300 who sells, furnishes or gives alcohol to an obviously intoxicated minor and, (2) Any person who "sells, or causes to be sold, any alcoholic beverage" to an obviously intoxicated minor. Under either provisions, "selling" alcohol to an obviously intoxicated minor precludes immunity.

One important rule of statutory construction established by this Court has not been extensively discussed by the parties: Effectuating the intent of the Legislature. This Court summarized this statutory construction rule in *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 186-187: "[O]ur *first* task in construing a statute is to ascertain the intent of the Legislature *so as to effectuate the purpose of the law*." (Emphasis added.) In doing so, this Court said, "a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import.... *The words of the statute must be construed in context, keeping in mind the statutory purpose*.... Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Ibid*.; emphasis added.) Furthermore, "the

legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*Ibid.*)

Other extrinsic aids to interpretation may be employed only if the statute is ambiguous. (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 211 ["[i]f the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls." (Internal quotation marks omitted).] If, however, "the statutory language may reasonably be given more than one interpretation, courts may employ various extrinsic aids, including a consideration of the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*Ibid*.)

The ambiguity of section 25602.1 as to what constitutes the "sale" of alcohol invokes this latter analysis. And in this case, the evil to be remedied in the context of sections 25602.1 and 1714(d) is to fulfill the Legislature's "demonstrated policy of keeping minors away from alcohol." (Fabel, at 502.) This means that, rather than construing section 25602.1 narrowly, the section should be construed in order to effectuate that public policy purpose.

Applying those principles in this case compels the conclusion that by charging strangers an entrance fee to her otherwise-private party, defendant

Jessica Manosa stepped across the line drawn by the Legislature; she stepped outside the boundary of protection offered to "social hosts" and became someone who should have had a license to provide alcohol and/or who actually "sold" alcohol to an obviously intoxicated minor under section 25602.1.

The Answer Brief on the Merits posits a number of questions designed to minimize the impact of defendant's conduct in charging only a few people a modest entrance fee and for making so little money in the endeavor. Those questions are designed to blur the bright line that the Legislature drew under sections 25602 and 25602.1: If you provide alcohol to an obviously-intoxicated minor for free, you are a social host and immune from liability. But if you step across the line and provide that alcohol for a fee, however charged or collected, you forfeit immunity. Simple and clear. And supportive of the Legislature's intent that underage drinking be discouraged.

The "slippery slope" is actually created by the Answer Brief's argument that a $60 "profit" is insufficient to impose liability on Manosa as a "commercial" provider of alcohol as to whom section 25602.1 should apply. If $60 is not enough, what is? What if her word-of-mouth advertising for her party had netted her $100? A thousand dollars? Where

is the line then? Is a $10 "cover charge" for strangers enough? Twenty dollars? Do there have to be more paying "guests" than "comp" guests? Is a 50/50 proportion enough to fall within the exceptions to immunity?

The questions seeking a bright line in the Answer Brief and the questions posited in the preceding paragraph all emphasize the point that the Legislature has *already* established the bright line: If you start charging for admission to a "party" and provide alcohol at that "party," you have stepped outside the magic circle of a social host and – at least with respect to providing alcohol to an obviously-intoxicated minor – you have subjected yourself to liability.

The Legislature's choice may not be the ideal one; it may not be the choice that most perfectly effectuates the Legislature's desire to balance protections for social hosts while guarding against underage drinking. The balance struck by the Legislature under section 25602.1 may be perceived as both overinclusive (by imposing liability on those who would otherwise be "social hosts" but who charge admission to parties where alcohol is served) and underinclusive (by allowing social hosts to serve alcohol indiscriminately). But it is a balance struck by the Legislature and the one that must be enforced by this Court.

And it must be kept in mind that Manosa had two other – and equally simple – options: (1) Charge no one; or (2) Deny admission to strangers. She chose a third option: Charge strangers. In doing so, she forfeited the protection of sections 25602 and 1714 and subjected herself to liability under section 25602.1.

CONCLUSION

The legislative balance between protecting social hosts and imposing liability for serving alcohol to obviously intoxicated minors must be honored, especially where a social host steps across the line mandated by the Legislature and charges for entry to a "party." The Court of Appeal's decision should be reversed.

Dated: September 6, 2011 THE ARKIN LAW FIRM

By: _____
SHARON J. ARKIN
Attorney for *amicus curie*
CONSUMER ATTORNEYS OF CALIFORNIA

CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is 2201 words as calculated utilizing the word count feature of the Word:Mac 2008 software used to create this document.

Dated: September 6, 2011

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SHARON J. ARKIN

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address 355 S. Grand Avenue, Suite 2450, Los Angeles, CA 90071.

On **September 6, 2011**, I served the within document described as:

AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFFS AND APPELLANTS FAIEZ ENNABE, ET AL.

on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes to be delivered, addressed as set forth in the attached service list with postage paid thereon and depositing them with the United States Postal Service at Brookings, Oregon.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 6, 2011 at Brookings, Oregon.

_____

SHARON J. ARKIN

ENNABE v. MANOSA
Case Number S189577

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