TO: Scott Rokley

FROM: Cameron Smith

Date: November 13, 2000

RE: Clydesdale v Bad 00-01234-NA

STATEMENT OF ASSIGNMENT

Our clients, Bud and Er Clydesdale are bringing a cause of action against property owners, Knute and Sophie Bad for furnishing alcohol to a minor, where the minor driver and his passenger were subsequently involved in a auto accident, and seriously injured. You asked me to write a detailed memo with authorities covering the following points:

- Is negligence a valid cause of action against either Knute Bad or Sophie Bad (property owners)?
- If so, will either plaintiff (Er Clydesdale the injured minor, and Bud Clydesdale, the passenger) likely prevail against either defendant?

ISSUE ONE

Under the Michigan Liquor Control Act, MCL 436.1701; MSA 18.1175 does relinquishing control of one's property for the use as a social gathering, where beer is provided by the host, breach the duty *not* to knowingly furnish alcohol to a minor, when the property owners attend the gathering?

BRIEF ANSWER TO ISSUE ONE

No the duty is not breached. A property owner who relinquishes control of their property to another for a social gathering, where beer is provided, and where the property owners had no participation in the preparation of the gathering, (more importantly, control over the liquor) have no duty to monitor consumption of alcohol by minors.

ISSUE TWO

Under the Michigan Liquor Control Act, MCL 436.1701; MSA 18.1175 does the inquiring of one's age, then requesting identification of that person constitute "diligent inquiry", when determining if

a person is a minor, for the purposes of serving alcohol?

BRIEF ANSWER TO ISSUE TWO

Yes, requesting a person's age and identification will likely be considered "diligent inquiry" in order to determine if a person is a minor for the purposes of serving alcoholic beverages.

FACTS

Knute and Sophie Bad own a home in DeWitt, Michigan, and gave permission to their in-laws, the Constantinoples, to use their property for a graduation party for the Constantinople's son. Edwina and Eduardo Constantinoples planned and organized everything, including the food and beverages for the party, as well as they served as social hosts. Edwina followed Knute's suggestion and posted a sign by the self-serve keg of beer, which read "Adults Only"

The Clydesdale brothers, Bud and Er, came from another party where they consumed two beers, before arriving at the Bad's house. Knute noticed Bud and Er (invitees) hanging around the beer keg, and inquired as to their age and requested their identification. Bud presented a Michigan driver's license, which indicated he was 23 years old. Er produced a fake identification, without a picture, asserting that he was a member in good standing of the Republican Party, which indicated he was 21 years old. Knute muttered "Oh, all right, party down, dudes!" Both Clydesdales drank from the beer keg until they were legally intoxicated.

The Clydesdales left the party in Er's car, with Er driving. While driving 60 miles per hour in a 55 mile per hour zone, Er crossed the centerline and collided with a car driven by Zarley Kermit. Kermit, Bud, and Er survived the auto accident, but were seriously injured. Later at the hospital, Kermit stated to the police that he had two beers about an hour before the accident. Blood tests performed at the emergency room indicated Kermit (the other injured driver) had a .04 percent blood alcohol level by volume, and Er's blood alcohol level was .19 percent, (well over the lawful limit .02 percent for minors).

DISCUSSION

ISSUE 1: Under the Michigan Liquor Control Act, MCL 436.1701; MSA 18.1175 does relinquishing control of one's property for the use as a social gathering, where beer is provided, breach the duty *not* to knowingly furnish alcohol to a minor, when the property owners attend the gathering? The answer is "NO"

Property owners, such as the Bads, who relinquish control of their property for the use of the social host, have no duty, as a matter of law, to monitor the consumption of alcohol by a minor guest.

The people of this state, through the Michigan Constitution, Art 4, Section 40, as well as the Legislature, through the Liquor Control Act, have determined that persons under twenty-one years of age should *not* be sold, given, or furnished alcoholic beverages. The primary law governing actions of "knowingly" furnishing alcohol to minors is MCL 436.1701; MSA 18.1175. This statute, in pertinent part, states that a person who knowingly sells or furnishes alcoholic liquor to a person who is less than 21 years of age, or who fails to make diligent inquiry as to whether the person is less than 21 years of age, is guilty of a misdemeanor. Moreover the Michigan Constitution, Article 4, Section 40, states in pertinent part, that a person who has not reached the age of 21 years shall not possess any alcoholic beverages for the purpose of personal consumption.

Our clients, Bud and Er Clydesdale allege that the Bads breached a duty *not* to "knowingly" to give, provide, or furnish alcoholic beverages to anyone under the age of twenty-one. Plaintiffs further allege that the defendants were negligent in furnishing alcohol to Er and that this negligence was the proximate cause of the injuries the plaintiffs received as the result of an automobile accident. In order to prevail in a cause of action for violation of MCL 436.1701; MSA 18.1175, the plaintiff must prove the following elements of the tort:

- The defendant had a duty not to knowingly furnish alcohol to a minor;
- The defendant breached that duty;
- The selling, giving, or furnishing of alcoholic liquor was a proximate cause of the injury or damage; and

- The plaintiff was injured or damaged;

Our Supreme Court held that a civil cause of action exists for injuries or death caused by the furnishing of alcoholic beverages to a person under twenty-one years of age by a social host under the Michigan Liquor Control Act MCL 436.33; MSA 18.1004. Longstreth v Gensel, 423 Mich 675; 377 NW2d 804 (1985). Although the proven violation of § 33 (which was repealed and replaced § 1701, with no substantive changes) would establish a plaintiff's prima facie case, plaintiff must still establish proximate cause. It is true that once a cause of action arises under MCL 436.1701; MSA 18.1175 the determination of social host liability is based on common-law negligence principles. The civil cause of action is grounded, however, in a legislative provision intended to protect against the intoxication of minors. This provision, in turn, is part of the legislative scheme meant to govern all aspects of liquor regulation. Our Supreme Court reasoned that violation of this penal statute gives rise to a rebuttable presumption of negligence. As the Supreme Court warned in Longstreth, "this type of evidence [violation of § 33] is only available to certain plaintiffs under certain situations." Longstreth, at 692.

In Bambino v Dunn, 166 Mich App 723; 420 NW2d 866 (1988) the question was whether the Lauraines' (property owners) conduct, as a matter of law, constituted the furnishing of alcoholic beverages, the Court of Appeals held that it did *not*. The Court of Appeals affirmed the trial court's grant of Lauraines' motion for summary disposition, claiming that the property owners had not furnished the alcohol, i.e., beverages, but had merely allowed Karen White to use their premises for the party. In Bambino, the plaintiff had not shown that defendant "knowingly" gave or furnished alcohol to a minor. In all of the civil cases, the person allegedly violating the Liquor Control Act statute must be shown to have some "control over" or an active part in supplying a minor with alcohol. Lover v Sampson, 44 Mich App 173; 205 NW2d 69 (1972). The need for this element is one of the reasons the Legislature included the word "knowingly" in the statute. Christensen v Parrish, 82 Mich App 409; 266 NW2d 826 (1978). The Bambino case does not represent a violation of the statute. Violation of a penal statute gives rise to a

prima facie case of negligence. It is negligence *per se*, but by its terms, only a person who "knowingly gives or furnishes" alcoholic beverages violates the statute. Plaintiff has failed to show that defendant was such a person, i.e., knowingly furnished alcoholic beverages.

In Bambino, it is undisputed that the Lauraines allowed Karen White to use their home for the party and that Karen White hosted the party and provided the food and beverages. It was undisputed that the Lauraines relinquished control of their premises to Karen White. The Lauraines further claimed that Karen White had retained control over the party. The Lauraines' conduct in the Bambino case was similar to the conduct of an owner of a rental hall, who provides his/her premises for the renter's use. White provided the food and the beverages. The liquor did not belong to defendants and they did not retain control over it. To the extent that plaintiff's claim was that the Lauraines had a duty to supervise the minor's consumption of alcoholic beverages, no such duty existed where Karen White furnished the alcohol. Plaintiffs have shown little more than the fact that defendant was present in her own home while minors consumed alcoholic beverages furnished by someone else.

In the present case involving the Clydesdales, the Bads relinquished control of their property to the Constantinoples to host a graduation party. The Constantinoples provided the food and beverages, including the keg of beer. The beer did not belong to the Bads. More importantly, they had *no* control over the beer keg. Therefore, the Bads had no duty as a matter of law, to supervise the consumption of beer by minors, including Er Clydesdale. The only thing the Clydesdales can show is that the Bads were present in their own home, while minors consumed alcohol furnished by the Constantinoples.

COUNTERANALYSIS FOR ISSUE ONE:

The defense may argue that reliance on the Bambino case is misplaced, because the position adopted in the case is different in the present case. The question presented was whether the Lauraines' conduct amounted to furnishing alcohol within contemplation of MCL 436.33; MSA 18.1004. Prior cases interpreting the furnish requirements of the statue, have required the actor to assume some control

over whether alcohol would be made available or take some part in supplying of alcohol to minors. The defendants may claim Knute's actions demonstrate that he, the property owner, was taking back control of his property and of the liquor, which is not present in the Bambino case. The defendants may argue Knute had sufficient control over the party and the supplying of beer, and he may be found to have furnished within the contemplation of the statute. For example, Knute's action demonstrated he was taking back control of his property, when he suggested the posting of a sign "Adults Only" nearby the beer keg. Additionally, Knute exerted control over the alcohol when he observed Bud and Er at the beer keg, and inquired as to their age, then requested their identification. Then Knute gave the Clydesdales permission to consume alcohol. These actions may constitute sufficient control over the alcohol.

Clearly it can be argued that Knute's suggestion to post a sign "Adults Only" nearby a keg of beer at a graduation party; and asking a young person's age, before they consume alcohol is a act of moral character, and should *not* be construed as taking back control of his property or over the alcohol. Any adult attending the party could have made these suggestions, and it would have been just that, a suggestion. Knute's actions are a duty of moral character, not a duty as a matter of law.

Whether a duty exists or whether there has been a breach of duty are questions for a jury to decide. Since the Bads had no control of the liquor, there is no breach of duty from a violation of MCL 436.1701; MSA 436.1175. Thus, there can be no negligence. The relinquishing control of one's property to a social host, for the purposes of a social gathering, where alcoholic beverages is provided, does not breach a duty not to "knowingly" provide alcohol to any person under the age of twenty-one. Like in the Bambino case, the Clydesdales have not shown the Bads to have knowingly furnished alcohol to a minor.

DISCUSSION:

ISSUE 2: Under the Michigan Liquor Control Act, MCL 436.1701; MSA 18.1175 does the inquiring of one's age and requesting identification of that person constitute "diligent inquiry", when determining if a person is a minor, for the purposes of serving alcohol? The answer is "yes"

The second part of MCL 436.1701; MSA 18.1175 also states in pertinent part, that a person who fails to make diligent inquiry as to whether the person is less than 21 years of age is guilty of a misdemeanor. In Lamson v Martin, 216 Mich App 452; 549 NW2d 878 (1996), the Court of Appeals held that a jury could conclude that a defendant made a "diligent inquiry" about Lund's age when the defendant asked for an explanation as to why Lund could not purchase the alcohol herself. The court reasoned that in determining whether the defendant in the Lamson case violated the statute, the court had to define the term "diligent inquiry". Michigan law defines "diligent inquiry" as a diligent good faith effort, to determine the age of a person, which includes as least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal identification card, or any other *bona fide* picture identification. MCL 436.1701(6); 18.1175(8)(b). In a case involving "diligence" under the dramshop statute, diligence was defined as "devoted and painstaking application to accomplish an undertaking." Woodbeck v Curley, 107 Mich App 784; 310 NW2d 242 (1986). That definition is appropriate in the present context. The furnishing of alcohol to minors is a serious matter necessitating that diligence be defined such a way as not to dilute the purpose of the statute. Lamson.

In the Lamson case, Lund and defendant were employed at Howe's Lanes, a bowling alley, and they had worked together approximately six times over a three-week period. At approximately 5:00 p.m., Lund, who was beginning her shift, asked defendant, who was finishing her shift, to purchase liquor for her. Defendant asked Lund why she needed someone to purchase the liquor. Lund responded that she was working late and would not be able to get to the store before it closed. Defendant accepted the explanation and purchased the liquor. Thus, it was clear the defendant furnished the liquor to the minor.

The furnishing of alcohol to a minor in the present case is not so clear. Knute observed Bud and Er Clydesdale hanging around the keg of beer when he approached them; asking their age and for some identification. Er produced a fake identification, without a photograph, asserting that he was a member in good standing of the Republican Party, which indicated he was 21 years old. As in the Lamson case, a jury could find that Knute's action constituted "diligent inquiry" when he inquired as Er's age and asked for his identification. Knutes's inquiry of the Clydesdales' ages, coupled with an examination of their identification, demonstrates a greater degree of a good faith effort, to determine a minor's age, in contrast to the facts constituting a supposed "diligent inquiry" in the Lamson case.

A defendant's lack of knowledge may be an excuse depending on the facts of the case. Lamson. MCL 436.1701(6); MSA 18.1175(6) provides that in an action for the violation of this section, proof that the defendant or the defendant's agent or employee demanded and was shown (before furnishing alcoholic liquor to a minor) a motor vehicle operator's or chauffeur's license or a registration certificate used by the federal selective service, or other *bona fide* documentary evidence of the age and identify of that person, shall be a defense to an action brought under this section. The statement of facts, state Er presented Knute with a fake identification, indicating he was 21 years of age, in order to consume beer under false pretenses. Er drank from the beer keg until he was legally intoxicated, disobeying the law, illegally drove under the influence of alcohol, causing an accident and injured another driver, himself, and his passenger and brother. Since Er presented Knute a fake identification card, Knute lacked knowledge of Er' true age. Knute relied on the Republican Party Card as proof of Er identity and of being of legal age to drink. Knute's "diligent inquiry" as to the proof of Er's age satisfies the requirements of MCL 436.1701(6); MSA 18.1175(6) and provides a defense to the action brought by the Clydesdales. Additionally, Bud Clydesdale's claim against the Bads, as a injured third party, may be barred under the innocent party doctrine.

At least one panel of this Court has concluded that the social host's liability under § 33 for furnishing alcohol to underage guests extends to injured third persons. Traxler v Koposky, 148 Mich App 514; 384 NW2d

819 (1986). However, the facts in Traxler do not reveal whether the third party there was an innocent victim. In Pollard v Ovid, 180 Mich App 1; 446 NW2d 574 (1989), the Court of Appeals affirmed the trial court's order and held that plaintiff was precluded from bringing a cause of action against social hosts for furnishing alcohol to a minor when plaintiff's decedent admittedly participated in the minor's intoxication. This rule, known as "the noninnocent party doctrine", applies even when the plaintiff is a minor. Craig v Larson, 432 Mich 346; 439 NW2d 899 (1989). The noninnocent, injured third party is also excluded from recovery under the dramshop act if he actively participated in the intoxication of the tortfeasor. Although the present case does not involve a licensee, the rules regarding dramshop liability reflects (the court noted) the increasing social awareness of the dangers involved in furnishing alcohol to all age groups. The "noninnocent party doctrine" is consistent with the intent of the Legislature to address those concerns and to regulate all aspects of liquor regulation under the Liquor Control Act. Craig. In Pollard, plaintiff's decedent was at least as much the cause of the resulting or continuing intoxication as the present plaintiffs are alleged to be. Since plaintiff's decedent created the type of harm which § 33 was intended to prevent by knowingly violating the statute, it is apparent that he is not among those to whom § 33 provides a remedy.

Bud actively participated in Er's intoxication. Bud knew Er was a minor and did nothing to prohibit his brother from breaking the law, becoming intoxicated, and later causing an accident through Er's own negligence. In fact Bud can be found to show he participated in the intoxication of his brother Er, which could bar in from recovery under an action for violation of MCL 436.1701; MSA 18.1175.

COUNTERANALYSIS FOR ISSUE TWO:

The defense may argue that Knute should have denied Er access to the beer keg, since Er's identification did not provide a photograph as required by the statute MCL 436.1701 (8)(b); MSA 18. 1175 (8)(b). The statue defines "diligent inquiry" as a good faith effort, to determine the age of a person. The statute then gives examples of examination of identification cards including "...any other bona fide picture identification which establishes the identity and age of the person." In the statement of facts, Er presented a

Republican Party identification card, indicating he was 21 years of age. However, the ID did not, like a Michigan operator's license, include a picture of the person being identified. However, the statue has to be read in the spirit behind the statute: i.e. making certain that the person presenting the over-21 identification is, indeed, the person identified in the document, cart, etc. Thus, an argument can be made that where the person to whom the Republican Party Card is presented knows the presenter to be the person identified in the card, and the card shows the person to be over 21 years of age, it is "diligent inquiry" to accept the card even where it lacks a photograph of the presenter.

The Bads' attorney may argue that Bud is Er's brother and is more than aware that Er is underage, and was using a fake ID. The defense may argue that there are equally relevant cases that do *not* support the position adopted in Pollard. The noninnocent party doctrine applies only to dramshop actions, and not to actions for common law negligence as in the present case. Arbelius v Poletti 188 Mich App 14; 469 NW2d 436 (1991). We need to show that the holding in the Arbelius case can not be relied upon, and does not support Bud's position as he is not among those (minors) to whom § 33 provides a remedy.

CONCLUSION

Under Michigan common law, it is *not* a tort to furnish intoxicating beverages to a person over twenty-one years of age. The theory behind this rule is that it is the drinking rather than the furnishing of the alcohol, which is the proximate cause of any injury to a third party. Longstreth. Both our state constitution and statutes continue to prohibit any person form giving alcoholic beverages to those under the legal drinking age of twenty-one. Accordingly, a civil action continues to exist for injuries or death caused by the furnishing of liquor to a minor by a social host or other person not falling under the purview of the Liquor Control Act. Lonstreth.

In order to prevail in a tort action for a violation of § 1701, the plaintiff must prove the following elements to maintain a cause of action: 1) the plaintiff had a duty *not* to knowingly furnish alcohol to a minor; 2) the defendant breached that duty; 3) the selling, giving, or furnishing of alcoholic liquor was

a proximate cause of the injury or damage. and 4) the plaintiff was injured or damaged. It is negligence *per se*, but by its terms, only a person who "knowingly gives or furnishes" alcoholic beverages violates the statute. Bambino. In all of the civil cases, the person allegedly violating the statute must be shown to have some "control over" or an active part in supplying a minor with alcohol. Lover.

A person who merely allows the use of their property as a site for a party, hosted by another, where beer is supplied, by the host, and consumed by minors, does not furnish alcohol to a minor. Nor are property owners liable in a civil action for injuries caused by the intoxicated minor. The Bad's conduct is similar to the conduct of an owner of a rental hall, who provides his/her premises for the renter's use, when they relinquished control to the Constantinoples. The Constantinoples provided the food and the beverages. The liquor did not belong to Bads, nor they did not retain control over it. The Clydesdale's claim that the Bads had a duty to supervise the consumption of alcoholic beverages is misplace; no such duty existed where the Constantinoples furnished the alcohol. The Bads simply provided a place for the Constantinoples to have a social gathering and that defendants were present, while Er Clydesdale illegally consumed alcohol, under false pretenses. The Bads have no duty to supervise the consumption of alcohol where they did not sell, furnish or give alcohol to the Er Clydesdale. Bambino. Therefore, plaintiffs have no liability to the defendants or person(s) injured by the negligence of the Clydesdales.