

ORAL ARGUMENT – 9/5/01
00-1192
D HOUSTON V. LOVE

TAYLOR: In 1987, the Texas legislature enacted the dram shop act, which is a strong, effective, clear and succinct piece of legislation, which is aimed at deterring commercial alcohol providers from serving or providing alcohol to intoxicated persons.

Today, respondent, Melissa Love, seeks to undermine that legislation by asking this court to find exceptions to the dram shop act, which the Texas legislature never intended, and which this court has never recognized.

In the TC there were two motions for summary judgment. The first motion for summary judgment, it's a partial motion for summary judgment, which was granted on the safe harbor or trained server exclusion of the dram shop act. The second summary judgment, the final summary judgment that disposed of the other issues is the issue that's before the court today.

PHILLIPS: There is no more complaint about the dram shop act?

TAYLOR: There is no more complaint about the dram shop act other than whether it is actually the exclusive cause of action for a commercial provider providing alcohol to a intoxicated person. There were two issues set out by the appellate court, but really they are really the two sides of the same coin. The first issue is, is the dram shop act the exclusive cause of action. And the second one is, based on Otis Engineering whether there can be another common law cause of action recognized for employers and extended in this case to independent contractors in light of the fact that there is a dram shop act which claims to be the exclusive cause of action regarding commercial providers provision of alcohol.

O'NEILL: What if Ms Love was an employee undisputedly?

TAYLOR: If Ms. Love was an employee undisputedly the court would have a different question before it.

O'NEILL: And that's the question I'm asking you. Would there be an Otis duty there?

TAYLOR: Arguably not. Otis was decided 4 years before the dram shop act was enacted. Otis has only been extended in an alcohol case one time since then, and it's been in the Spruiell case. In that case it did not involve a commercial alcohol provider.

O'NEILL: What if Ms. Love was an employee, and she showed up and she showed up drunk to work, and Treasures did not serve her, but she showed up drunk. Would they have any duty then?

TAYLOR: According to the Vardura(?) v. King Hospitality case, out of the Ft. Worth CA, Treasures would not have a duty to her. In that case, the court found that an employer who sent an intoxicated employee home who later was in a 1-car collision and was killed in that accident did not have a duty to protect her from that harm to herself. And that would be the situation we would be under.

O'NEILL: But they would have a duty to someone else because that she had hurt.

TAYLOR: Yes.

O'NEILL: That presents a bit of a different question.

TAYLOR: It's not a different question in the fact that in this case Ms. Love was the person...

O'NEILL: No. I understand that. But let's say that she had collided with someone else and injured someone else.

TAYLOR: Then possibly yes, there would be a duty.

O'NEILL: So then the dram shop would not be the exclusive remedy there. In fact, it would not be remedy in that situation because they were not the provider.

TAYLOR: I don't agree, because the dram shop act was enacted after the Otis case came out. But there would be room for this court to more clearly and easily extend Otis in that situation than in this case, which involves a commercial provider and a first party who was injured as opposed to an innocent third party, which is what's been required in Otis.

PHILLIPS: Both parties have agreed this person was an independent contractor?

TAYLOR: Yes.

PHILLIPS: Are we bound by that? Is that a legal stipulation, or factual?

TAYLOR: I'm not sure of the difference. It's a factual stipulation and there's not been any evidence to the contrary or any argument from the TC on as to whether...

PHILLIPS: Why is this person an independent contract?

TAYLOR: There was an actual contract signed when Ms. Love was hired as an entertainer at Treasures in which it says she's an independent contractor.

PHILLIPS: Well I understand that, but people can say that all the time. Did she have

complete artistic freedom?

TAYLOR: Yes. She was able to choose what days she wanted to come to work, whether she wanted to come to work on a particular day unlike an employee who is a waitress who has a particular schedule and has to work a particular shift. An independent contractor entertainer at this club could come to work when she chose to.

JEFFERSON: Did she choose whether or not to drink on the job?

TAYLOR: Yes.

JEFFERSON: Was she encouraged to do so?

TAYLOR: There is evidence that she was encouraged to do so.

JEFFERSON: What was the encouragement precisely?

TAYLOR: There is a manual that is giving to the entertainers at the time that they are applying for employment or for the ability to dance or work at the club. And in it it explains that the business of the nightclub is the sale of alcohol, and that the entertainers are encouraged to drink and to encourage the customers to consume alcohol while at the bar.

PHILLIPS: Is there anything in the record about whether there's a watered-down - there is a distinction in drinks that certain people get?

TAYLOR: There is deposition testimony, which I believe is in the record between pages 56 and 66, that discusses that she doesn't have to drink. But if she's drinking that she would be getting the same type of alcohol -beverage - that a customer would.

JEFFERSON: What benefit is it to the dancer to drink?

TAYLOR: It's a choice.

JEFFERSON: So the encouragement and solely for the profitability of the company, and has nothing to do with the dancer's compensation?

TAYLOR: It has nothing to do with a dancer's compensation. It's a choice on the part of the dancer, and it is also as you were saying part of the club's profit, but so would the sale of a coca cola or a non-alcoholic beverage, which is also available to the dancer if she chose to drink that instead.

PHILLIPS: Did she get any salary while she's on this role as an independent contractor?

TAYLOR: She's paid per dance that she does for a customer. Like with a waitress they are giving a shift pay plus tips, and with an independent contractor and entertainer there is no salary or compensation from the club other than what she makes from the customer at the club.

PHILLIPS: That's what I meant. Her pay comes solely from the customer.

TAYLOR: Solely from the customer. And she is required to pay the club for the ability to work there on the nights that she shows up for dancing, which is another factor that goes into the independent contractor verses employee.

JEFFERSON: Does she receive any benefits?

TAYLOR: Not in her role as an independent contractor. Ms. Love did work as an employee for the club as a waitress also on a different shift. And I don't know whether she received any benefits from the club for that.

PHILLIPS: If she ever paid for her own drinks would she be a customer for purposes of the dram shop?

TAYLOR: Yes. And regardless of whether she was paying for her own drinks, under the dram shop act she would be considered a customer.

She would be considered a customer regardless of whether she was purchasing the drinks. For the purposes of the dram shop act, the liability attaches for the provision of the alcohol to any person. And the administrative code...

BAKER: But it defines person as customer, member or guest of the club.

TAYLOR: The first sentence of ch. 2.02 refers to the provider's liability for customers, members or guests, which Treasures would contend is not a definition of who the act applies to. Because later in that same provision, it refers to the dram shop act being the exclusive remedy for provision of alcohol to any person over 18 years of age. This court has never required there to be any proof of a person's eligibility or standing under the dram shop act other than that there be a commercial provider and that the person who the alcohol was provided to be a person over 18 years of age.

BAKER: So in your view then, even though she's an independent contractor/dancer because she received drinks during the course of her dancing, she is a person over the age of 18 that's being provided alcohol by the club, so she's covered by the dram shop act. Is that your...

TAYLOR: Any cause of action that she would be able to bring would have to come under the dram shop act.

PHILLIPS: If this was one of these BYOB clubs then the whole Otis panoply could apply could it not because she got alcohol while she was there? Either she smuggled it on or it was given to her so that she could be more artistically.

TAYLOR: I think that would depend on some other facts in the case. And the factors that would be significant would be whether the location would be considered a commercial alcohol provider; whether she would have a relationship...

PHILLIPS: If they don't have a liquor license they are not going to be a commercial alcohol provider.

TAYLOR: Correct. And then the other issue would be what her relationship was with the club. And in this case it's independent contractor, and this court has never extended the Otis duty to the independent contractor relationship in a commercial alcohol case.

O'NEILL: You don't see any problem or policy problem with keeping the Otis authority in place and saying that you can be a provider and an employer if this were an employee. I mean what's wrong with that? If the relationship is not as provider, but as employer, then the exclusivity provision of the dram shop seems to implicate if you're a provider you are liable exclusively as a provider. The sole remedy against a provider is the dram shop act, but that doesn't preclude liability against the employer if there's an employee. Can you come up with a policy reason as to why we should justify dram shop if the employer is acting as an employer rather than a provider?

TAYLOR: I think that you get into a real slippery slope on how far you're going to get extended into other types of causes of action that could be brought against commercial alcohol providers if you would allow the Otis duty to an employee. I think that there are particular facts in Otis and if it's limited to its particular facts it can stand in the face of the dram shop act. But if the court gets too far away from the particulars of Otis, I think that there is some major dangers. And one of them is, the liability of the employer in that situation would be premised on something other than the provision of alcohol. Because the dram shop act clearly is the exclusive remedy for the provision of alcohol.

O'NEILL: I agree. That's how I qualified my question: if the liability was other than by providing.

TAYLOR: But then you get into an entire range of possibilities of the types of actions that could be considered liability as opposed to just the provision of alcohol. And what would keep...

PHILLIPS: Why should the whole word, I mean from a law firm to a manufacturing company, to a good will be liable for its employees if they drink and go out and something happens on the road? Why should they be liable for that and this type of - an establishment with a liquor license be exempted? What would make us think the legislature was ever even thinking about that type of situation when they wrote this act, and they said this industry should not have a duty that the

rest of the world has?

TAYLOR: And your question refers to why the commercial alcohol providers wouldn't have a duty that the rest of the world has?

PHILLIPS: Right. When this was written this was an extension. I mean as they were working of the bill. Because they were working on a bill this is an extension of the law to make these people liable in an area where it wasn't clear that they had had any duty before. Now why would we interpret that to say alright we have an Otis duty for everybody in the whole world except if your job is selling alcohol then you are totally exempt from an Otis duty?

TAYLOR: You have an Otis duty to everybody in the whole world...

PHILLIPS: I mean every other person in the world who is an employer except maybe the State of Texas has this Otis duty, but somebody who is selling alcohol - because we're going to extend a new duty of people who are selling alcohol at the same time we're going to exempt them from an Otis duty, does that make any sense?

TAYLOR: It does make sense. First of all, the Otis duty pre-dates the dram shop act. And I would contend that there's an argument that the dram shop act regarding commercial alcohol providers would exclude the Otis duty from those commercial alcohol providers.

PHILLIPS: I understand your argument on the language - on the use of the word person. But is there any policy argument about why the legislature knowing the Otis duty would say well let's be sure and write this act to make sure that these people don't have this Otis duty. We're going to give them a new separate duty to other people instead.

TAYLOR: Yes. And it goes to the purpose of the dram shop act. The dram shop act is very effective in what it does, and it's because of the scheme that's been adopted by the legislature. It's got a carrot and a stick approach. It gives the commercial alcohol provider the possibility of very high liability for breaching the duty that its given in the act. But on the other hand, it has an out. If it takes steps that have been proven to be effective by training its servers, having there be the specter of civil liability for the serves themselves for violating the act...

ENOCH: On the Otis duty suppose the employee shows up at the alcohol provider's establishment drunk, and the alcohol provider and establishment doesn't provide any alcohol. They are just drunk. They know they are impaired. They send them home, and they have an accident. Isn't that the Otis issue? You have someone who is obviously impaired and the employer sends them home, takes some sort of control of the employees activity.

TAYLOR: It's the affirmative action.

ENOCH: So there has not been any provision of alcohol. Now are you saying that just

because they are in the business of selling alcohol they are exempted from any liability for having sent a drunk employee home even though that employee did not buy any alcohol on the premises?

TAYLOR: I'm saying yes, that that can be the case. But that's not the issue in this case here.

ENOCH: Let's assume that the dram shop applies if your cause of action just providing alcohol. There's no providing alcohol here. We simply have an employer who sends a drunk employee home, that's Otis, right?

TAYLOR: Yes.

ENOCH: Under those circumstances in this case, is there any evidence out there that the employer was aware that the employee was incapacitated and in spite of that sent the employee home?

TAYLOR: In this case?

ENOCH: In this case.

TAYLOR: The only evidence there is, is her blood alcohol level after the accident, which is a .225. According to Ms. Love's own testimony, which is part of the record, she was not exhibiting signs of intoxication while she was at the club.

ENOCH: And she was not in fact sent home by the employer?

TAYLOR: No. She was not in fact sent home by the employer.

ENOCH: Her term was up and she just left.

TAYLOR: Yes.

JEFFERSON: I thought there was evidence that that blood alcohol level would - a person with that level of intoxication would have given signs of intoxication _____?

TAYLOR: You are correct. There is a doctor's affidavit that said at that level she would likely exhibit signs of intoxication.

BAKER: But didn't the manager's testimony that none of those symptoms were observed by him when she left?

TAYLOR: That's correct.

BAKER: So do we have a fact issue?

TAYLOR: Yes, there would be a fact issue based on her blood alcohol level and the affidavit that says that...

BAKER: Is that relevant to what the CA held?

TAYLOR: It is not relevant, because of the exclusivity of the dram shop act in this situation, and the fact that Otis has not been extended to independent contractors and should not be extended in this case, because she was an independent contractor, not an employee, and there was no affirmative active control in this case as there was in Otis.

BAKER: So your view is because there is no disagreement that she's an independent contractor, Otis doesn't apply?

TAYLOR: Our first argument is the dram shop act, which came after Otis means what it says and it's the exclusive remedy. There's no argument with the TC's granting the summary judgment on that. But in the alternative, Otis would not apply in this case because it's distinguishable in several factors, one of which is that she's an independent contractor.

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RESPONDENT

HANKINSON: Mr. Chapin you have abandoned the statutory cause of action, is that right?

CHAPIN: Yes.

PHILLIPS: Why should Otis be extended to an independent contractor?

CHAPIN: Some of the questions previously addressed got at the point when a special relationship exist between an employer/employee and with employer/independent contractor, a duty exist for the employee to exercise reasonable care. The Spruiell court in its decision stated that even when the employer is the provider of alcoholic beverages, the duty still exists because...

O'NEILL: I believe Spruiell, there was a fact question as to whether the employer provided alcoholic beverages there.

CHAPIN: Yes, that's true. What we have though is that the situation that triggers the dram shop act is the providing of the alcoholic beverages. When you have a special relationship between an independent contractor and the employer or the employee and the independent contractor, what triggers the duty in the employer/employee context is the exercise of control over the incapacitated employee. In the independent contractor context, it's the retention of the right of control over some particular aspect of the job.

BAKER: Well what evidence is there in this case that Treasures retained the right of control over her activities as a dancer?

CHAPIN: The evidence is that they exercised the right of constant supervision. They told the dancers that if they became - they encouraged them to drink alcohol at work - and then they said that if they became in Treasures' estimation too intoxicated to continue working, that they would remove them from...

BAKER: Well I understand that they have a policy that says exactly what happens if an independent contractor/dancer becomes alcoholically impaired and incapacitated. But the only evidence that was there at the time she left is that she did not appear, so they never invoked the policy. In other words, they wouldn't exercise no control to implement that policy unless and until she was obviously intoxicated.

CHAPIN: Well there is the evidence that 3-hours after she left work...

BAKER: I understand, and that's where the fact question comes if you extend Otis to this set of facts.

CHAPIN: Yes, that's true.

BAKER: But would you say that only unless until she is visibly intoxicated does the duty arise?

CHAPIN: That would be under an employer/employee context.

BAKER: The duty exist because of that relationship?

CHAPIN: Right. In the employer/independent contractor relationship it's simply the retention of the right and, so therefore...

BAKER: But what right did Treasures retain?

CHAPIN: It retained a right to control whether she used her own property to drive home. It controlled the right whether she could continue to work.

O'NEILL: But then don't you use that as elements as indicia of employee status, and haven't you conceded that by saying she's an independent contractor?

CHAPIN: No.

O'NEILL: The retention of control or the exercise of control indicates an employer/employee relationship.

CHAPIN: Yes, that's true.

O'NEILL: And by definition if someone's an independent contractor, there is no right of control or retention of control, because if there is then they are an employee.

CHAPIN: As this court stated in Hertz(?) _____, the duty that is generated on the part of the employer in the independent contractor context, the duty is commensurate with the amount of retained control. And that's what I'm getting at when I was answering that. The retained control they had was they retained the right to constantly supervise so that they could determine if the independent contractor was too intoxicated. They retained the right to prevent them from using their own property which was their vehicle. They prevented them from being able to continue drinking. I mean they retained this right of control and that is what triggers the duty, and that's what the...

BAKER: But when do all those rights of control arise?

CHAPIN: When the peril has been created. And so I guess that would arise when she was intoxicated.

BAKER: No duty exist until this independent contractor is obviously intoxicated?

CHAPIN: If there is a fact question as to whether she's intoxicated...

BAKER: No, no. First question, the legal question: no duty arises until the independent contractor is obviously intoxicated?

CHAPIN: That's true.

BAKER: The next part, the factual thing, whether the evidence shows she was obviously intoxicated, whereby Treasures should have implemented its control policy. So it's not a pre-existing duty. It's one that's dependent on finding this fact.

CHAPIN: Yes, that's true.

PHILLIPS: Let's assume the dram shop act does not preclude this action. And let's presume Otis can be extended to an independent contractor relationship in some circumstances even though we've never done it before, and I don't think the CA has either.

CHAPIN: No.

PHILLIPS: Now let's get to the third question. Can the Otis duty extend to a first party claim, or should it?

CHAPIN: Yes, simply because using the risk utility test in determining whether a duty should exist, if the person is intoxicated and whether it's an employee or whether it's an independent contractor, and there is some exercise of control, and through a breach of the duty you allow them to get out into the public on the public streets and drive. If the duty covers only the persons to whom that intoxicated person may end up injuring, that still leaves out the situation of the protection of the person themselves. If you have a policy saying that we'll protect you...

PHILLIPS: The law in Texas, I think, was always pretty clear. Maybe it was just clear because nobody brought the suit. But at least in treatises it is fairly clear that intoxication was an assumption of the risk, which in modern terms, we would say it was contributory negligence. And we rather reluctantly in a case interpreting the dram shop act because it mentioned protecting that person or others based on the language of the act, we allowed the young man to bring a suit when he got drunk at a similar joint to this one, and ran into a telephone pole. But there is quite a bit of difference when we talk about the common law whether or not there is good public policy to extend that because there isn't. There is going to be a contributory negligence submission in this suit if you ever get it to a jury. It's a quite bit different thing in Otis to say if you get drunk and run into somebody and they get hurt, that they should be limited to your 20/40 auto policy when somebody else has put them in a situation, and it's a different thing to talk about the individual themselves who clearly had some responsibility particularly an independent contractor more than an employee. Although we don't need to get into that for this question. Why should we extend that statutory scheme that we were very reluctant to a common law issue where it's our call whether or not this duty should go to first parties as well as third parties?

CHAPIN: If you don't extend the duty to the person themselves, then what you get into is a situation like this case if the employer were the server of alcoholic beverages, then what they could do is have a policy that required the person to drink at work, and they could set quotas on how many drinks you have to have at the end of your shift, or each hour with particular customers, and they...

PHILLIPS: They wouldn't be an independent contractor at that stage of specificity.

CHAPIN: I guess that's true. Getting it back to the employer/employee context, even if an employer is the server of alcoholic beverages then, no matter how many drinks they serve to the person, then if the person injured only themselves, the employer could hide behind that.

OWEN: But you would have a dram shop cause of action.

CHAPIN: If it was an employee, my argument would be that there would be no dram shop application.

OWEN: Why is that?

CHAPIN: Because as the dram shop states clearly, it applies only to the persons who

become the customers, members or guests who are, or become intoxicated. So in addressing this question if it was the employee who became intoxicated they are not a customer, member or guest by any common definition.

HANKINSON: But that sentence in the statute talks about when the providers may be liable for certain people's action. The liability of providers under this chapter for the actions of their customers, members or guests who are, or become intoxicated _____ of common law. I don't understand why that has anything to do. Clearly they are a provider of alcohol under the definition of §201.

CHAPIN: Yes.

HANKINSON: And she was provided alcohol, so why wouldn't she have a cause of action under §2.02? Isn't that the remedy that's available to her?

CHAPIN: Why wouldn't she have a cause of action under the dram shop act? Well she might have a cause of action under the dram shop act if she could provide evidence that they served her alcoholic beverages...

HANKINSON: She didn't have to be a customer in order to have a dram shop act claim did she?

CHAPIN: No.

PHILLIPS: Did you give up your dram shop act claim case because you didn't think she fell within the category of permissible class, or because you thought they could prove the safe harbor as a matter of law?

CHAPIN: We gave it up because there was no evidence that they had provided her alcoholic beverages when she was visibly intoxicated to the point she presented a danger to herself or others.

PHILLIPS: But can't you say there's a fact issue by the time she left that she was visibly intoxicated?

CHAPIN: Yes. The issue wasn't whether or not she was intoxicated. It was just whether there was evidence that they had served her when she was in that state.

JEFFERSON: With an ordinary customer does a place like Treasures have the right to restrict access to an automobile of the customer that they _____ alcohol?

CHAPIN: They don't have a duty to that person. That's where we get into the difference here.

JEFFERSON: Under the manual in this case, does Treasures have the right to prohibit a dancer from driving her automobile home?

CHAPIN: Yes they have retained the right to prevent someone - a dancer from driving home if in their determination she's become too intoxicated. With a normal customer, they wouldn't have any legal position to retain that right because there's no special relationship.

ENOCH: They don't have an agreement with the dancer that they could take her car keys away. You're just arguing that there is "a special relationship between a contractor and independent contractor that gives the right to the contractor to withhold the ability"?

CHAPIN: There is both. There is a policy that dancers know that the club has retained that right. So they know if they become too intoxicated that it's the club's policy to protect them, and take their car keys away.

JEFFERSON: Is that in a written policy or where is it in the evidence?

CHAPIN: That I don't believe is written policy. That is stated club policy. That was the club's manager's testimony.

JEFFERSON: And that's in this record?

CHAPIN: Yes.

O'NEILL: And it's largely uncontested correct?

CHAPIN: Yes. There was no contest to that.

As to the stipulation to an independent contractor, the determination of legal status of independent contractor or employee is a legal issue - a ruling of law for the court. And so that would be a legal stipulation. As it were, I don't believe this court would be necessarily be bound by that.

PHILLIPS: I don't either. But can you give us any persuasive argument that she's an employee? It sounds like she gets closer to an employee once she gets drunk, but up until that time _____.

CHAPIN: They do retain a right that - whenever those particular independent contractors or those particular people report to work, the time that they report if they get there before a certain time they don't have to pay a fee to work. They get there between certain hours they have to pay \$20, and then they get...

PHILLIPS: That's no indicia of an employment relationship. I mean just saying I'm going

to pay you more for working a certain hour than another.

CHAPIN: Well the employee has to pay that. If the dancer's entertaining a customer and there is a credit card tab, which that same written manual encourages them to put things on a credit card, the club gets a cut out everything that is normally the dancer's fee whether it be a dance, or drink or tips, or anything such as that, the club gets a cut out of that. And that's testimony by the manager in the record. And so they retain that right to control the person that way. Then we get into the control as it relates to intoxication.

HECHT: But you're not withdrawing your stipulation, or you are?

CHAPIN: No, I'm not withdrawing.

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REBUTTAL

TAYLOR: This court doesn't have to disregard Otis in order to reverse the CA in this case. Because Otis can still stand on its facts, which are very distinguishable from the facts of this case. Otis can stand in cases where we have a non-commercial provider of alcohol or another type of employer, where there is an employee/employer relationship, which is as far as that case has been extended, where we're dealing with injuries to third party as opposed to a first party injury like we're dealing with in this case.

PHILLIPS: The public policy isn't stronger to hold somebody who is just having a BBQ liable than it is someone who encourages these people it's paying to drink, and to drink heartily and at the same rate as paying customers.

TAYLOR: Yes and no. I would say that there is two answers to that. First of all, the affirmative act of control is significant, which is the fourth situation I was going to say where Otis can still stand. Otis depends on an affirmative act of control as opposed to non-_____ or letting something go.

PHILLIPS: But you concede here, because you have to since the fact is raised that this club had control procedures that kicked in.

TAYLOR: I would argue that the control procedures that were discussed in Ms. Love's deposition that are part of the record, are no different than the control procedures that the club would take over any person that was in the club who had had too much to drink or that they perceived had too much to drink, which would be to call a taxi for them, to try to get them to say and not drive home, to try to get their keys so that they wouldn't drive. Those were basic safety issues that had nothing to do with the relationship with Ms. Love over any other person that would come in to her...

O'NEILL: That's not in the record.

TAYLOR: No.

O'NEILL: What the record does say is they did it specifically with respect to the dancers.

TAYLOR: Regarding the dancers, that they did retain this. And what I'm saying is that I would argue that that's no more than just a safety precaution that they would take for any person.

JEFFERSON: So you think Treasures would have the right to cease somebody's automobile - a customer's automobile, or cease their keys?

TAYLOR: There is no evidence that they have the right to cease her automobile or keys. The evidence is that if they notice that a dancer was intoxicated that they would try to get her keys, try to call her a cab, remove her from the floor - get her off of the dance floor would be the thing that they retain the right to actually do. But whether they can actually take her keys, there is no evidence where they say we retain the right.

We talked earlier about the pamphlet that they fill out and the procedures. There is nothing in there that says we retain the right to do this. There is just deposition testimony from the manager who says if this happens and she becomes intoxicated, we try to call a cab. This is what our policy is about handling a situation where someone is intoxicated.

A danger that we get into with the problem of not living up to that policy the way that one would argue that they should would be that they become penalized for having a party to protect the public and the dancers from the harm of intoxication. Whereas some less responsible alcohol provider could just have no policy on the issue and perhaps avoid responsibility. So that's a policy argument why Treasures should not be held more responsible because it has a policy to keep the dancer from getting on the road when she is intoxicated just like it would for any other person that was in there.

But the affirmative act of control is what that addresses right there. And that is a significant factor in Otis that's not present in this case.

ENOCH: I thought in answer to one of the questions, it was undisputed that the policy of the club that the dancer's were aware of is the club would take their car keys if they were too intoxicated to drive. Am I mistaken about what I understood?

TAYLOR: My reading of the record is that the deposition testimony of the manager is, that the club retains the right to take the dancer off the floor, try to get their car keys, try to put them in the dressing room away from the customers to try to let them no longer be intoxicated. That's my reading of the record. And I do not believe that there's anything in the materials setting out the relationship between the club and the dancer that addresses that issue.

So Otis can still stand in the face of this case if the court reverses the CA in

this case. And Treasures argues that the court should reverse the CA because the opinion in the CA is in contradiction to the dram shop act. It extends Otis where no court has extended Otis and the circumstances of this case don't justify that. And that it would be bad public policy because it would undermine the purpose of the dram shop act and it would open the door to other litigation for other types of lawsuits not involving provision of alcohol but failure to properly supervise people that were in a club that are not necessary under the facts of this case.