

ORAL ARGUMENT - 4/17/96
95-1286
SMITH V. MERRIT ET AL.

GRIFFITH: May it please the Court, Chief Justice Phillips, associate justices. My name is David Griffith. I am from Gilmer. I have my co-counsel, Mr. Robert Bennett, who is an attorney of record. As you know this is an appeal out of Rusk county, based on a summary judgment issued by the Honorable Judge Donald Ross. Thereafter, this case went to the Tyler CA which affirmed the summary judgment in part, and reversed the summary judgment in part. The Tyler court held that my clients, the Smiths, had a cause of action as to a defendant Robert Barbee under §106.06 of the Texas Alcoholic Beverage Code. The court also held that there was no evidence of ownership as to other defendants and affirmed the summary judgment as to those defendants in all matters.

We have brought this application and I would like to address the question of the ownership briefly before getting to the other main issue in this case. We ought to set a law that if summary judgment movant has the burden of proving that no material issue exists and that the movant is entitled to a judgment as a matter of law, the appellate court must resolve any doubts in favor of the nonmovant on fact issues. The Tyler CA in deciding this case basically decided it on a point that was not raised in the summary judgment. Summary judgment issue went solely to the question of liability and whether the social host liability existed as to the defendant Barbee and the defendants Merrit and others. The CA then picked out the issue and said that there was no evidence of ownership, that the plaintiff did not prove that the certain defendants were the owners of the lake house where this event took place. And thereafter decided that since there was no evidence presented in the summary judgment that they would rule on that point and dismiss it summarily.

While there may not have been much evidence and we concede that there was not presented, but the reason that it was not was because it was not a basis of the summary judgment motion. The CA in effect shifted the burden to the nonmovant to put on a prima facie case as to every point. They could have just as easily picked out a question of damages, or approximate cause, or something along those lines. Our position is that they wrongfully shifted the burden, ruled on a point that was not submitted and that this court should reverse that judgment for the reason that they picked it out unnecessarily.

ABBOTT: Are you claiming that the homeowners could be found negligent per se under 106?

GRIFFITH: Yes sir we are.

ABBOTT: And you're also claiming that the homeowners have a common law duty to not allow consumption of alcohol on the premises?

GRIFFITH: Yes your honor that's the other basis. We believe that if one of the defendants has that duty, then all of the defendants would have that duty.

ABBOTT: One thing I didn't see in any of the briefs or the CA's opinion and I would like your comment on it if you could is for you to state for me what exact common law duty you think homeowners have with regard to allowing alcohol to be served on their premises?

GRIFFITH: We believe the common law duty would be...well it's going to be statutory originally, plus the common law duty to not allow minors...a social host liability...not allow minors to obtain and receive alcohol on their premises. It would be analogous to a premises liability cause of action not to allow a dangerous event to take place on the property.

ABBOTT: And I would presume that duty would arise only when the homeowners actually knew that minors were consuming alcohol on their premises?

GRIFFITH: Yes sir if they knew or should have known based on immediate conduct or past conduct. We think that is a fact issue that should be presented, should be resolved by a trier of fact your honor.

ABBOTT: So you're saying that if the homeowners knew that in the past some minors were consuming alcohol on their premises but did not know currently with regard to the present situation that minors were consuming alcohol that, too, would trigger the common law duty?

GRIFFITH: A past event would not necessarily trigger liability if they had no reason to believe that it would take place in the future or was continuing to take place. If they knew that this was a regularly scheduled event or in the event that it was understood that these type of activities were condoned and would take place, then we believe that the fact issue would exist as to whether they should have liability under that circumstance.

ABBOTT: And I presume your position is with regard to the two pairs of homeowners, two couples of homeowners, that if they had no knowledge that there was any consumption of alcohol by minors on their premises, then there would be no triggering of a common law duty?

GRIFFITH: Yes sir I believe that would be right your honor. In summation on this, we believe that the status of the owner's negligence and the issue we've talked about assuming a cause of action under the common law statute would be a factual issue and should not have been decided by the summary judgment, but should be reserved for the trier of fact.

BAKER: Is your argument that it's always a fact issue?

GRIFFITH: Yes sir. It would be a fact issue from the standpoint of what knowledge they had.

BAKER: What if the summary judgment evidence is they have no knowledge?

GRIFFITH: Then that could be decided as a matter of law. But there would have to be a factual basis for deciding the summary judgment. When I say that it would be a question of fact obviously if there were no contrary facts, the court could decide it as a matter of law. However, in this case we never got to that point because the court picked that out and said there is no evidence as to ownership not knowledge or what took place but picked it out and there's no evidence of ownership.

BAKER: So the owners in their motion for summary judgment didn't allege no knowledge of the party or serving of alcohol?

GRIFFITH: No sir.

BAKER: So your point is, the ownership issue is the writ of error _____?

GRIFFITH: Your honor we believe that it is. We believe that when the court picked that out they just arbitrarily took one issue and said that since they are not the owners, or we can't tell from the evidence in the summary judgment that they are the owners, we are going to _____ out of hand, when we could have presented evidence had it been properly presented in the motion for summary judgment. The same as if the summary judgment had said they had no knowledge or they weren't the owners.

BAKER: So your position under City of Houston v. Clear Creek they would carry their burden?

GRIFFITH: That's correct your honor.

BAKER: And then the CA improperly shifted it to you?

GRIFFITH: That's correct your honor, that they just picked that issue out and we did not have the opportunity to properly respond in the lower court. This leads me to the main issue to be decided: what cause of action do the plaintiffs have under the laws that now exist? We are cognizant of the fact that this court expressly rejected the theory of social host liability for adults under Graff v. Beard. We are just as mindful of the fact that this court expressly reserved the issue as it pertains to minors and we believe the court should extend the liability to a social host for providing alcohol to a minor for several reasons. First I would like to address the opposing counsel argument that §§ 201 - 203 of the Alcohol and Beverage Code preempt and limit the remedy for serving alcohol to persons 18 years of age or older.

As this court expressly stated in Graff v. Beard at page 919 the dram shop statutes as I will refer to them and the statutes thereafter only apply to commercial providers. The court expressly said that it only applies to commercial providers and since there is no claim in this case that the defendants were a commercial provider this statute would not apply and the social host theory then would obviously be an open question in this case specifically. Impliedly a social host is not a commercial provider. Since the statute expressly talks of providers, subsequent statutes, it talks of provisions to a minor, and these two terms are repeatedly used in the chapter, we believe that the statute should be construed as this court did in Graff to include only commercial providers. And let the provisions of §106.06 control as to others who supply alcohol to minors. In other words when the statutes expressly say there is a sole remedy under 201 _____, we believe the sole remedy applies to commercial providers. However, §106.06 of the Texas Alcoholic Beverage Code expressly condemns the serving of alcohol to a minor which it defines as a person under the age of 21 expressly in that statute. The statute very plainly states that a person commits an offense if he supplies an alcoholic beverage to a minor.

BAKER: In this case the son is the one who actually furnished the alcohol to Mr. Hale is that correct?

GRIFFITH: Yes your honor.

BAKER: How do you extend liability to the parents when they didn't "serve" it as does 106 suggests they must?

GRIFFITH: The statute says "a person", and that would be Robert Barbee. The adults however were, if the evidence...we believe the evidence will show that the adults were aware of the fact that this activity was taking place. The activity had taken place in the past and that they impliedly allowed their property to be used for this purpose. I believe you could call it an agency relationship. It's going to be a parent/child relationship. They were a party by allowing their property to be used for this purpose, and we believe knowingly used for this purpose. When the statute says a person it also includes a natural person, association...

BAKER: But we have a live person that did furnish it who is not the owner per se?

GRIFFITH: Yes sir.

BAKER: So your theories are agency apparent child?

GRIFFITH: Yes your honor.

BAKER: Some type of vicarious liability?

GRIFFITH: Vicarious liability because of the fact that they knew what was going on. They gave permission for this property to be used for that purpose, and knew that...

BAKER: Is it your position then that the cause of action is dependent upon knowledge or permission?

GRIFFITH: Yes your honor. We believe that the cause of action is not going to be a strict liability cause of action. In other words the statute says provides. It talks about now with criminal negligence previous statutes said knowingly. And we believe that it's going to be a cause of action based on the conduct, on the knowledge, and based on a negligence cause of action. In other words we're not asking for a strict liability cause of action under the statute. Just because it happens doesn't mean that you're going to be liable. The other elements of a pure negligence case including proximate cause, the factual circumstances would be important. And so that's implicit in our belief that the social host liability should extend under the statute and under common law.

BAKER: And under these facts however as I recall the record, Mr. Hale was not statutorily _____; is that correct?

GRIFFITH: No sir he was not statutorily intoxicated. That's going to be a fact question. His blood alcohol level was approximately .07, and there's going to be evidence and testimony as to what it actually was at the time of the accident, and what it would be later. The fact that he was not statutorily intoxicated from a prima facie standpoint would not affect the case from the standpoint we believe that the trier of fact could also consider what effect the alcohol had on him. And further what if any result this was from a proximate cause standpoint?

ABBOTT: With regard to Mr. Barbee, he was a minor when it comes to consuming alcohol?

GRIFFITH: Yes sir he was.

ABBOTT: What was he when it comes to serving alcohol: was he a minor or an adult?

GRIFFITH: We believe that he is a person under the Alcoholic Beverage Code. And he would be a minor under that strict section under 106, but he is a person as that statute defines a person who provides.

ABBOTT: What about with regard to common law duty?

GRIFFITH: Common law duty he would also be an adult because of the fact that he undertook to provide the alcohol. There's no exclusion. And in fact under common law if one is 18, then he becomes an adult. There's a dichotomy there obviously between a statutory minor and a common law minor, but under common law he would be over the age of majority for that purpose.

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RESPONDENT

GRAYCHECK: May it please the court. My name is Greg Graycheck, and I'm here today representing the Barbees and the Merrits, the defendants in the trial court below. We are here opposing

the Smith's attempt at creating several new novel and far reaching duties previously unknown to Texas law. Interestingly all of the theories put forward require the court to mix both statutory and common law principles together in order to reach the results desired by the Smiths. We would disagree with the order in which these issues should be addressed. As this court has repeatedly stated the first for threshold issue in every case is what duty exist? What duty is owed in this case?

I think it is important when considering this issue to keep in mind the players in their various capacities in this case. Who they are? What they represent? Why they're here? Robert Barbee, a 20-year old adult child of Bob and Marita Barbee hosted a party at a lake house in October, 1990. Bob and Marita Barbee are the parents of Robert Barbee, but were not present. Margaret Merrit the owner of the property is a grandparent of Robert Barbee, again not present. A.P. Merrit, the grandfather of Robert Barbee, was also not present. These parties are before this court based on their status. They are alleged to be owners, where they have some nebulous duty to control the actions of an adult child of the parties, or grandchild.

I would point out that all the attendees at the party especially those connected in any way with the accident that happened in this case, are common law adults. They were 18, 19, or 20 years old or older. Therefore, I think the issue that this court pinpointed in the Graff v. Beard decision as the basis of its decision or one of the basis for its decision is controlling here - and that is the right to control. Did any of the parties in this case have the right to control the conduct of those that were actually involved in this accident?

ABBOTT: Wasn't the issue in Graff in that regard the right to control how much alcohol an adult consumes, that was one of the two basics right?

GRAYCHECK: That was one of the issues that whether they had the right to control the actual consumption of the alcohol, and then the practicality of trying to determine how much it was and the other difficulties in that issue.

ABBOTT: And I'm sure you would agree in this situation that the minors should be consuming zero alcohol?

GRAYCHECK: That would be correct. I would strongly agree that the minors should not be allowed possession of alcohol. They should not be allowed consumption of alcohol. The problem or dilemma we are faced with here is what is the capacity of these individuals? They are 18, 19 and 20 years old. At common law for all purposes they are adults. Yet the Alcohol and Beverage Code in ch. 106 makes everyone under 21 a minor for the purpose of the Alcohol and Beverage Code only. Therefore, at least for that particular purpose they are considered minors in the law as we are dealing with the Alcohol and Beverage Code not when we come outside it. That's what I am trying to say. To make the statutory and common law remedies just makes no sense at all. At common law they are adults. At common law therefore the Graff v. Beard decision controls and they have no social host liability in that regard.

ABBOTT: I understand the fact scenario that we apparently have and that is that neither the adult Barbees nor the Merrits knew that this action was going on. Let's assume the facts are slightly different and that is that they knew all along that their children were going to be having a beer bust at their house. Would it be proper for this court to condone parents allowing minor children to be consuming alcohol?

GRAYCHECK: Again I have difficulty with the terminology. Minors under 18 I would have no problem with that.

ABBOTT: I understand. But when it comes to consuming alcohol, you have to agree that a person is a statutory minor if they are under 21?

GRAYCHECK: Yes.

ABBOTT: So in other words when we are talking minor or major, or adult or minor, the issue about consuming alcohol if they are under 21 they are a minor. So the question is can this court condone parents or homeowners allowing their children to consume alcohol on their premises?

GRAYCHECK: And again I would have difficulty with the terminology because the parents have no right to control the conduct of that child, that 18, 19 or 20 year old minor. At common law, statutory law they have no right and therefore should have no obligation to control that behavior. Whether they condone it or not or whether this court condones it or not we never get to that point because they practically cannot do it, they can't reach that point.

BAKER: Do they have the responsibility to control their premises?

GRAYCHECK: Every landowner has a practical responsibility to control their premises. Just as in Graff v. Beard, the host of the party has the duty to control his premises. That's correct. The question is where does that duty end or begin when we're talking about controlling the conduct of others. Can we make others not drink alcohol? No. Can we make them leave if they don't stop? Probably.

HECHT: But this is against the law. If they were manufacturing drugs in the back, not only would they have to stop it, but they would risk forfeiture of their property if they didn't. You can't just say well I can't control these people. So there's nothing I can do.

GRAYCHECK: Again that would be correct. Except it's not against the law for minors to be drinking on your property. It's against the law for you to provide alcohol to minors. There's a difference. The fact that somebody's committing a crime on your property - you know do you have the duty to control, the responsibility to prevent it, the responsibility to foresee it? You know those are issues especially in security cases for stores where people come on the property and commit crimes. You know where does the duty begin to stop this conduct?

HECHT: If Robert were 17 you would say it would begin there?

GRAYCHECK: If Robert were 17 I would say the parents have an affirmative duty to monitor his conduct, prevent his conduct from being illegal, or immoral in any way.

HECHT: And if his guests were 17 you would say it extended that far?

GRAYCHECK: Again that gets into a problematic area: how do they know what the age of his guests are? If they practically know that these minors are there and using this property I probably would have no difficulty saying yes they probably should control at least to the extent of excusing them from the property if they don't behave under the rules that they set. I don't believe from a practical standpoint they can control the conduct of these children, but they can exclude them if they don't conform to the conduct that they set on the property. I think there's a distinction there.

But I think it's important to remember the 18, 19, or 20 year old dichotomy was set up artificially in the first place. It was a dichotomy that was imposed upon the state legislature by the federal legislature holding highway funds ransom. The legislature went to the added step of adding an automatic repealer to that provision. They do not intend for 18, 19, or 20 year olds not to be allowed to

drink under Texas law, under Texas public policy. The federal government imposes that on us and enforces us to use that rule - some would contend unconstitutionally, because it's outside their area of responsibility. That's what we're dealing with. Does that statute intend to provide these particular minors a special status? I would contend it doesn't. It was never intended to do so. I believe that's one of the reasons why the legislature in chapter 2 made chapter 2 expressly applicable to all those over 18 years of age. Chapter 2 is a civil liabilities provision of this particular code. And it preempts all liability for everyone over 18 other than what's provided for in Chapter 2. I would contend that that provision prevents social host liability for 18 year olds and above in all circumstances unless they sell the alcohol, and then they comply with the requirements of chapter 2 knowingly providing a person that is obviously intoxicated etc., etc.

If you look at the legislative history they specifically rejected social host liability in chapter 2. It was considered, it was addressed, it was debated and it was knocked out. I think under typical or proper statutory construction we must presume the legislature intended there be no such liability.

CORNYN: Would your position be different if the Barbee's actively participated in the serving of the alcohol on the premises?

GRAYCHECK: My position would be different to the respect that they would have violated a criminal statute and would be criminally liable. I think that they still would not be civilly liable under the terms of this particular statute, which preempts that type of liability. The legislature says yes we want to make that a crime, we want to keep these kids from getting possession of alcohol but we are not going to allow you to lay that off on somebody else because we recognize 18, 19 and 20 year olds are going to find it. They are going to get it somewhere.

CORNYN: Why should there be divergent duties under the civil law and criminal law in that circumstance?

GRAYCHECK: Again I think it's a policy decision of the legislature saying look we want to stop it, we are going to make it a crime, if you do it - you're caught doing it - you can be punished by the state. But we recognize the practicalities of the situation. Parents even for their own children that are 18, 19 and 20 year old no longer have responsibility to control that conduct. What would you rather have me do? Have my children come home and have a couple of drinks with your friends, or should I send you out and say no you can't so you go across the border to Shreveport where it's legal, get the drinks, and then drive all the way back home 1-1/2 hours drunk on the highways? What is the preference of this situation? I think the legislature recognized the impracticality of this particular age group. The parents can control them if they wanted to. Some don't want to - some do. Those that want to and do try to it creates friction or problems. Where do we draw these lines?

CORNYN: So the only option is between two illegal choices: you're saying either serve minors alcohol in your home illegally, or to let them go to Shreveport, get drunk and have a wreck on the road on the way back?

GRAYCHECK: No, the Utopian solution would be just not to have anybody have any alcohol anywhere anyway.

CORNYN: Or at least not illegally?

GRAYCHECK: Well legal or illegally I think the preference would be just not to have the problem. Addressing the problem can you keep the kids away from it? Ideally we would hope that we could. We would like to. Realistically, no. There's absolutely no way to do that.

CORNYN: That's not a decision you expect this court to write on an opinion that says that?

GRAYCHECK: I think the policy has been set forth by the legislature as to what they think the practicalities of the situation are. And I think this court should follow that policy. I think chapter 2 specifically is adopted for that purpose. I would point out the interpretation that the Smith's would ask this court to adopt reaches an extremely bazaar result. Because if the Barbees had come forward and sold this liquor to these kids they would have no civil liability under the statute. Because clearly it preempts any civil liability in that regard. They would have criminal responsibility if they did and these kids were kids.

ABBOTT: What statute preempts civil liability?

GRAYCHECK: Chapter 2 of the Alcoholic Beverage Code.

ABBOTT: But that applies to providers which are commercial providers?

GRAYCHECK: Well I would contend it applies to everybody under the intent of the legislature.

ABBOTT: What did Graff say though?

GRAYCHECK: Well I don't believe the issue is before this court in Graff. Graff said or there was a provision in Graff that indicated this is a provider statute. But the issue never came before this court as to whether or not there was a provider or social host under the statute. At least in my reading of the case. In fact the facts of Graff indicate the facts arose before the statute was enacted. So while there was a provision in Graff that said that, I don't think the issue was before the court for consideration at that time. Be that as it may, I think if you look at the legislative history the legislature has said we don't want social host liability in this state for anyone 18 and above. And that was the intent of chapter 2. But what I was discussing was the impracticality or the bazaar result that would be reached if the Barbees' had sold this alcohol. Under chapter 2 they would have no liability civilly. Because chapter 2 would prevent that. Yet if they give the alcohol away all of a sudden they are imposed with the civil liabilities.

CORNYN: Well there is no decision of this court or anywhere else that says if they had sold it they would be immune from liability? Graff only addressed social host liability, not about seller.

GRAYCHECK: That's correct. There is a case that addressed the question of whether or not chapter 2 preempts liability or civil liability in this regard. And the case of course held that the legislature intended to preempt and did preempt under chapter 2, that you must comply with the element of chapter 2 in order to impose civil liability against a provider of alcohol. In this case it was to an adult, somebody who was drinking legally. The question is is if you drink legally and you get drunk what liability is imposed? Chapter 2 dictates what those elements are that have to be met before you can impose civil liability. It preempts any other liability under the statute.

CORNYN: Do you think that we have the application for writ of error in Rhine v. Freasenhahn(?) out of the San Antonio court pending? Is it your argument that we should reverse that CA's decision?

GRAYCHECK: Yes it is. I believe Rhine basically again imposes duties that are not practical, are not capable of being enforced, and are contrary to the policy both dictated by this court in Graff and that dictated by the legislature in the statute that they impose. That case is a little more problematical because the minor was under 18 years of age. He was actually a minor in all respects. But again did the parents have the practical ability or right to control the conduct of this child, this third party child? No. Could they have kicked them off the property? Yes. But in that case the children brought their own from what I have

read in the case. Everybody brought their own. Everybody drank everybody else's or whatever, and this child happened to have some drinks and left the property in an intoxicated condition.

HECHT: So when I asked you earlier if Robert Barbee were 17 would there be a duty, I thought you said yes maybe, but now you're saying probably not?

GRAYCHECK: No, I believe my response your honor was that their duty would be to exclude them from the property if the kids were not conforming to the conduct that they imposed upon them on the property. And they probably would have had that duty to exclude them if they knew that these children were drinking on the property.

HECHT: Why is it any different excluding 17 year olds so that they can go some place else and buy it and excluding 18 year olds? I thought your argument was it would be better to do it on the premises?

GRAYCHECK: The difference and there is some merit to that argument that yes you know it would be better to have them where you can control at least the part of their conduct if they become totally inebriated you can make sure that they don't get behind the wheel or something of that nature. But leaving that aside the basic simple distinction is at 18 they are adults and are responsible for themselves. At that point you no longer can prevent them from drinking whether you want to or not. At 17 you still have that responsibility as a parent even if the law doesn't impose it upon you your obligations as a parent would impose it upon you. In that regard then you know at 18 you lose the obligation to control the behavior of your children whether you like it or not and most parents don't like it from a practical standpoint.

I would point out the basic principle that plaintiff was trying to get this court to impose aside from the vicarious liability issues, which to me go even further than Graff was asked to go and that is to impose liability on an owner of a property for the consumption of alcohol by someone on the property even if you are not present. In Graff at least the SA CA required you be present, that you see it and know it, or be aware that it's going on. In this case they are asking you to impose that burden just because they may have known that a party was being held at the property but they weren't there, they weren't around, and they had no knowledge of what actually was taking place out there at the time that it was going on.

CORNYN: Well that was your burden to prove that the owners to conclusively disprove that they had knowledge of the party and consented to it wasn't it?

GRAYCHECK: Again I don't think the CA decision came down to the question of knowledge. I don't think it came down to the question of ownership. I think it came down to whether they...

CORNYN: You're asking us to assume that it didn't have knowledge?

GRAYCHECK: No what I am asking you this court to recognize that they weren't present. They weren't there and there is no...

CORNYN: Well can they avoid civil liability by intentionally leaving a party that they know is going on? I mean isn't the important issue knowledge, not their presence?

GRAYCHECK: If they were there they knew a problem was happening and they up and left? Possibly you could say well you're not going to be able to avoid your liability by hightailing it. But that's not the facts of this case. They were never there.

CORNYN: You did not attempt to negate their knowledge of the activity in your summary judgment evidence did you?

GRAYCHECK: That's correct your honor. We dealt with the issue of whether or not there was a duty at all. We did not actually get to the next step of whether or not and like I said Margaret Merrit is the only owner, the other had no control of the property anyway even though they've all been dealt with as owners. So there are other issues that could potentially provide a resolution to this case down the road if it came to that. But were dealing with the issue of what duty if any exists in Texas law.

BAKER: The Merrits are the owners of the property?

GRAYCHECK: Margaret Merrit alone is the owner of the property.

BAKER: And the Barbee parents had no ownership?

GRAYCHECK: Well Marita Barbee is the child of Margaret Merrit, but that's the only connection they have to this case legitimately. And again none of this is in the record because we never got to that stage. We were dealing with the question of duty not with the question of the status?

BAKER: But the CA despite your earlier comment in response to Judge Cornyn says it is undisputed that the owners not being present did not give or knowingly make available any alcoholic beverage. And so they sustained the summary judgment. You said that there was no issue of knowledge or lack of knowledge in the trial court, but _____ said there was?

GRAYCHECK: What I said is there is no issue of denial as that this was going on. I think there is evidence in the record that they did not knowingly make available or provide the alcohol. They weren't present. There is evidence they weren't present. There is evidence that they didn't provide it. There's evidence that there was none at the premises when they got there. That is all in the record in the deposition testimony.

BAKER: Petitioner's argument is that the CA improperly shifted the burden to then to show ownership when it was your duty to show no ownership and no knowledge.

GRAYCHECK: It's our position the CA's did not shift the burden of ownership, they simply assumed all of these people were owners. Right or wrong they simply assumed it. I don't think that's a basis for their decision. Their decision is based on the fact that these people were not present, did not provide the alcohol, and left no alcohol on the premises. And that's what the CA sets out - they did not knowingly make available or provide alcohol on the premises and were not present. Did they know that the party was going on? Did they give permission for the premises to be used? That's what I believe the plaintiffs are saying gives liability by itself. Did they make the alcohol available? Did they purchase it? Did they give him money? None of that happened. And there's evidence in the record to establish those facts.

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REBUTTAL

GRIFFITH: First of all I would like to clear up one issue. The various defendants, the Merrits and the Barbees were shown as record owners in certain bank records, and that's the reason that they were brought in your honors.

Again that is not an issue that was specifically addressed because it was not a part of the summary judgment motion, but there is evidence in certain notes and bank documents that they were

shown as record owners. And again that would be a fact question then as to whether they had actual knowledge and whether or not they were _____

BAKER: But there's no real dispute on ownership?

GRIFFITH: We believe the only dispute on ownership would be...well we think they are an owner because they're shown as a record owner. The defendants have said all we were was an owner for the purpose of a bank note. And therefore we are not an owner, and that Margaret Merrit was the actual owner. However, in light of the use of the lake house, the folks that were using it - the grandson, and the various knowledge that the parties had we believe that the question of ownership and control would be an issue.

BAKER: But the second part of this, assume they all are owners, then the CA held that there was no knowledge, that they either made it available or served it to anybody at the party by the owners, whoever they might be?

GRIFFITH: They made that statement but that was never explored or developed factually sufficiently for them to make that decision. Basically they assumed that they were not owners, or that they were owners and had no knowledge. But there was no factual development sufficient for them to make that decision in our position.

BAKER: Well when you opened your argument you said that ownership is the issue. But as I understand you now that the real crux is the knowledge?

GRIFFITH: Yes sir the ownership was the issue from the standpoint of there was a question. Yes sir I will be corrected on that. The question is what knowledge they would have as the owners? We further disagree that the parents would have no right of control over a child 18 - 21 years old. Courts have held that a parent has control over a child, and that there is a special relationship. This is especially in light of the fact of who would own the property, who would have the right to control the property, and I believe it would be stretching credibility to say that a parent would have no right of control over a minor child on that parent's property. It would be ridiculous to say that once a child reaches the age of 18, that a parent could not control the activities of that child on their own property or on property that they own, or within their control. And that's what the respondents are asking you to believe that the control issue is so difficult to enforce, that it should not form the base of liability.

Under the status of the law as respondents would have it as to social host, a 30 year old man could give alcohol to a 15 year old until they were obviously intoxicated, and incur no civil liability. The statute 106.06 provides for a nominal criminal penalty but unless it would be extended to civil liability there would be no sanction for providing alcohol to a minor even to the point of being obviously intoxicated. We think this is a ludicrous result especially in light of the grave danger implicit in giving alcohol to a minor, or providing alcohol to a minor, especially when motor vehicles are involved as they so often are in this case.

PHILLIPS: Doesn't the statute say however that it's the exclusive cause of action for providing an alcoholic beverage to a person 18 years or older?

GRIFFITH: Yes your honor. And that's the statute 201, 202, and 203, which expressly under this court's pronouncement relates to commercial providers. If this was an individual providing the alcohol then impliedly there would be no liability regardless of the age of the minor.

SPECTOR: So does Robert Barbee have civil liability?

GRIFFITH: We believe that he does your honor because he is a person who provides alcohol to a minor.

SPECTOR: But can be sued as an adult?

GRIFFITH: That's correct. He is a minor from the standpoint of the Alcoholic Beverage Code prohibition. However under common law he would be an adult subject to adult civil penalties.