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A VOLUNTEER CAN BE AN AGENT

The First District Houston Appellate Court recently found that (1) a volunteer can act as an agent for a corporation and (2) two entities did not share a community of pecuniary interest that would constitute a joint enterprise. *Harris v. Houston Livestock Show & Rodeo, Inc.*, 01-09-00590-CV (1st Dist. March 10, 2011).

FACTS OF THE CASE

The Houston Livestock Show & Rodeo (“HLS&R”) runs an entertainment and livestock show, the Rodeo. HLS&R entered into a contract with Corral Club. In the contract, HLS&R allowed Corral Club to sell alcohol during the Rodeo. Corral Club agreed to pay HLS&R a portion of the total revenue it earned. Corral Club also agreed to pay for the cost of all alcohol it obtained to sell.

The contract further provided that HLS&R would not sell or dispense alcoholic beverages. The contract also stated that Corral Club was encouraged to use HLS&R’s staff, but it was understood that any staff member used to operate the areas selling or serving alcohol would be under the exclusive control, supervision, and care of Corral Club.

HLS&R organized its Rodeo volunteers into different committees. The volunteers assigned to the Corral Club Committee were responsible for the day-to-day running of the Club East Bar. All alcoholic beverages at the Club East Bar were purchased by Corral Club. HLS&R did not have a permit from the Texas Alcoholic Beverages Commission to sell alcoholic beverages.

When the Rodeo was open to the public, only bartenders paid by Corral Club *sold and served* alcohol at the Club East Bar. Volunteers from the Corral Club Committee conducted other activities other than dispensing alcohol. These volunteers watched the entrances and exits to the bar to ensure that alcoholic drinks did not come in or out of the bar. Some volunteers stocked the bars with alcohol, and at the close of business, other volunteers determined and recorded the quantity of alcohol served that day.

At the conclusion of the Rodeo, a private party consisting of Corral Club Committee volunteers and guests was held at the Club East Bar after the business was closed. At the party, volunteers served free alcoholic beverages. No bartenders paid by Corral Club served alcoholic beverages during the party, however, Corral Club had purchased the alcohol served at the after hours party.

An off-duty police officer employed by HLS&R was invited to attend the after hours party. The off-duty officer became intoxicated after drinking alcohol served to him at the party. After leaving the party, the off-duty officer caused a car accident, resulting in serious injuries to Calvin Guyton and Calvin Harris.

Guyton and Harris later sued Corral Club and HLS&R under the Dram Shop Act. They alleged that (1) Corral Club was directly liable pursuant to the Dram Shop Act and (2) HLS&R was vicariously liable based on the claim that Club East Bar was run as a joint enterprise.

At the trial level, the Defendants filed a Motion for Summary Judgment. The Motion was based on the assertions that (1) Corral Club was not a “provider” pursuant to the Dram Shop Act because none of its employees sold or served alcohol to the off-duty officer and (2) HLS&R was not vicariously liable based on the theory of joint enterprise because it did not have a community of pecuniary interest with Corral Club. The trial court granted the Defendants’ motion.

On appeal, Corral Club argued that volunteer members of the Corral Club Committee of the HLS&R served alcohol during the after hours party, and not paid employees of Corral Club. The Court, however, analyzed the Texas Alcoholic Beverage Code and the Dram Shop Act and found that the acts of employees of a corporation are only one way for it to be liable under the Act. A corporation may also be held liable for the acts of its agents.

According to the Court, Corral Club’s Motion for Summary Judgment only specifically addressed the theory that the volunteers were not employees, and did not dispute the theory that volunteers were agents of Corral Club.

According to the Plaintiffs, because Corral Club had a statutory duty and right to control the service of its alcohol, it had an interest in the manner of the service, and it obtained a benefit by using volunteers. The Plaintiffs also argued that under the borrowed-servant doctrine, the volunteers were volunteering for Corral Club the night of the after hours party.

The Court concluded that Corral Club failed to disprove the allegation that the volunteers acted as its agents. Therefore, Corral Club failed to show that it was not a “provider.”

In the second basis for appeal, HLS&R challenged the third element of a joint enterprise, namely, a community of pecuniary interest among the members and the common purpose. This requires proof of a monetary interest that is “shared without special or distinguishing characteristics. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 525 (Tex. 2003).

The Court referred to the interest of a franchisor regarding the success of its franchisee in order to demonstrate the insufficiency to constitute a community of pecuniary interest and the common purpose.

The Court acknowledged that HLS&R benefited by earning a percentage of the revenues from Corral Club on the alcohol sold at Club Bar East, and Corral Club profited by retaining the income not paid to HLS&R. However, the benefits HLS&R achieved from the operation of Club Bar East was different from Corral Club's interests. HLS&R's interest was solely in the portion of the total revenues, regardless of costs, and Corral Club's interest was only the profits it earned.

The Court also noted that Corral Club was never reimbursed by HLS&R for the alcohol it served.

The Court affirmed the trial court's ruling that HLS&R and Corral Club were not engaged in a joint enterprise.

HOW DOES THIS CASE AFFECT YOU?

It is well established that if you have an entity that is subject to the Dram Shop Act, liability can be established by the acts of your employees. However, liability has now been extended to volunteers acting as agents on behalf of your entity.

Thus, it is imperative that your employees and agents (volunteers or otherwise) are mindful of the risks involved in serving alcoholic beverages. The use of volunteers may be helpful in the keeping expenses down. However, these well-meaning volunteers may unknowingly assist in establishing liability under the Dram Shop Act if the proper safeguards are not in place.



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