

RENDERED: JANUARY 31, 2003; 2:00 p.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000365-MR

MARLENE CARNEYHAN, ON BEHALF OF
THE ESTATE OF JAMIE LEE CARNEYHAN

APPELLANT

v. APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 95-CI-00036

MICHAEL THOMAS; RONNIE CAIN;
GRAND AERIE FRATERNAL ORDER
OF EAGLES; and FRATERNAL ORDER
OF EAGLES CANTON AERIE

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; HUDDLESTON and McANULTY, JUDGES.

EMBERTON, CHIEF JUDGE: In the early morning hours of April 1994, nineteen-year-old Jamie Lee Carneyhan was operating a motor vehicle when she was involved in a single vehicle accident resulting in her death. The issue on appeal is whether the Grand Aerie Fraternal Order of Eagles, a national fraternal organization, can be held liable for the alleged negligent acts of a local chapter. The trial court granted summary judgment to the organization and this appeal followed.

The question on review of a summary judgment is not whether the non-moving party will prevail at trial, but whether it appears, as a matter of law, that it would be impossible for the non-moving party to present evidence at trial warranting a judgment in his favor.¹ The Grand Aerie contends that it had no control over the actions of members of the local chapter, no control over guests to local chapter social functions, and that no officer of the national organization was present when the alcohol was allegedly served to Jamie; therefore, as a matter of law, the Grand Aerie could not be liable for the negligence of its local chapter.

If the local chapter was, at the time of the accident, acting as an agent for the Grand Aerie, under the doctrine of respondeat superior, the Grand Aerie as principal would be liable for the negligent acts of its agent. In determining whether an agency relationship exists between two or more people or entities, the court must look to the control, if any, that one party exerted, or could exert, over another. As stated in McAlister v. Whitford:²

Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

¹ Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

² Ky., 365 S.W.2d 317, 319 (1962).

The constitution and statutes of the Grand Aerie give the local clubs authority in managing their daily activities and explicitly state the operation of local clubs is not subject to supervision and control by the national body. Other than that the members of the local clubs were members of the national organization, there is no evidence that the national organization had any supervisory role over the social activities of its members. We affirm the trial court's finding that, as a matter of law, no agency relationship existed between the local chapter and the Grand Aerie.

Although the Grand Aerie is not liable under the doctrine of respondeat superior, there remains the issue of whether it has any liability for its own negligence. The stated purpose of the Eagles organization is the promotion of charitable and community activities. The local club in this case, however, was by all accounts, primarily a social club and one where drinking was common. And, it is clear that the Grand Aerie reasonably anticipated the sale of alcohol as a means of producing income for local clubs. In literature distributed to the officers of local chapters, a table delineates the recommended amount of alcohol in drinks and prices to maximize the profits of local clubs. Included is the following reminder:

REMEMBER. . .PROFIT is the last portion of the bottle you pour. Be sure you receive the required number of drinks from each

bottle with money in the register. The size of your shot glass determines the number of drinks served from the bottle. The Steward must realize that every drink not paid for, or over-pouring, reduces the NET PROFIT -- the justification of employment.

The local clubs are told that it is to comply with all laws which include those pertaining to serving and the sale of alcohol.

We will not go so far as to label the organization as a social drinking club, yet clearly, drinking is at least a recognized predominate activity. In Grayson Fraternal Order of Eagles v. Claywell,³ the Kentucky Supreme Court held the local chapter could be liable to a third party for injuries suffered at the hands of a patron to whom the club served alcohol when the club knew, or should have known, that the patron was intoxicated. Although it did not discuss the liability of the national organization, it stated the general rule that ~~A~~every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury.⁴ The ~~A~~universal duty of care[@] has, since Grayson, been narrowed in application. The scope of the duty of care is determined, in large part, by the foreseeability of the risk of harm. As stated in North Hardin Developers v. Corkran:⁵

³ Ky., 736 S.W.2d 328 (1987).

⁴ Id. at 332.

⁵ Ky., 839 S.W.2d 258, 262 (1992).

Prior to application of the universal duty of care to a particular set of facts, it must appear that the harm was foreseeable and the facts must be viewed as they reasonably appeared to the party charged with negligence, not as they appear based on hindsight. Mitchell v. Hadl, Ky., 816 S.W.2d 183 (1991). As to what constitutes an unreasonable risk of harm, Prosser has said:

Nearly all human acts, of course, carry some recognizable but remote possibility of harm to another. . . . Those against which the actor is required to take precautions are those which society, in general, considers sufficiently great to demand them. No man can be expected to guard against harm from events which are not reasonably to be anticipated at all, or are so unlikely to occur that the risk, although recognizable, would commonly be disregarded. @ W. Prosser, Torts, '31 (1978).

The risk of harm associated with serving alcohol needs no elaboration. The Grand Aerie, while not promoting itself as a drinking club, is undeniably aware that its local chapters serve or sell alcohol. We agree with appellant that the duty of the Grand Aerie is analogous to that of a national fraternity recognized in Hernandez v. Flavio,⁶ where the court reasoned:

The national fraternity, having sponsored what amounts to a group of local drinking clubs, cannot disclaim responsibility for the risks of what it has sponsored. The national fraternity exercises control over many aspects of the activities of its local chapters. That a duty exists in this circumstance was implicitly admitted by the

⁶ 186 Ariz. 517, 519 924 P.2d 1036, 1038 (1995).

act of the national fraternity in sending to local chapters instructions to abide by local laws and university regulations in serving alcohol at chapter functions. Whether such an admonitory letter is sufficient to discharge any duty to exercise reasonable care is, of course, for the jury to decide.

We hold that where a national organization such as the Grand Aerie, Fraternal Order of Eagles encourages, or induces, the sale or serving of alcohol, there is a duty to exercise reasonable care to control the service or sale of alcohol. Whether it complied with that duty is a jury question.

The summary judgment is reversed and this case is remanded for trial.

ALL CONCUR.

BRIEF FOR APPELLANT:

David F. Broderick
BRODERICK & THORNTON
Bowling Green, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Paul Kevin Hackworth
BRODERICK & THORNTON
Bowling Green, Kentucky

BRIEF FOR APPELLEE GRAND
AERIE FRATERNAL ORDER OF
EAGLES:

Mark A. Osburn
Carol S. Petitt
SCHILLER, OSBOURN & BARNES
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE
GRAND AERIE FRATERNAL ORDER
OF EAGLES:

Carol S. Petitt
SCHILLER, OSBOURN & BARNES
Louisville, Kentucky