S189577
2nd Civil No. B222784
LASC No. KC053945

IN THE SUPREME COURT OF CALIFORNIA

FAIZ ENNABE, Individually and as Administrator, etc., et al.

Plaintiffs and Appellants,

vs.

CARLOS MANOSA, et al.,

Defendants and Respondents.

ANSWER TO PETITION FOR REVIEW

From a Decision of the Court of Appeal
Second Appellate District, Division One

Honorable Robert A. Dukes, Judge

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PRELIMINARY STATEMENT

The reasons for denying the petition can be stated briefly.

First, it is based on a premise – "commercial gain" – that finds no support in the record.

Second, lacking record support for "commercial gain," the petition discusses "consideration" based on a statute that has nothing to do with this case.

Lastly, plaintiffs' disagreement with the Court of Appeal's decision simply does not rise to the level meriting additional review by this Court.

ARGUMENT

The Court of Appeal correctly held that "a social host who charges guests an admission or entrance fee of $3 to $5 to help defray the costs of making alcoholic beverages available to his or her guests is not a person who 'sells, or causes to be sold' an alcoholic beverage within the meaning of section 25602.1." [1] (Slip Op. at p. 10.) The Court of Appeal's unanimous holding is grounded in the language and legislative history of the relevant statutes, and warrants no further review by this Court.

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[1] All statutory references are to the Business and Professions Code, unless otherwise noted.

I. THE PETITION'S PREMISE OF "COMMERCIAL GAIN" IS NOT SUPPORTED BY THIS RECORD

"Commercial gain" is the petition's catch-phrase intended to put this case within the immunity exception for "any person" who "sells, or causes to be sold" alcoholic beverages to an obviously intoxicated minor.[2] "Commercial gain" is the language appearing in the legislative history of section 25602.1. (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 1053 (1985–1986 Reg. Sess.) as amended June 18, 1986, p. 2. ["It is asserted that the act of selling alcohol to obviously intoxicated minors for commercial gain should be a sufficient basis for imposing liability, and that imposing civil liability only upon licensed sellers does not serve the best interests of the public."], quoted in Slip Op. at p. 7.) However, nothing in the record supports even an inference that the cover charge in this case was for "commercial gain." (Pet. at pp. 9-10.)

In the trial court, plaintiffs offered no facts and raised no triable issues remotely suggesting that defendants expected or realized profit. (1 Appellants' Appendix [AA] 265-269 [Plaintiffs' Separate Statement Of Additional Disputed Facts].)

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[2] The petition does not question the Court of Appeal's rejection of plaintiffs' reading of section 25602.1 as imposing civil liability on "any person" who *furnishes, sells, or gives* alcoholic beverages to an obviously intoxicated minor. (Slip Op. at p. 8.)

In the Court of Appeal, plaintiffs downplayed the significance of profit by contending that "any consideration" forfeits the immunity. (Appellants' Opening Brief [AOB] at p. 12 ["Respondent's potential contention that her subjective aim was not for profit is completely irrelevant."].)

And when the Court of Appeal concluded that the cover charge was to "help defray the costs of making alcoholic beverages available" (Slip op. at p. 10), plaintiffs took no issue with that characterization in their petition for rehearing.

In short, this record does not support a major premise of the petition, namely, that the cover charge was for "commercial gain."

II. ABSENT RECORD SUPPORT FOR "COMMERCIAL GAIN," THE PETITION OFFERS A MISLEADING DISCUSSION OF "CONSIDERATION"

In an implicit concession that evidence of "commercial gain" is nowhere found in this record, the petition argues that a "sale" can be supported by "any consideration," including a "cover charge." (Pet. at p. 23, citing section 25604.) What the petition does not say is that the definition of "consideration" appearing in section 25604 applies in the limited context of public actions to abate a public nuisance. The Court of Appeal properly disregarded that irrelevant definition. No compelling reason is offered for this Court's review of that decision.

Equally unpersuasive is the belatedly tendered Department of Alcoholic Beverage Control's November 2009 Trade Enforcement Information Guide (TEIG). (See Defendants' Application To File Letter Brief, filed September 3, 2010.) The Court of Appeal gave the definition of "sale" in the TEIG "no weight because it does not appear to address the statutes or issues presented in this appeal." (Slip Op. at p. 13.) Nothing in the petition enhances the TEIG or raises any issue as to the TEIG deserving of this Court's review.

III. PLAINTIFFS' DISAGREEMENT WITH THE COURT OF APPEAL'S DECISION DOES NOT RISE TO THE LEVEL THAT WARRANTS FURTHER REVIEW BY THIS COURT

The Court of Appeal applied the reasoning of *Bennett v. Letterly* (1977) 74 Cal.App.3d 901 to this case. Plaintiffs do not say that either *Bennett* or the Court of Appeal in this case misconstrued this Court's precedents. Rather, plaintiffs simply disagree with one Court of Appeal's interpretation of another Court of Appeal's opinion. That is not a sufficient reason for this Court's review.

References to statistical studies on alcohol and minors do not enhance the case for review. (Pet. at pp. 2-3.) If anything, the sociological studies underscore that underage drinking is a broader, social problem

better addressed by the Legislature. In fact, the Legislature did precisely that while this appeal was pending.

In 2010, the Legislature amended Civil Code section 1714 to address the "furnishing" of alcohol to minors where, as here, there is no "sale" of alcohol to minors. (Civ. Code, § 1714, subd. (d), added by Stats. 2010, ch. 154, § 1.) Effective January 1, 2011, the amendment exempts from immunity a "parent, guardian, or another adult who knowingly furnishes alcoholic beverages at his or her residence to a person under 21 years of age . . . ." [3]

Below, however, plaintiffs abandoned on appeal their claims against Jessica Manosa's parents. (Appellants' Reply Brief at p. 39 ["Respondents are correct in that appellants are waiving any claims as to Respondents Carlos and Mary Manosa."].) Only the minor defendant was pursued.

But there is a more fundamental point pertinent to why review should be denied. The Legislature's vigilance in addressing a broader social problem should not be disturbed by reexamining a well-reasoned Court of Appeal opinion challenged on the basis of a premise found nowhere in the record.

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[3] Unlike the immunity exemptions set forth in section 25602.1, the new statute does not contain the element of an "obviously intoxicated minor."

CONCLUSION

For these reasons, the petition should be denied.

Dated: January 27, 2011

Respectfully submitted,
MORRIS POLICH & PURDY, LLP

By: _____
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CERTIFICATE OF WORD COUNT

I certify that the text of this brief, including footnotes, consists of 1,023 words as counted by the Microsoft Office Word 2003 word-processing program used to generate this brief.

Dated: January 27, 2011

MORRIS POLICH & PURDY, LLP

By: _____
Richard H. Nakamura Jr.
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PROOF OF SERVICE

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ANSWER TO PETITION FOR REVIEW

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