Analyzing the Oklahoma Supreme Court's Peculiar Expansion of Dram Shop Liability [Boyle v. ASAP Energy, Inc., 408 P.3d 183 (Okla. 2017)]

Curry Sexton

Following a tragic collision at the hands of an intoxicated driver, the Oklahoma Supreme Court reversed the trial court and court of appeals and expanded dram shop liability within its state by holding that Fast Lane Stores, Inc. had a duty to desist from selling low-point beer to clearly intoxicated individuals. Oklahoma had never enforced this duty upon vendors selling to adult individuals for off-premises use.

I. INTRODUCTION

Drunk driving is an epidemic in this country. In 2016, over 10,000 people died in the United States from alcohol-impaired driving incidents.[1] This accounted for nearly thirty percent of all traffic-related deaths.[2] In the same year, over one million people were arrested for driving under the influence of either alcohol or drugs.[3] These serious issues are just as prevalent in Oklahoma. From 2003 to 2012, over 2200 people were killed in Oklahoma in incidents involving a drunk driver.[4] In Oklahoma, 5.6 people per 100,000 died in 2012 in drunk driving incidents, compared to the national average of 3.3 people per 100,000.[5]

States have attempted to take preventive measures to mitigate this problem, including the enactment or enforcement of dram shop liability laws. Oklahoma, a state that has allowed commercial

1. *Impaired Driving: Get the Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 16, 2017), https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html [https://perma.cc/M6XA-58QV].

2. *Id.*

3. *Id.*

4. *Sobering Facts: Drunk Driving in Oklahoma*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 2014), https://www.cdc.gov/motorvehiclesafety/pdf/impaired_driving/Drunk_Driving_in_OK.pdf [https://perma.cc/KL2X-2RS7].

5. *Id.*

vendors to be held liable off and on throughout the last 100 or more years, recognizes commercial vendor liability under civil law.[6] In its recent decision in *Boyle v. ASAP Energy, Inc.*,[7] however, the Oklahoma Supreme Court questionably extended dram shop liability to include commercial vendors, such as liquor stores, as potentially liable for selling alcohol to seemingly intoxicated individuals for use *off-premises*.[8] In doing so, the court significantly opened the door for suits against commercial vendors stemming from almost every alcohol-related vehicle incident.

II. BACKGROUND

A. Case Description

In May 2012, George Carothers drunkenly drove his pickup through a four-way stop at a high rate of speed and caused a collision with another vehicle carrying Pamela Crain, Ashley Haas, and Shannon Keeves ("plaintiffs").[9] Crain was fatally injured in the accident, while Haas and Keeves suffered permanent injuries.[10]

On the day of the accident, Carothers consumed a large number of alcoholic drinks beginning sometime that morning at a golf tournament.[11] The golf tournament ended around 2:00 p.m. and Carothers returned home around 3:20 p.m., at which time, according to Carothers, he "was probably beginning to sober up a little bit."[12] Upon returning home, and despite a foggy memory, Carothers recalled grilling chicken for dinner and drinking four to five more beers, taking three to four shots of vodka, and ingesting another shot of moonshine.[13] At 5:17 p.m., Carothers drove to Fast Lane Stores, Inc. ("Fast Lane") convenience store and purchased a nine-pack of low-point, sixteen-ounce Miller Lite cans and a pack of cigarettes.[14]

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6. *See* Brigance v. Velvet Dove Rest., Inc., 725 P.2d 300, 302 (Okla. 1986).
7. 408 P.3d 183 (Okla. 2017).
8. Boyle v. ASAP Energy, Inc, 408 P.3d 183, 194 (Okla. 2017) (emphasis added).
9. *Id.* at 188. The vehicle on the receiving end of the collision was driven by Haas, who was operating a "Take Out Taxi," a sober taxi service provided in Elk City, Oklahoma. *Id.*
10. *Id.*
11. *Id.* According to the plaintiffs, Carothers consumed eighteen to twenty-one beers, three to four shots of vodka, and a couple pulls of moonshine between 8:30 a.m. and 5:00 p.m. on the day in question. *Id.* Carothers claimed his alcohol consumption for this period consisted of fourteen to sixteen beers at the tournament and one sip of moonshine. *Id.*
12. *Id.*
13. *Boyle*, 408 P.3d at 188.
14. *Id.* In Oklahoma, the term "low-point beer" refers to "beverages containing more than one-half of one percent (1/2 of 1%) alcohol by volume, and not more than three and two-tenths percent (3.2%) alcohol by weight." 37 Okla. Stat. § 163.2(1) (2017).

To complete the transaction, Carothers had to communicate his intended purchase to Fast Lane employee Joshua Dodge.[15]

Carothers returned home for a few hours before leaving around 9:00 p.m. to attend a party in Elk City.[16] Carothers testified at trial that he was concerned about getting behind the wheel, but wanted to get out of the house.[17] Further, he testified that he had enough to drink by that point, so he only had one shot of vodka at the party and no beer was served.[18] Around 11:00 p.m., somewhere between five and six hours after his purchase at Fast Lane, Carothers failed to complete a required stop, sped through the intersection, and caused the fatal accident.[19] Following the accident, Carothers was observed as "having bloodshot eyes, slurred speech, and a staggering gait."[20] He failed a field sobriety test three times and had a blood-alcohol content of 0.29% when his blood was drawn at 11:45 p.m.[21]

Dodge testified that he does not sell alcohol to apparently drunk customers, he had refused such sales previously, and Fast Lane has a policy proscribing these sales.[22] Dodge had no recollection of the sale he made to Carothers.[23] Further, he stated that he had been trained to spot intoxicated persons by looking for abnormal gaits, bloodshot eyes, and slurred speech.[24] The plaintiffs agreed that Fast Lane did in fact have a policy in place, but there was no agreement as to whether Dodge followed it by completing the transaction with Carothers.[25]

The plaintiffs brought suit in the District Court for Custer County, claiming that ASAP Energy, Inc. doing business as Fast Lane Stores, Inc. "negligently and recklessly sold low-point beer to a noticeably intoxicated person who injured" the plaintiffs in the vehicle accident.[26] The trial court granted Fast Lane's motion for summary judgment, the Oklahoma Court of Civil Appeals affirmed,

15. *Boyle*, 408 P.3d at 188. Carothers said he did not recall driving to Fast Lane and making the purchases on that date, and he did not personally know any of the Fast Lane employees, nor did they know him. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 189.

21. *Boyle*, 408 P.3d at 189. Carothers' blood-alcohol content equated to 0.29 grams of alcohol per 100 milliliters of blood. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* Fast Lane's policy prohibiting sales to seemingly inebriated individuals was labeled, "the REFUSE system." *Id.*

26. *Id.* at 185.

and the plaintiffs appealed to the Oklahoma Supreme Court.[27] The predominant issue raised on appeal was whether "Oklahoma jurisprudence recognize[s] a cause of action against a commercial vendor of alcohol who sells alcohol to a noticeably intoxicated adult for consumption off of the premises when the sale results in an injury to an innocent third party."[28] The Oklahoma Supreme Court determined that Oklahoma does recognize this cause of action as a violation of a state statute prohibiting such sales.[29]

B. Legal Background

Oklahoma is one of many states that recognizes some level of dram shop liability, permitting criminal punishment and civil liability for businesses that sell alcohol to intoxicated persons who ultimately cause injuries.[30] Oklahoma criminal law prohibits "holder[s] of a retail license or permit to sell low-point beer, or an employee or agent of a holder of such a license or permit, shall knowingly, willfully and wantonly sell, deliver or furnish low-point beer to an intoxicated person."[31] Moreover, a person in violation of this statute "shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than Five Hundred Dollars ($500.00) or by imprisonment in the county jail for a term of not more than six (6) months, or by both such fine and imprisonment."[32] A violation may also result in revocation of any license or permit to sell low-point beer.[33]

Following the repeal of Oklahoma's dram shop act in 1959, a civil cause of action was not available until the Oklahoma Supreme Court created a civil cause of action in 1986 in *Brigance v. Velvet Dove Restaurant, Inc.*[34] The *Brigance* court held that "one who sells intoxicating beverages for on the premises consumption has a duty to exercise reasonable care not to sell liquor to a noticeably intoxicated person."[35] According to the court, a vendor could reasonably foresee the risk that a drunken individual may cause

27. *Boyle*, 408 P.3d at 185.
28. *Id.* at 186. The second issue raised on appeal was whether there were sufficient factual disputes to reverse summary judgment. *Id.* For the purposes of this Comment, this issue will not be discussed further.
29. *Id.* at 197.
30. *See* 37 Okla. Stat. § 247 (1996).
31. *Id.*
32. *Id.*
33. *Id.*
34. Brigance v. Velvet Dove Rest., Inc., 725 P.2d 300, 302 (Okla. 1986).
35. *Id.* at 304.

harm if he or she attempts to operate a motor vehicle after consuming alcohol on the premises.[36] The court imposed a duty on commercial vendors to exercise reasonable care in furnishing alcohol to intoxicated individuals who lack the capacity to sufficiently operate a motor vehicle.[37]

III. COURT'S DECISION

The issue before the court was whether Oklahoma's dram shop liability laws recognized an action against a commercial vendor who sells alcohol to a visibly intoxicated person for off-premises consumption.[38] The majority noted that seven years after *Brigance*, the court recognized that other states had extended their dram shop liability to vendors who transact illegal sales to minors for consumption off-premises.[39] Expanding liability of vendors under 37 Okla. Stat. § 247, the court cited a Georgia Supreme Court decision which rejected the argument that liability is cut off when the consumption takes place off-premises.[40] The majority determined that, even if the vendor's chances for observation are limited, they are sufficient to determine whether the purchaser poses a risk.[41]

The court reasoned that Fast Lane had a statutory duty based on 37 Okla. Stat. § 247, which was in effect at the time of this accident, to refrain from selling low-point beer to an intoxicated person.[42] The court also determined that Fast Lane had a negligence-based duty, in coordination with public policy considerations, to withhold from selling low-point beer to an intoxicated person.[43] Section 247 requires a plaintiff to show a vendor did "knowingly, willfully and wantonly sell, deliver, or furnish low-point beer to an intoxicated person," and the court

36. *Id.*
37. *Id.*
38. Boyle v. ASAP Energy, Inc, 408 P.3d 183, 190 (Okla. 2017).
39. Tomlinson v. Love's Country Stores, Inc., 854 P.2d 910, 915 (Okla. 1993). One year later, the court reaffirmed that commercial vendors have a duty to refrain from selling beer to persons under the age of twenty-one, regardless of the place of consumption. Mansfield v. Circle K. Corp., 877 P.2d 1130, 1133 (Okla. 1994).
40. Flores v. Exprezit! Stores 98–Georgia, LLC, 713 S.E. 2d 368 (Ga. 2011), *overruled in part by* Phillips v. Harmon, 774 S.E.2d 596 (Ga. 2015). According to the Supreme Court of Georgia, when selling alcohol to consumers, a convenience store employee has the opportunity to see the manner in which the customer arrives and departs. *Id.* at 371. Therefore, the employee can observe whether the person will be operating a motor vehicle. *Id.* The court reasoned that because the store seller has these opportunities, selling alcohol to an intoxicated customer creates a foreseeability that this customer will drive a vehicle while intoxicated and ultimately injure an innocent third party. *Id.*
41. *Boyle*, 408 P.3d at 191.
42. *Id.* at 193.
43. *Id.*

adopted the reasonable care standard from negligence jurisprudence, requiring plaintiffs to show the vendor "knew or should have known" of the purchaser's intoxicated state.[44] The court stated that because it has made clear that a civil dram shop claim is a negligence-based action, a vendor's conduct must avoid creating "an *unreasonable* risk of harm to others who may be injured by the person's impaired ability to operate a motor vehicle."[45] The majority stated that using a reasonableness standard creates no vagueness in the law regarding vendors' standards.[46]

Finally, the majority stated that allowing this action against Fast Lane does not establish a new liability regime in Oklahoma.[47] According to the court, this statutory duty was previously construed in *Brigance*, *McGee v. Alexander*,[48] and *Mansfield v. Circle K. Corp.*[49] In *McGee*, the duty was enforced against a vendor who served adults alcohol for on-premises consumption.[50] In *Mansfield*, the court applied the statutory duty against a vendor serving minors for off-premises use.[51] The court used these two cases to determine that, taken together, a commercial alcohol vendor should have easily predicted this duty would apply to sales made to intoxicated persons for off-premises use.[52] The court concluded that the statutory duty applies to the commercial sale of alcohol to clearly intoxicated customers for off-premises use.[53]

IV. COMMENTARY

Oklahoma has never extended dram shop liability to facts such as these.[54] "[T]he majority expand[ed] the doctrine of dram-shop liability in a way that cannot be squared with th[e] doctrine's roots and rationales."[55] The *Boyle* court created a common law dram shop cause of action rooted in negligence.[56] According to the court, a

44. *Id.* ("*It is negligence* to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor *knows or should know* that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.") (quoting RESTATEMENT (SECOND) OF TORTS § 308 (1965)).
45. *Id.* (quoting Brigance v. Velvet Dove Rest., Inc., 725 P.2d 300, 305 (Okla. 1986)).
46. *Id.*
47. *Boyle*, 408 P.3d at 194.
48. 37 P.3d 800 (Okla. 2001).
49. 877 P.2d 1130 (Okla. 1994); *Boyle*, 408 P.3d at 194.
50. McGee v. Alexander, 37 P.3d 800, 808 (Okla. 2001).
51. Mansfield v. Circle K. Corp., 877 P.2d 1130, 1133 (Okla. 1994).
52. *Boyle*, 408 P.3d at 194.
53. *Id.*
54. *Id.* at 198 (Winchester, J., dissenting).
55. *Boyle*, 408 P.3d at 199 (Wyrick, J., dissenting).
56. *Id.* at 200.

commercial vendor could reasonably foresee the risk of harm to others resulting from selling alcohol to intoxicated persons for *on-premises* consumption.[57]

This decision is, in many ways, a large departure from the common law of negligence.[58] This newly created duty generates significant uncertainty for sellers who now lack clear notice as to what the law requires them to do.[59] According to the statute, a vendor shall not "knowingly, willfully and wantonly" sell to the visibly intoxicated.[60] This decision expands the statutorily created duty by prohibiting a vendor from selling alcohol to a "noticeably intoxicated" person.[61] It eliminates the "knowingly" component and consequently lowers the standard to those capable of being noticed as intoxicated, even if the vendor does not actually notice an individual's apparent state of intoxication.[62]

The new cause of action disregards the common-law negligence[63] requirement that the duty violation be the proximate cause of the injury.[64] Traditionally, proximate cause is "the efficient cause that sets in motion the chain of circumstances leading to an injury."[65] Instead, the court disposed of the requirement that "a plaintiff must still show the illegal sale of alcohol led to the impairment."[66] The standard for proving liability of the vendor now requires only that a sale be made to one who was apparently intoxicated and later caused an injury to another member of the public.[67] The decision eliminates any need to show that the sale played any part in the intoxication of the customer and in the subsequent accident.[68]

In Colorado, a state with a long history of common law and statutory dram shop liability, an injured party must prove proximate causation on the part of the alcohol vendor.[69] That is, the alcohol vendor knowingly and willfully sold alcohol to a visibly intoxicated

57. *Brigance*, 725 P.2d at 304 (emphasis added).
58. *Boyle*, 408 P.3d at 200 (Wyrick, J., dissenting).
59. *Id.* at 201.
60. *Id.*; 37 Okla. Stat. Ann. § 247 (1996).
61. *Boyle*, 408 P.3d at 201 (Wyrick, J., dissenting).
62. *See id.*; *see also* 37 Okla. Stat. Ann. § 247.
63. Tomlinson v. Love's Country Stores, 854 P.2d 910, 915 (Okla. 1993). The elements of negligence are: "(1) the existence of a duty on the part of a defendant to protect the plaintiff from injury; (2) a violation of that duty; and (3) injury proximately resulting from the violation." *Id.*
64. *Boyle*, 408 P.3d at 201 (Wyrick, J., dissenting).
65. *Tomlinson*, 854 P.2d at 916.
66. *Boyle*, 408 P.3d at 201 (Wyrick, J., dissenting).
67. *Id.*
68. *Id.*
69. Build It & They Will Drink, Inc. v. Strauch, 253 P.3d 302, 307 (Colo. 2011).

patron.[70] Without establishing as much, proximate cause is not satisfied, and a commercial alcohol vendor cannot be held liable.[71] By eliminating the proximate cause requirement, the *Boyle* court effectively abandoned a significant portion of common law negligence requirements, in which the cause of action is deeply rooted.

Moreover, the court's extension of dram shop liability to include off-premises consumption creates an unwarranted potential liability for commercial vendors whose sales are consumed off-site.[72] In Kentucky, the dram shop may be liable only if its employees fail to perceive visible or apparent warning signs of intoxication.[73] This need for observation is why dram shop liability is not typically expanded as far as this court has done.

Unlike the on-premises bartender or server who is uniquely positioned to observe the condition of the customer and know whether that person should be cut off, a commercial vendor whose sales are consumed off-premises has exceptionally brief encounters with customers.[74] The store clerk is poorly situated to determine the customer's state of intoxication during these brief encounters.[75] The clerk has observed no physical alcohol consumption and has no idea how many drinks the customer has consumed or how quickly they were consumed.[76] Because the law prohibits alcohol consumption in a vendor's store[77] and in one's vehicle,[78] a commercial vendor should reasonably believe that the alcohol it sells will not be consumed until it reaches a place of legal consumption.[79] Therefore, the sale of alcohol for off-premises consumption wholly fails to provide any connection of the seller to the intoxication of the consumer.[80] These off-premises sales are a poor vehicle for identifying culpable parties

70. *Id.*

71. *Id.* The Colorado Supreme Court conceded that establishing proof of foreseeability is not necessary to prove, as long as an injured party can show there was a willfully and knowingly made sale to an intoxicated person. *Id.* at 307–08.

72. *Boyle*, 408 P.3d at 201 (Wyrick, J., dissenting).

73. Carruthers v. Edwards, 395 S.W. 3d 488, 492 (Ky. Ct. App. 2012).

74. *Boyle*, 408 P.3d at 201 (Wyrick, J., dissenting).

75. *Id.*

76. *Id.*

77. *See* 37 Okla. Stat. § 537(A)(8) (2011) ("No person shall: . . . [d]rink intoxicating liquor in public except on the premises of a licensee of the Alcoholic Beverage Laws Enforcement Commission who is authorized to sell or serve alcoholic beverages by the individual drink or be intoxicated in a public place").

78. *See* § 537(A)(8) ("No person shall . . . [k]nowingly transport in any vehicle upon a public highway, street or alley any alcoholic beverage except in the original container which shall not have been opened and the seal upon which shall not have been broken and from which the original cap or cork shall not have been removed").

79. *Boyle*, 408 P.3d at 202 (Wyrick, J., dissenting).

80. *Id.*

and develop the potential for "arbitrary impositions of liability."[81] This extension of liability ultimately allows commercial vendors to be held liable when they have no causal nexus to either intoxication or the subsequent drunken accident.[82]

Other courts have correctly determined that allowing for a claim against a vendor who sells solely for off-premises consumption would unnecessarily extend dram shop liability.[83] Issues of caution, foreseeability, and breach of duty are far more complex and much less certain if the liquor is not consumed on the premises.[84] In Ohio, the only cause of action an injured party has against a commercial vendor who sells for off-premises consumption is when the vendor or permit holder knowingly sells to a visibly intoxicated or underage person.[85] Likewise, a Florida appellate court determined that dram shop liability should not be expanded to create a cause of action against commercial vendors who sell unopened containers to adults for off-premises consumption.[86]

The Oklahoma statute imposes liability on those who "knowingly, willfully and wantonly sell" alcohol to an intoxicated person.[87] Unlike its counterpart courts who refuse to extend liability to commercial vendors whose sales are consumed off-premises, the majority completely abandons the knowledge component in making its determination.[88] This creates an unreasonable, arbitrary standard that could impose liability on a vendor for selling one beer to a person the vendor has no reason to believe is intoxicated. Following this decision, the proximate cause requirement is seemingly eliminated.[89] This decision would create potential liability on the part of the vendor who lacked knowledge and is not the proximate cause of an accident if a person, intoxicated or not while on the premises, causes a subsequent drunken accident.

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81. *Id.* at 201–02.

82. *Id.* at 202.

83. *See* Eddy v. Casey's Gen. Store, Inc., 485 N.W.2d 633, 637 (Iowa 1992). The Iowa court determined that a vendor must sell and serve an intoxicated person before liability could attach. *Id.* Iowa did, however, have a much more detailed dram shop statute. *See* Iowa Code § 123.92.

84. *See* Snodgras v. Martin & Bayley, Inc., 204 S.W.3d 638, 640–41 (Mo. 2006).

85. Johnson v. Montgomery, 86 N.E.3d 279, 282 (Ohio 2017).

86. Persen v. Southland Corp., 640 So. 2d 1228, 1230 (Fla. Dist. Ct. App. 1994). The court refused to extend the dram shop doctrine, intended to create liability for consumption on a vendor's premises, to include liability for vendors who sell solely for off-premises consumption. *Id.*

87. *See* 37 Okla. Stat. § 247 (1996).

88. *See Boyle*, 408 P.3d at 197.

89. *See Id.* at 197–98.

V. CONCLUSION

The court's decision simply cannot stand, for two reasons. First, the decision to extend dram shop liability significantly departs from traditional negligence. By obviating the requirement to show proximate cause, the court has opened the door for widespread litigation against commercial alcohol vendors, who will not be able to provide a strong defense. Second, commercial vendors who sell for off-premises consumption lack the ability to determine the level of intoxication of a certain individual. Based on the nature of their business and the brief encounters with each individual consumer, vendors do not have substantial enough interaction to make a legitimate determination of each consumer's level of intoxication. A vendor who sells for off-premises consumption is wholly different from a vendor who sells for on-premises consumption, and the decision to treat them as similar is inherently flawed.