Can Friends Still Let Friends Drive Drunk?

A look at social host liability in Texas.

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A NEW CASE FROM THE 14TH COURT OF APPEALS COULD OPEN THE DOOR FOR NEGLIGENT SOCIAL HOSTS TO BE LIABLE TO THEIR INTOXICATED GUESTS.[1]

A recent report from the *Houston Chronicle* shows that Harris County consistently leads the nation in alcohol-related fatalities.[2] Despite these findings, Texas has had a firmly established rule since 1993 that social hosts who serve alcohol to intoxicated guests will not be held liable if their guests later leave and injure themselves or others.[3] The Texas Supreme Court has made it clear that unless the Legislature creates a statutory cause of action for social host liability, this rule in Texas will remain unchanged.[4] Recently, however, the 14th Court of Appeals has held that injured parties may be able to recover from negligent social hosts under a negligent undertaking theory.[5] This article will examine the history of social host liability in Texas with an emphasis on the reasoning of the Texas Supreme Court that underlies the theory. Then, the article will examine the new case from the 14th Court of Appeals, along with cases from other jurisdictions that have implemented negligent undertaking theories of social host liability. Finally, the article will surmise what impact a negligent undertaking theory of liability could have on the landscape of social host law in Texas.

THE HISTORY OF SOCIAL HOST "NON-LIABILITY" IN TEXAS

The issue of social host liability in Texas began in 1987 with the enactment of the Texas Dram Shop statute. The statute creates a civil cause of action that injured persons can bring against alcohol providers, i.e. "Dram Shops," who knowingly serve alcohol to intoxicated persons.[6] The statute applies only to "providers," which are persons or establishments that sell alcohol through a license or permit.[7] Initially, the Senate amended the Dram Shop bill to include social hosts within the definition of "providers"; however, this version of the bill was rejected by the House. The Dram Shop bill that eventually became law does not include any provisions for social host liability.[9] The Texas Supreme Court has used this legislative history to significantly shape its interpretation of social host liability in Texas.

The landmark Texas case on social host liability came in 1993 with *Graff v. Beard*, where the Texas Supreme Court held that social hosts owe no statutory or common law duty to third parties injured by their intoxicated adult guests.[10] In *Graff*, Houston Moos left a party hosted by the Graffs in an intoxicated condition and subsequently injured Brett Beard.[11] Beard sued the Graffs under a common law theory of social host liability.[12] The 4th Court of Appeals held that a social host has a duty to stop serving alcohol to an intoxicated guest the host knows will be driving.[13] The court reasoned that the foreseeability of the risk that intoxicated driving posed to the general public warranted imposing a common law duty on social hosts.[14] This holding mirrored previous Texas case law, which held that foreseeability of the risk is the most important factor to consider when a court creates a common law duty.[15] The Texas Supreme Court reversed this holding, basing its decision on two factors.[16] First, because the House rejected the Dram Shop bill that included social host liability, the court reasoned that the Legislature did not intend for there to be a statutory cause of action against negligent social hosts.[17] Second, the court held that questions of duty also turn on "whether a right to control the actor whose conduct precipitated the harm exists."[18] Thus, because the Legislature did not create a statutory cause of action against social hosts and a social host is under no legal duty to control the conduct of his or her guests, the court refused to create a common law duty against social hosts.[19]

Since *Graff*, the Texas Supreme Court has refused to extend liability to negligent social hosts in two more cases: *Smith v. Merrit* and *Reeder v. Daniel*. The reasoning in both of these cases is also derived from the language and legislative history of the Dram Shop statute.

In *Smith*, the court held that there was no liability for social hosts who serve alcohol to persons 18 years of age or older.[20] There, the plaintiffs argued that *Graff* was not binding because the social host served alcohol to a guest who was 19 years old and thus below the legal drinking age in Texas.[21] The court denied this proposition and held that *Graff* was still valid.[22] The court based its decision on both the wording and legislative history of the Dram Shop statute. The Dram Shop statute states that it is "the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older," and that "the liability of providers . . . is in lieu of common law or other statutory law warranties and duties of providers of alcohol."[23] Also, as previously noted, the legislative history of the Dram Shop statute indicates that the House rejected a version of the bill that included social host liability.[24] The court reasoned that because the Dram Shop statute is the exclusive cause of action for persons aged 18 years of age or older against commercial providers and the legislative history of the Dram Shop statute indicates that the Legislature did not intend to impose statutory liability upon negligent social hosts, the Legislature did not intend for there to be common law liability against social hosts who serve persons 18 years of age or older.[25] The question of whether or not social host liability should be imposed on hosts who serve alcohol to true minors, persons under the age of 18, was not addressed until four years later in the case of *Reeder v. Daniel*.

In *Reeder*, the court held that there is no common law cause of action against a social host who makes alcohol available to persons under age 18.[26] In that case, Andrew Daniel was struck in the face by a 17-year-old party guest who had been served alcohol.[27] Daniel advanced several theories of liability against the social hosts including a theory of negligence per se under a penal portion of the Alcoholic Beverage Code.[28] The court refused to extend liability to social hosts under this theory.[29] Because the Texas Alcoholic Beverage Code is bifurcated, the penal provisions of the code, which impose criminal liability on persons that serve alcohol to minors, are located in a different section than the Dram Shop statute.[30] The court reasoned that because the Legislature did not create a statutory cause of action against social hosts when it enacted the Dram Shop statute, it would be inappropriate to impose civil liability under a theory of negligence per se based on a penal statute located within the same code.[31] The court bolstered this argument by citing to other jurisdictions that had declined to extend social host liability out of deference to the Legislature, including: Washington, Nevada, Kansas, Nebraska, and Illinois.[32]

After *Reeder*, the Legislature amended the Dram Shop statute by adding a civil cause of action against adult social hosts who serve alcohol to true minors, persons under the age of 18.[33] Since the Dram Shop statute was amended, the Texas Supreme Court has not issued any

new opinions on social host liability. It seemed that the contours of social host liability were firmly established by the court: no liability for social hosts unless a cause of action is explicitly stated in the Dram Shop statute. Recently, however, the long-standing Texas tradition of non-liability for social hosts was brought into question by the 14th Court of Appeals.

A NEW APPROACH TO SOCIAL HOST LIABILITY?

The 14th Court of Appeals has recently held that under a negligent undertaking theory, social hosts may be liable to persons injured by their drunken guests.[34] In the case of *Plunkett v. Nall*, Plunkett attended a New Year's Eve party at the Nalls' home.[35] To discourage drunk driving, the Nalls required any guests remaining at midnight to spend the night; however, the Nalls did not take car keys away from the guests or perform any other actions to enforce this rule.[36] At 2 a.m., a drunken party guest left the Nalls' home.[37] When Plunkett attempted to dissuade the guest from leaving, he was hit by the guest's car.[38] Plunkett sued the Nalls for both negligence and negligent undertaking.[39] The Nalls filed a motion for summary judgment asserting that they owed no duty to Plunkett under a social host liability theory, and the trial court granted the motion.[40] The 14th Court of Appeals reversed and held that though the Nalls properly moved for summary judgment on the negligence claim, they failed to move for summary judgment on the negligent undertaking claim.[41] The court specifically pointed out that the concept of social host liability is distinctly different from a negligence claim that imposes a duty through a voluntary undertaking theory.[42] Essentially, an assertion that "there is no liability for social hosts in Texas" is enough for summary judgment on a claim for negligence, but it is not enough on a claim for negligent undertaking.[43] This ruling suggests that Texas social hosts may not be entirely shielded from liability; but, because the court simply denied the Nalls' motion for summary judgment, the potential contours of a negligent undertaking theory of liability in the social host context are unclear. The court however did explicitly hold that even though a social host has no duty to prevent intoxicated guests from driving, once a social host voluntarily undertakes to prevent intoxicated guests from driving, there could be a duty to act with ordinary care.[44]

This is not the first time the 14th Court of Appeals has allowed an injured intoxicated person to recover damages under a negligent undertaking theory. In *Venetoulias v. O'Brien*, the court held a bar owner liable for the damages an intoxicated woman incurred when she wrecked her car.[45] There, the bar owner encouraged a woman to drink by promising her a ride home at the end of the night.[46] She obliged and drank 15 alcoholic beverages over the course of four hours.[47] At the end of the night, the bar owner asked the woman to accompany him to another party and made an advance.[48] When the woman refused, he put her in her car, started her car's ignition, and left.[49] The 14th Court of Appeals found that the bar owner had a duty to arrange for transportation for the woman.[50] According to the court, "if a party negligently creates a situation, then it becomes his duty to do something to prevent injury to others if it reasonably appears . . . that others . . . may be injured thereby."[51] The woman began to consume alcohol based on the bar owner's promise of a ride home. Thus, the bar owner negligently created the situation, and he did not act reasonably by placing the woman in her car with the keys in the ignition.[52]

The *Venetoulias* case lends insight into the viability of the negligent undertaking theory of social host liability in Texas by proving that traditional Texas social host non-liability and a negligent undertaking theory of liability for social hosts may be able to co-exist. The theory of social host non-liability first asserted in the landmark case of *Graff* was bolstered by two assertions: (1) the Legislature demonstrated its intent for there to be no common law

social host liability when it passed the Dram Shop statute; and (2) questions of duty turn on whether a right to control the actor whose conduct precipitated the harm exists.[53] Conversely, when the 14th Court of Appeals imposed a duty based on a negligent undertaking theory of liability in *Venetoulias*, it cited foreseeability of the risk of injury as its primary consideration.[54] Even though *Venetoulias* was decided after *Graff*, it used the same reasoning that Texas courts had followed before the *Graff* decision.[55] This was also the same reasoning that the Texas Supreme Court declined to follow in *Graff*.[56] Thus, if the 14th Court of Appeals extends social host liability using the negligent undertaking theory from *Venetoulias*, one of two distinct conclusions must be drawn. Either a negligent undertaking theory of social host liability is a direct violation of the court's reasoning in *Graff*, or a negligent undertaking theory of social host liability can be distinguished from traditional social host non-liability and become its own category of case law, distinct from *Graff* and its progeny.

When the Texas Supreme Court decided not to extend social host liability to minors in *Reeder*, the court partially based this decision on the holdings of courts from other jurisdictions.[57] One of the states the court cited to was Illinois.[58] If the court looks to Illinois again for guidance, it may decide that traditional social host non-liability and a negligent undertaking theory of liability for social hosts could co-exist in Texas.

NEGLIGENT UNDERTAKING LIABILITY IN ILLINOIS

Illinois, like Texas, interprets its Dram Shop statute so that there is absolutely no civil cause of action against social hosts; however, the Illinois Supreme Court recently recognized a negligent undertaking theory of liability against social hosts.[59] The landmark case for social host liability in Illinois is *Charles v. Seigfried*. The *Charles* case in Illinois is equivalent to the *Graff* case in Texas; it is a pioneer case that affirmatively establishes no common law social host liability in Illinois.[60] Since *Charles*, the Illinois Supreme Court has held that negligent undertaking is a viable theory of liability against social hosts in two separate cases: *Wakulich v. Mraz* and *Bell v. Hutsell*.[61]

In *Wakulich*, social hosts provided alcohol to the plaintiff's daughter who later began vomiting and became unconscious.[62] The hosts put a pillow under her head to prevent her from aspirating but did not contact her parents or seek any kind of medical care.[63] The plaintiff's daughter died the next day.[64] When the plaintiff pled negligent undertaking as a theory of liability against the social hosts, the defendants argued that plaintiff's assertion of a negligent undertaking theory was simply a way to circumvent the rule against social host liability from *Charles*.[65] The Illinois Supreme Court rejected this argument and held that the theories of social host non-liability and a voluntary undertaking theory of liability against a social host could co-exist.[66] This was possible because the liability of the defendants under a negligent undertaking theory was not contingent upon their status as social hosts.[67] Instead, liability arises "by virtue of their voluntary assumption of a duty to care for [the plaintiff]."[68] In *Bell*, the court again affirmed its reasoning in *Wakulich*.[69] In Illinois, both social host non-liability and a negligent undertaking theory of liability can be applied consistent with one another because liability does not arise solely because a party is a social host.[70] Instead, liability arises from duties that social hosts voluntarily undertake.

Even though the 14th Court of Appeals has stated that negligent undertaking is a viable theory of liability against social hosts, it is still unclear just how far this theory could extend in Texas.

FUTURE IMPLICATIONS FOR SOCIAL HOSTS IN TEXAS

Even though the 14th Court of Appeals has stated that negligent undertaking is a viable theory of liability against social hosts, it is still unclear just how far this theory could extend in Texas. In its opinion in *Plunkett*, the court specifically declined to say whether or not Plunkett's claim had any chance of succeeding under a negligent undertaking theory of liability.[71] The only guidance given by the court was the applicable rule of law for negligent undertaking in a social host situation, which is Section 323 of the Restatement (Second) of Torts.[72] The Texas Supreme Court generally adopted this section of the Restatement as the standard for negligent undertaking liability in *Torrington v. Stutzman*.[73] There, the court created a three-step test, whereby to establish negligent undertaking a plaintiff must show: (1) the defendant undertook services necessary for the plaintiff's protection; (2) the defendant failed to exercise reasonable care in performing those services; and (3) the plaintiff relied upon the defendant's performance or the defendant's per-

formance increased the risk of harm.[74] The 14th Court of Appeals restated this test as the standard applicable in the social host context.[75] However, there are no Texas cases on point that apply the Restatement test to a social host situation. Again, a look at some of the decisions from the Supreme Court of Illinois lends insight into the possible construction of the negligent undertaking theory of liability in Texas.

In *Bell v. Hutsell*, the Supreme Court of Illinois outlined the type of situations where social hosts would *not* be held liable under the negligent undertaking theory. In *Bell*, the defendant parents' son hosted a party at his parents' home attended by underage teenagers who were drinking alcohol.[76] Although the parents did not provide the alcohol to the teenagers, the parents knew the teenagers were drinking.[77] The parents spoke to a number of the partygoers who had been drinking and requested that they not drive after the party.[78] The plaintiff, one of the underage partygoers, had been drinking in plain view of the parents.[79] He later drove away, crashed his car, and died.[80] The court in *Bell* once again affirmed its holding in *Wakulich* that negligent undertaking is a viable theory of liability, separate and distinct from the concept of social host "non-liability" in Illinois.[81] However, using the test from Section 323 of the Restatement (Second) of Torts, the court found that the parents were not liable under a negligent undertaking theory.[82] First, under the Restatement test the duty undertaken must be to protect the plaintiff.[83] The court held that in the specific factual situation of *Bell*, to satisfy the duty prong the defendants would have had to take "affirmative action . . . in an attempt to *prohibit* possession of alcohol, the ultimate objective of the undertaking."[84] The defendants never tried to confiscate alcohol or stop the party, they only monitored, and that in itself is not an undertaking necessary to ensure the protection of the teenagers.[85] Moreover, the court stipulated that even if the parents had both incurred a duty and negligently performed that duty, there would still be no liability because there was no proof that the monitoring of the teenagers "increased the harm" or evinced "reliance or change of position."[86]

The Illinois Supreme Court's opinion in *Bell* demonstrates a narrow interpretation of its negligent undertaking theory of social host liability. The court distinguished *Bell* from *Wakulich*, the case where the court first applied the negligent undertaking theory.[87] The court emphasized that in *Wakulich*, "the defendants' affirmative conduct, amounting to an assertion of control over an inebriated and significantly impaired person, increased the risk of harm to that person and/or created a risk of harm to others."[88] The court thus showed that to succeed under a negligent undertaking theory of liability there must be two distinct factors present: (1) affirmative conduct; and (2) an increase of the risk of harm or reliance and change of position. To be held liable under a negligent undertaking theory of liability, social hosts must do more than just monitor and observe their guests. There must be affirmative action to prevent the conduct. Furthermore, by stipulating that the parents in *Bell* would still not be liable under a negligent undertaking theory even if they had taken affirmative action because they did not "increase the harm," the Illinois Supreme Court acknowledged the bizarre policy implications that could occur if a negligent undertaking theory was strictly applied in a *Bell* situation.[89] The court notes that "the imposition of a duty and liability in this situation would only serve as a deterrent to those who would consider volunteering assistance to others."[90] It makes no sense for a jurisdiction that strictly absolves social hosts of liability to penalize social hosts who later "cut-off" drunken party guests or put an end to out-of-control soirees. Thus, even if affirmative action is taken, that action must either be relied upon by the guest or increase the risk of harm to the guest to sustain a claim for liability.

The interpretations of the negligent undertaking liabili-

ty theory in *Wakulich* and *Bell* lend insight into how the Restatement test could be applied in future Texas social host cases. First, it is important to note that unlike Illinois, the Texas Dram Shop statute holds social host adults liable for damages caused by the intoxication of minors under the age of 18.[91] If the *Bell* case had occurred in Texas, the parents would be liable under our Dram Shop statute. That aside, it is still clear that if a host serves alcohol to a guest until he becomes helplessly intoxicated, negligently cares for that guest and also increases the guest's risk of harm by excluding him from any other care, there would almost certainly be liability through the negligent undertaking theory.[92] However, if a social host merely monitors guests or even "cuts-off" a party guest who has had too much to drink, liability is much more tenuous.[93] In a *Plunkett* situation in which the social hosts enact a policy against drunk driving and then negligently enforce it, the outcome is much murkier. First, liability depends on whether or not the policy rose to the level of an affirmative act or undertaking. Even if this is met, it is difficult to argue that the hosts "increased the harm" to guests by allowing them to sleep over after the party. Instead, the plaintiff will have to prove that he relied on the defendant's performance of the undertaking to impose liability. The liability of the social hosts turns on the guests attitude and reliance upon "rules" the social hosts create to protect the guests.

CONCLUSION

Since 1993, the holdings from the Texas Supreme Court have consistently shown that there is no social host liability in Texas. For a negligent undertaking theory of social host liability to survive, the court must find that this new cause of action can be distinguished from our current case law. If the court looks at the reasoning of the 14th Court of Appeals as well as the case law in Illinois, it will find that social host non-liability and a negligent undertaking theory of liability can be applied consistent with one another. Moreover, a narrow construction of this theory will avoid negative policy implications while still allowing those injured by negligent social hosts a much needed remedy under the law. Even though social hosts are generally shielded from liability in Texas, under certain situations, friends who let friends drive drunk could possibly find themselves liable through a negligent undertaking theory. **TBJ**

NOTES

1. *See Plunkett v. Nall*, No. 14-11-00356-CV, 2012 WL 2389602 (Tex. App.—Houston [14th Dist.] June 26, 2012, pet. filed).
2. James Pinkerton, *'Ticking time bomb' at the wheel*, HOUS. CHRON., Jul. 15, 2012, at A1.
3. *See Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993) (declining to extend a common law duty to social hosts).
4. *See Reeder v. Daniel*, 61 S.W.3d 359, 364 (Tex. 2001) (stating that the court will not disturb the Legislature's Dram Shop law by creating a common law cause of action).
5. *See Plunkett*, 2012 WL 2389602 at *1.
6. *See* Tex. Alco. Bev. Code Ann. § 2.02 (West 2005).
7. *Id.* at § 2.01.
8. H. Study Group, Bill Analysis, Tex. H.B. 1652, 70th Leg., R.S. (1987).
9. *See id.*; Tex. Alco. Bev. Code Ann. § 2.02 (West 2005).
10. 858 S.W.2d 918, 918 (Tex. 1993).
11. *Id.*
12. *Id.*
13. *Beard v. Graff*, 801 S.W.2d 158, 159–163 (Tex. App.—San Antonio 1990), *rev'd*, 858 S.W.2d 918 (Tex.1993).
14. *See Id.* at 163.
15. *See El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987) (based on foreseeability of the risk, an alcoholic beverage licensee has a common law duty to injured third parties); *see also Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) (foreseeability of the risk is the foremost and dominant consideration when establishing duty).
16. *Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993).
17. *Id.* at 919.
18. *Id.* at 920.
19. *See id.* at 920–21.
20. 940 S.W.2d 602, 607 (Tex. 1997).
21. *Id.* at 605.
22. *Id.*
23. Tex. Alco. Bev. Code Ann. § 2.03 (West 2005).
24. H. Study Group, Bill Analysis, Tex. H.B. 1652, 70th Leg., R.S. (1987).
25. *See Smith*, 940 S.W.2d at 605.
26. 61 S.W.3d 359, 360–61 (Tex. 2001).
27. *Id.* at 361.
28. *Id.* at 360–61.
29. *Id.* at 362–63.
30. *Id.*
31. *Id.* at 363.
32. *Id.* at 363–64.
33. Tex. Alco. Bev. Code Ann. § 2.02 (West 2005).
34. *See* No. 14-11-00356-CV, 2012 WL 2389602, *1 (Tex. App.—Houston [14th Dist.] June 26, 2012, pet. filed).
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at *2–3.
41. *Id.*
42. *Id.*
43. *Id.*
44. *See id.*
45. 909 S.W.2d 236, 239 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd).
46. *Id.* at 240.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 242.
51. *Id.*
52. *Id.*
53. 858 S.W.2d 918, 919–20 (Tex. 1993).
54. *Venetoulias*, 909 S.W.2d at 241–42.
55. *Supra* note 15.
56. *Cf.* Randall O. Sorrels & Benny Agosto Jr., *Social Host Liability: Friends Can Let Friends Drive Drunk!*, 58 Tex. B.J. 560, 564 (1995) (the Texas Supreme Court's decision in *Graff* holding no duty for social hosts runs contrary to the reasoning of its earlier opinions that establish common law duties).
57. *Reeder v. Daniel*, 61 S.W.3d 359, 363–64 (Tex. 2001).
58. *Id.*
59. *See Wakulich v. Mraz*, 785 N.E.2d 843, 854 (Ill. 2003) (holding that negligent undertaking is a viable theory of liability against social hosts); *See Bell v. Hutsell*, 955 N.E.2d 1099, 1106–07 (Ill. 2011) (affirming the reasoning in *Wakulich* that negligent undertaking is proper cause of action against social hosts).
60. *See Charles v. Seigfried*, 651 N.E.2d 154, 159 (Ill. 1995) (holding that all causes of action for alcohol-related liability are pre-empted by the Dramshop Act, therefore there is no liability for social hosts).
61. *Supra* note 59.
62. *Wakulich*, 785 N.E.2d at 846.
63. *Id.*

64. *Id.*
65. *Id.*
66. *See id.* at 854.
67. *See id.*
68. *Id.*
69. *See Bell v. Hutsell*, 955 N.E.2d 1099, 1106–07 (Ill. 2001).
70. *See Id.* at 1106.
71. *See* No. 14-11-00356-CV, 2012 WL 2389602, *4 n.1 (Tex. App.—Houston [14th Dist.] June 26, 2012, pet. filed) (where the dissent specifically acknowledged that the court was only ruling on the pleading issue and was not ruling on whether or not Plunkett's negligent undertaking claim would be meritorious on the law).
72. *Id.* at *2.
73. 46 S.W.3d 829, 837–38 (Tex. 2000).
74. *Id.* at 838–39.
75. *Plunkett*, 2012 WL 2389602 at *2.
76. *Bell v. Hutsell*, 955 N.E.2d 1099, 1102 (Ill. 2011).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 1105–06.
82. *Id.* at 1108–09.
83. *Id.* at 1108.
84. *Id.*
85. *Id.* at 1108–09.
86. *Id.* at 1109.
87. *Id.* at 1109–10.
88. *Id.* at 1110.
89. *Id.* at 1109.
90. *Id.*
91. Tex. Alco. Bev. Code Ann. § 2.02 (West 2005).
92. *See supra* text accompanying notes 62–70.
93. *See supra* text accompanying notes 76–86.

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