



## Alerts

### Attorney Who Failed to Challenge Uncertainty in the Law Not Entitled to Dismissal

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*Lawyers for the Profession® Alert*

*L.D.G. Inc. v. Robinson, 290 P.3d 215 (Ala. 2012)*

#### Brief Summary

Defendant attorney represented plaintiff client, which owned and operated a bar, in a dram shop action arising out of the bar's having served alcohol to a visibly intoxicated patron, who later shot and killed a woman that night. The attorney did not pursue a third-party claim against the patron for allocation-of-fault purposes, and the bar was ultimately held liable for 100 percent of the resulting judgment. The subsequent legal malpractice action against the attorney was dismissed when the court found that the state of the law was unsettled at the time of the underlying trial. The Supreme Court of Alaska reversed, finding that where the law is unsettled, "there is at least a viable claim that the standard of care requires the attorney to advise a client to follow the reasonably prudent course of action in light of the uncertainty."

#### Complete Summary

The patron was convicted of first-degree murder for killing the deceased. The deceased's estate sued the client for wrongful death, alleging that it violated Alaska's dram shop act when it served alcohol to the patron while he was visibly intoxicated, proximately causing the death of the deceased. The client retained the attorney to defend the suit. The attorney did not seek to join the patron to the action or assert a third-party claim against him.

The case was tried to a jury, which found that an employee of the client had, with criminal negligence, allowed the patron to consume alcohol while he was drunk. The jury further found that it was more likely true than not that if the patron had not been drunk, he would not have killed the deceased. Despite these findings, the jury declined to find that the patron's intoxication was so important in bringing about the deceased's death that a reasonable person would regard it as a cause and attach responsibility to it. Consequently, it did not reach the question of damages.

The court granted the estate judgment notwithstanding the verdict, finding that fair-minded jurors could not conclude that the intoxication of the patron, who they found would not have killed the deceased but for that very intoxication, was not a substantial factor in the death. The court also noted that the problem "was

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exacerbated by a legal error of the defense” in failing to include the patron as a party for allocation of fault. The decision effectively attributed 100 percent of the fault to the client. After a trial on damages, the court entered judgment of \$945,911.95 against the client.

The client subsequently sued the attorney, alleging that his representation fell below the standard of care when he did not attempt to add the patron to the underlying action for allocation of fault. The attorney moved to dismiss for failure to state a claim, arguing that Alaska’s dram shop case law was unsettled as to whether alcohol sellers could apportion fault to consumers and that an attorney could not be liable for an error in judgment regarding an unsettled proposition of law. The lower court granted the motion, finding that the law was unsettled at the time of the trial and that, as a matter of law, the attorney did not breach his duty of care.

On appeal, the Supreme Court of Alaska agreed that the specific question facing the attorney – whether the client could make the patron a party for allocation of fault – was unsettled at the time of his representation. At that time, Alaska’s dram shop act provided that a bar owner could only be held liable for injuries resulting from the intoxication of a minor or a “drunken person.” Additionally, the only decision at that time that had analyzed fault allocation relative to the dram shop act was *Loeb v. Rasmussen*, 822 P.2d 914 (Ala. 1991). In that case, a store had negligently sold liquor to a minor, leading to an automobile accident. One year later, the minor committed suicide. The minor’s estate sued the store, leading the Supreme Court of Alaska to consider the relationship between the dram shop act and Alaska’s then recent adoption of comparative negligence. The Court held that a licensee who violates the dram shop act is not entitled to assert the comparative fault of a minor/consumer in a damage action resulting from the unlawful sale of alcohol. Notably, however, the Court expressly limited its holding with the caveat that, because *Loeb* did not involve multiple defendants, the court did not need to decide how the recent tort reform act, which had provided for pure several liability, affected the issue. The Court expressly reserved for future consideration “all issues related to multiple defendants.”

The attorney argued that *Loeb* was the governing law at the time he represented the client, but the Court determined that *Loeb* did not clearly establish the applicable law for two reasons: First, the holding in *Loeb* directly pertained only to minors. Second, at the time *Loeb* was decided, Alaska’s comparative negligence system retained joint and several liability, whereas, at the time of the attorney’s representation of the client, the law applied pure several liability, which was expressly reserved for future consideration. Thus, at the time of the attorney’s representation of the client, the Court had left unsettled the question of whether a defendant-licensee could bring a third-party complaint against a minor or intoxicated person for purposes of allocating fault.

The Court then discussed *Doe v. Hughes, Thorsness, Gantz, Powell & Brundin*, 838 P.2d 804 (Ala. 1992). In *Doe*, a couple hired a law firm to arrange their adoption of their biological child who had been born to a surrogate mother. Because the husband was part Native American, the firm became concerned about the impact of the Indian Child Welfare Act (ICWA) on the adoption, specifically that the act required that the adoptive parents obtain the surrogate mother’s consent. The firm had obtained the surrogate’s consent, but had failed to take additional steps to validate the consent under the ICWA because the firm was unsure whether the act actually applied to the case. Although the court accepted the surrogate’s consent to the adoption and terminated the surrogate’s parental rights, the surrogate later moved to vacate the decree on the grounds that her consent had not been obtained in conformity with the ICWA. The adoptive parents successfully defended the adoption, incurring significant costs doing so, and then sued the original law firm for malpractice, alleging that it had been negligent in failing to comply with the ICWA.

The Supreme Court of Alaska reversed summary judgment in favor of the law firm, finding that because the adoption was potentially subject to the consent requirements of the ICWA, “the risk in failing to obtain the biological mother’s consent to the adoption in conformity with the Act should have been clear to any attorney possessed of the required level of professional competence.” Thus, the court held that the attorney’s obligation included the “duty to advise the client of action the client should take in a given set of circumstances.” Because the firm had failed to advise the parents to obtain the surrogate’s valid consent, it had breached its duty of care. Thus, the Court declined to grant immunity to lawyers who committed an error in judgment with regard to unsettled law.

In this case, the Court found that where the law is unsettled, as it was here, “there is at least a viable claim that the



standard of care requires the attorney to advise a client to follow the reasonably prudent course of action in light of the uncertainty.” “[A] prudent defense lawyer would have considered attempting to add [the patron] as a defendant for fault allocation.” Thus, the attorney could not establish as a matter of law that his conduct could not amount to legal malpractice. The case was remanded for further proceedings consistent with the decision.

### **Significance of Opinion**

This case confirms that the simple fact that if an area of law is unsettled does not excuse an attorney from fulfilling his or her duty of care. It is incumbent upon the lawyer to follow the reasonably prudent course of action in light of the uncertainty in the law.

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