Uston v. Resorts International Hotel, Inc.
445 A.2d 370 (N.J. 1982)

PASHMAN, J.

[The Casino Control Commission upheld the casino's decision to exclude patron because he was "card counting." The Superior Court (Appellate Division) reversed the Commission's decision. The casino appealed. The New Jersey Supreme Court reviews the case *de novo*.]

Since January 30, 1979, appellant Resorts International Hotel, Inc. (Resorts) has excluded respondent, Kenneth Uston, from the blackjack tables in its casino because Uston's strategy increases his chances of winning money…under the current blackjack rules promulgated by the Casino Control Commission (Commission). However, Uston contends that Resorts has no common law or statutory right to exclude him because of his strategy for playing blackjack.

Kenneth Uston is…renowned for playing blackjack [and] card counting. Card counters keep track of the playing cards as they are dealt and adjust their betting patterns when the odds are in their favor. When used over a period of time, this method allegedly ensures a profitable encounter with the casino…

Resorts claimed that it could exclude Uston because it had a common law right to exclude anyone at all for any reason. The right of an amusement place owner to exclude unwanted patrons and the patron's competing right of reasonable access both have deep roots in the common law. In this century, however, courts have disregarded the right of reasonable access in the common law of some jurisdictions at the time the *Civil War Amendments* and *Civil Rights Act of 1866* were passed.

As Justice Goldberg noted in his concurrence in *Bell v. Maryland*, 378 U.S. 226 (1964):

> Underlying the congressional discussions and at the heart of the Fourteenth Amendment's guarantee of equal protection, was the assumption that the State by statute or by "the good old common law" was obligated to guarantee all citizens access to places of public accommodation. [378 U.S. at 296, Goldberg, J., concurring]

The current majority American rule has for many years disregarded the right of reasonable access, granting to proprietors of amusement places an absolute right arbitrarily to eject or exclude any person consistent with state and federal civil rights laws.

At one time, an absolute right of exclusion prevailed in this state, though more for reasons of deference to the noted English precedent of *Wood v. Leadbitter*, 13 M&W 838 (Ex.1845), than for reasons of policy. In *Shubert v. Nixon Amusement Co.*, 83 A. 369 (N.J. Sup.Ct. 1912), the former Supreme Court dismissed a suit for damages resulting from plaintiff's ejection from defendants' theater. Noting that plaintiff made no allegation of exclusion on the basis of race, color or previous condition of servitude, the Court concluded:

> In view of the substantially uniform approval of, and reliance on, the decision in *Wood v.*

> *Leadbitter* in our state adjudications, it must fairly be considered to be adopted as part of our jurisprudence, and whatever views may be entertained as to the natural justice or injustice of ejecting a theater patron without reason after he has paid for his ticket and taken his seat, we feel constrained to follow that decision as the settled law. [83 A. 369]

It hardly bears mention that our common law has evolved in the intervening 70 years. In fact, *Leadbitter* itself was disapproved three years after the *Shubert* decision by *Hurst v. Picture Theatres Limited*, 1 K.B. 1 (1914). Of far greater importance, the decisions of this Court have recognized that "the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property." *State v. Schmid*, 423 A.2d 615 (N.J. 1980).

State v. Schmid involved the constitutional right to distribute literature on a private university campus. The Court's approach in that case balanced individual rights against property rights. It is therefore analogous to a description of the common law right of exclusion. Balancing the university's interest in controlling its property against plaintiff's interest in access to that property to express his views, the Court clearly refused to protect unreasonable exclusions.

Schmid recognizes implicitly that when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises. That duty applies not only to common carriers, innkeepers, owners of gasoline service stations, or to private hospitals, but to all property owners who open their premises to the public. Property owners have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use.

No party in this appeal questions the right of property owners to exclude from their premises those whose actions "disrupt the regular and essential operations of the [premises]," or threaten the security of the premises and its occupants. In some circumstances, proprietors have a duty to remove disorderly or otherwise dangerous persons from the premises. These common law principles enable the casino to bar from its entire facility, for instance, the disorderly, the intoxicated, and the repetitive petty offender.

Whether a decision to exclude is reasonable must be determined from the facts of each case. Respondent Uston does not threaten the security of any casino occupant. Nor has he disrupted the functioning of any casino operations. Absent a valid contrary rule by the Commission, Uston possesses the usual right of reasonable access to Resorts International's blackjack tables. [Accordingly, we affirm.]

NOTES

The holding in *Uston* is a minority rule. The majority of states follow the traditional rule that imposes a duty to serve only on innkeepers and common carriers.