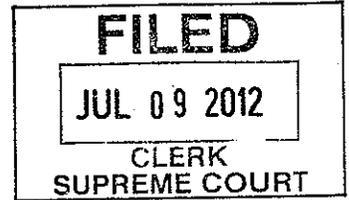


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2011-SC-000665



FORT MITCHELL COUNTRY CLUB

APPELLANT

v. **APPEAL FROM KENTON CIRCUIT COURT
CIVIL ACTION NO. 08-CI-3207
AND
APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-00813**

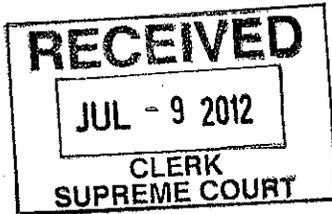
TIMOTHY LAMARRE, THERESA LAMARRE,
NATHAN LAMARRE, AND NICOLE LAMARRE

APPELLEES

BRIEF FOR APPELLEES

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above has been served by first class U.S. mail, postage prepaid, this 6th day of July, 2012, upon the Hon. Gregory M. Bartlett, Kenton Circuit Judge, Kenton County Judicial Center, 230 Madison Ave., Suite 701, Covington, KY 41011; William J. Kathman, Jr., Busald Funk Zevely, PSC, 226 Main Street, Post Office Box 6910, Florence, KY 41042; Tom Sweeney, Sweeney & Fiser PLLC, 2519 Ritchie Street, Crescent Springs, KY 41017; Donald L. Stepner, Adams, Stepner, Woltermann & Dusing, P.L.L.C., 40 West Pike Street, P. O. Box 861, Covington, KY 41012-0861; Mark G. Arnzen, Arnzen, Molloy & Storm, PSC, 600 Greenup Street, Post Office Box 472, Covington, KY 41012-0472.

Todd V. McMurtry

INTRODUCTION

This is a civil case in which Fort Mitchell Country Club ("FMCC") (1) served alcohol without an appropriate license, and (2) violated its liquor license by over-serving an intoxicated Michael Plummer alcohol, including illegally serving him a to-go bottle of champagne, which resulted in serious injury to Timothy LaMarre. Appellant FMCC has appealed the Court of Appeals' opinion reversing the Trial Court's grant of summary judgment. The LaMarres ask this Court to affirm the Court of Appeal's decision because: (a) the protections of the Dram Shop Act do not apply to a party that dispenses alcohol either without a license or in violation of its license; (b) the Appellant's motion for summary judgment was premature and granted before the LaMarres had an adequate opportunity to complete discovery, including producing a toxicologist's report on Mr. Plummer's level of intoxication; and (c) notwithstanding, the Trial Court erred in granting summary judgment because genuine issues of material fact exist as to whether FMCC employees knew or should have known that Mr. Plummer was intoxicated.

STATEMENT CONCERNING ORAL ARGUMENT

Appellees request oral argument. Appellees believe that oral argument may assist the Court in addressing the issue of statutory construction of the Dram Shop Act, in addressing the evidence in the record prohibiting summary judgment, and in addressing the premature grant of summary judgment.

COUNTERSTATEMENT OF POINTS AND AUTHORTIES

INTRODUCTION..... i

STATEMENT CONCERNING ORAL ARGUMENT ii

COUNTERSTATEMENT OF POINTS AND AUTHORTIES..... iii

COUNTERSTATEMENT OF THE CASE..... 1

I. FACTUAL BACKGROUND 1

II. PROCEDURAL BACKGROUND..... 6

III. LEGAL ARGUMENT 9

A. The Protections of the Dram Shop Act (KRS 413.241) are Not Available to FMCC as a Defense Against the LaMarres' Negligence Claims.9

 KRS 413.241.....9

1. FMCC Unlawfully Served Michael Plummer Alcohol and Violated its Permit to Sell Alcohol......10

 KRS 243.270.....10

 KRS 243.270.....11

 KRS 243.250.....11

 KRS 241.010.....11

 KRS 243.270.....12

2. FMCC cannot Shield Itself with the Dram Shop Act for the Repercussions of Unlawful Service that Violates its License.13

a. Statutory construction of the Dram Shop Act.13

Grayson Fraternal Order of Eagles v. Claywell, 736 S.W.2d 328 (Ky. 1987).....14

Grayson, 736 S.W.2d at 333 (1987)14

Autozone, Inc. v. Brewer, 127 S.W.3d 653,
655 (Ky. 2004)16

Rev. Cabinet v. O'Daniel, 153 S.W.3d 815,
819 (Ky. 2005)16

Public Service Com'n of Ky. v. Com., 320
S.W.3d 660, 666-67 (Ky. 2010).....16

Fox v. Grayson, 317 S.W.3d 1 (Ky. 2010)17

*Hardin Co. Fiscal Court v. Hardin Co. Bd.
of Health*, 899 S.W.2d 859, 862 (Ky. App. 1995)17

KRS 413.241(2)18

KRS 446.07019

Rev. Cabinet v. O'Daniel, 153 S.W.3d 815,
819 (Ky. 2005)19

Johnson v. Frankfort & C. R. R., 197
S.W.2d 432, 434 (Ky. 1946)20

O'Daniel, 153 S.W.3d at 81920

**b. Public policy strongly favors the LaMarres'
interpretation of the Dram Shop Act.**20

**c. The case law on dram shop liability referenced
by FMCC.**22

Grayson Fraternal Order of Eagles v. Claywell, 736
S.W.2d 328 (Ky. 1987).....22

Grayson, 736 S.W.2d at 333-34 (1987)23

Grayson, 736 S.W.2d at 333-34 (1987)24

Britton's, Admin. v. Samuels, 136 S.W.
143 (Ky. 1911)25

Waller's Admin. v. Collinsworth, 137
S.W. 766 (Ky. 1911)25

Grayson, 736 S.W.2d at 331-3225

<i>Waller's Admins.</i> , 137 S.W. at 766-67	26
d. FMCC's reliance on the unconstitutional section (1) of the Dram Shop Act should be disregarded.	26
KRS 413.241(1)	26
<i>Taylor v. King</i> , 345 S.W.3d 237, 243-44 (Ky. App. 2010)	26
<i>Taylor</i> , 345 S.W.3d at 243-44	27
KRS 413.241(1)	28
<i>White v. Rainbo Baking Co.</i> , 765 S.W.2d 26, 30 (Ky. App. 1989)	28
B. The Motion for Summary Judgment was premature, and the Trial Court Prematurely Granted it.	29
<i>Suter v. Mazyck</i> , 226 S.W.3d 837, 841 (Ky. App. 2007)	29
<i>Roberson v. Lampton</i> , 516 S.W.2d 838 (Ky. 1974)	30
<i>Suter</i> , 226 S.W.3d at 8	30
C The Legal Standard for Summary Judgment in Kentucky.	31
<i>Steelvest, Inc. v. Scansteel Service Center</i> , 807 S.W.2d 476, 483 (Ky. 1991)	31
<i>Hubble v. Johnson</i> , 841 S.W.2d 169, 171 (Ky. 1992)	31
<i>Steelvest</i> , 807 S.W.2d at 480	32
D Genuine Issues of Material Fact Exist and Preclude Summary Judgment.	32
<i>Scifres v. Kraft</i> , 916 S.W.2d 779 (Ky. App. 1996)	32
KRS 413.241(2)	33

1	Evidence Exists Showing that it is not Impossible for the LaMarres to Produce Evidence at Trial Establishing that Michael Plummer was Intoxicated when Served the To-Go Bottle of Champagne.	33
a	Amount of alcohol consumed.	33
	KRS 501.101	35
	KRS 189A.010	35
	<i>DeStock No. 14, Inc. v. Logsdon</i> , 993 S.W.2d 952 (Ky. 1999)	35
	<i>Hubble v. Johnson</i> , 841 S.W.2d 169, 171 (Ky. 1992)	36
b	The Police Officer did not Speak with Michael Plummer.	37
2	Evidence Exists Showing that Michael Plummer was Intoxicated after Consuming a Portion of the To-Go Bottle of Champagne.	39
3	FMCC's Arguments to the Contrary are Erroneous.	40
	KRE 401	41
IV.	CONCLUSION	42

APPENDIX

Index of the Appendix

- A. Court of Appeals Opinion, *LaMarre, et al. v. Ft. Mitchell Country Club*, Case No. 2010-CA-000813-MR.

COUNTERSTATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On Saturday, September 13, 2008, Michael Plummer called Fort Mitchell Country Club ("FMCC") to make a dinner reservation for himself, his wife Kimberly, and Timothy and Theresa LaMarre. At that time Mr. Plummer spoke with the bartender, Charles Dinolfi, and instructed him to remove two bottles of champagne from Mr. Plummer's wine locker to chill for their dinner. (Dep. of M. Plummer at 103-104)¹ The Plummers drove their modified golf cart vehicle to the LaMarre home, and together, the Plummers and LaMarres drove one city block to FMCC. They arrived for dinner at approximately 7:50 p.m. to 7:55 p.m. (Dep. of Mrs. LaMarre at 189)

Mr. Plummer parked the vehicle on the club's lawn next to the gazebo and in close proximity and plain view of their reserved table and the FMCC employees. (Dep. of M. Plummer at 113-114; *see also* Dep. of A. Marcum at 58-59) Immediately upon arrival, Mr. Plummer obtained one bottle of wine and a corkscrew from Mr. Dinolfi, opened the wine, and took it to his table. (Dep. of C. Dinolfi at 11-14, 16) At Mr. Plummer's request, Mr. Dinolfi then took one bottle of Mr. Plummer's champagne to the table, uncorked the champagne, and poured Mrs. Plummer a glass. (Dep. of C. Dinolfi at 16-17) Mrs. Plummer had brought a champagne glass from her home for her personal use. (*Id.*) At that time, Mr. Dinolfi also brought three wine glasses to the table; one each for Mr. Plummer, Mr. LaMarre, and Mrs. LaMarre. (Dep. of C. Dinolfi at 18)

¹ The Kenton Circuit Court Clerk attached the individual depositions to the record. They do not have a Record page number, so the LaMarres cite to the transcript number for deposition citations.

Mr. and Mrs. LaMarre were drinking wine; Mr. Plummer was drinking wine; and Mrs. Plummer was drinking champagne. (Dep. of M. Plummer at 119) Mr. LaMarre had recently returned from Italy, where he traveled for his work. During dinner, Mr. LaMarre took a carry-out meal home to his son. (Dep. of M. Plummer at 139-140) There he retrieved a bottle of wine recently purchased in Italy. (Dep. of M. Plummer at 144) He brought it back to FMCC to consume with dinner, presenting it to Mr. Plummer as a gift. (Dep. of Mr. LaMarre at Vol. I, 8) A short time later, January Boaz, a server, walked out to the gazebo. The Plummers and LaMarres were sitting at one of the tables. They asked Ms. Boaz to get a corkscrew to open the bottle of wine—this would be the second bottle of wine served. (Dep. of J. Boaz at 10-11) Ms. Boaz opened the bottle and poured wine for Mr. Plummer and Mr. LaMarre. (Dep. of J. Boaz at 14-15) At that time, an empty bottle of wine already sat on their table in plain view of the FMCC employees. (Dep. of J. Boaz at 14)

The Plummers and LaMarres closed their checks at 8:59 p.m. By the time that dinner was over, Mrs. Plummer had consumed a bottle of champagne, and the LaMarres and Mr. Plummer together consumed two bottles of red wine. (Dep. of M. Plummer at 151) After closing his check and while on his way out, Mr. Plummer obtained the previously chilled bottle of champagne from Mr. Dinolfi. (Dep. of M. Plummer at 126) This was the second bottle of champagne served. At that time he handed Mr. Dinolfi an empty bottle of wine, and Mr. Dinolfi exchanged it for the bottle of champagne to-go. (Dep. of C. Dinolfi at 31) Mr. Plummer took the champagne and gave it to Mrs. Plummer, who carried it out of FMCC with her. Mr. Plummer did not want to put it back in the locker. (Dep. of M. Plummer at 126) FMCC routinely permitted patrons, including

the Plummers, to walk home with glassware from the club (Dep. of M. Plummer at 108-109), and FMCC apparently permitted Mr. Plummer and/or other members of the party to take wine or champagne glasses with them that evening, which they used to consume the to-go champagne (*Id.* at 174-76).

Mrs. LaMarre understood, pursuant to the conversation at dinner, that they were going back to the Plummers' house. (Dep. of Mrs. LaMarre at Vol. I, 229) The LaMarres had agreed to travel a short distance in the vehicle to the Plummers' home. Mrs. LaMarre thought that they would pull in the Plummers' driveway and socialize a little more with the Plummers while they checked on the girls. (Dep. of Mrs. LaMarre at 232) The Plummers had their daughter's volleyball team over to their home to spend the night. (Dep. of M. Plummer at 100-101) As well, the Plummers had invited other friends to join them at their home. (Dep. of M. Plummer at 202) They departed in the vehicle with Mr. Plummer driving. (Dep. of M. Plummer at 168-169) Mr. Plummer and Mr. LaMarre sat in the front. Their wives sat in the rear seat. (*Id.*). There was no particular plan in place as to where they were going to go after dinner, however, Mr. Plummer assumed that following dinner, they "were headed to our house generally, we were headed to our house." (Dep. of M. Plummer at 166-167) There was no discussion at that point about taking a ride on the golf cart. (Dep. of M. Plummer at 167) Instead of returning to his home, Mr. Plummer, without seeking the agreement of others in the vehicle, drove the vehicle through the streets of Ft. Mitchell, Kentucky. (Dep. of M. Plummer at 171-173)

While Mr. Plummer drove the couples around Ft. Mitchell, he provided a "tour" by identifying who lived in various homes. (Dep. of Mrs. LaMarre at Vol. I, 245) During this tour, Mrs. LaMarre became concerned with Mr. Plummer's reckless driving. (Dep.

of Mrs. LaMarre at Vol. II, 97-98) Mr. LaMarre then told Mr. Plummer to slow down. (Dep. of Mr. LaMarre at Vol. 2, 32-33) He then asked Mr. Plummer to stop the vehicle, so he could switch seats with Mrs. LaMarre. (Dep. of Mrs. LaMarre at Vol. I, 246) Next, he switched seats with his wife, so she could sit in the more secure front seat. (Dep. of Mrs. LaMarre at Vol. I, 247) During the stop, Mr. Plummer opened the bottle of champagne from FMCC and poured champagne for Mrs. LaMarre, Mrs. Plummer, and himself. (Dep. of Mrs. LaMarre at Vol. I, 253-256; Dep. of Mrs. LaMarre at Vol. II, 92; Dep. of Mr. LaMarre at Vol. II, 36-38) Mr. Plummer drank the champagne he poured for himself. (Dep. of Mrs. LaMarre at Vol. II, 92) By this time, Mr. Plummer had consumed copious amounts of wine and champagne from around 8:00 p.m. until near 9:25 p.m.

Mrs. LaMarre did not drink the champagne Mr. Plummer poured for her. (Dep. of Mrs. LaMarre at Vol. I, 253-254) During portions of the drive, Mr. Plummer blared the stereo system and drove the vehicle in a hazardous and erratic manner. (Dep. of Mrs. LaMarre at Vol. I, 266) As they were returning to the Plummers' home, they spotted the Hills arriving at their home. Mr. Plummer then turned the golf cart around and headed to the Hill residence. (Dep. of Mr. LaMarre at Vol. II, 47)

Shortly thereafter, the Plummers and LaMarres arrived at the Hill residence on Summit Lane in Ft. Mitchell. Mr. Plummer pulled the vehicle into their driveway. (Dep. of M. Plummer at 192) Ron Hill heard the vehicle's stereo blaring down the street before seeing them arrive. (Dep. of R. Hill at 42-43) Mr. LaMarre exited the vehicle and began speaking with Mr. Hill in the driveway. (Dep. of Mrs. LaMarre at Vol. I, 269) Mr. Plummer, Mrs. Plummer, and Mrs. LaMarre for a time stayed seated in the vehicle conversing with Mrs. Hill. During this conversation, Mr. Plummer, apparently seeking

attention, engaged in sexually suggestive banter with Mrs. Hill -- Mrs. LaMarre "heard Michael Plummer rambling something to Susan Hill and it seemed to be of a sexual nature, although I could not verbatim tell you word for word what he said." (Dep. of Mrs. LaMarre at Vol. I, 272) Growing concerned with the tone of things, Mrs. LaMarre insisted that Mr. Plummer return home, so she could check on her children. (Dep. of Mrs. LaMarre at Vol. II, 101-102)

Mr. Plummer's behavior started to become so obnoxious that Mrs. LaMarre realized that his alcohol from the evening was "catching up to him." (Dep. of Mrs. LaMarre at Vol. I, 271) Mr. Plummer was "becoming more belligerent." "He was crossing that line." (Dep. of Mrs. LaMarre at Vol. I, 271) Mrs. Hill disapproved of Mr. Plummer's crude behavior, rebuffed him, and moved to the rear of the cart to speak with Mrs. Plummer. (Dep. of Mrs. LaMarre at Vol. I, 276) Mr. Plummer was agitated while watching Mr. LaMarre and Mr. Hill speaking. (Dep. of Mrs. LaMarre at Vol. I, 277) By this time, Mr. Plummer had received a number of phone calls from his daughter urging him to return the vehicle so she and her friends could drive it. (Dep. of M. Plummer at 199) (The vehicle was a recent birthday gift to his daughter. (Dep. of M. Plummer at 73))

With his growing foul mood, Mr. Plummer apparently tried to turn the group's attention back to himself when he unilaterally decided to leave immediately. He turned to Mrs. LaMarre and said, "Let's leave Timmy!" (Dep. of Mrs. LaMarre at Vol. I, 279) Based upon previous negative experiences with Mr. Plummer, Mrs. LaMarre protested saying, "No, please don't do that!" (Dep. of Mrs. LaMarre at Vol. I, 286) At this moment, the following events occurred in rapid succession: (1) Mr. Plummer backed the golf cart to the end of the driveway and out onto the street; and (2) Mr. LaMarre, while

still speaking with Ron Hill in the driveway, moved to board the departing vehicle. (Dep. of Mr. LaMarre at Vol. II, 50-52) At this instant, Mr. LaMarre had two feet and one hand on the cart attempting to take his seat. (Dep. of Mr. LaMarre at Vol. II at 63) Mr. Plummer looked over his shoulder, looked directly at Mr. LaMarre attempting to board the vehicle, and said, “He’s on!” (Dep. of Mrs. LaMarre at Vol. I, 289) At this instant, Mr. LaMarre saw Mr. Plummer look directly at him and say something, which he could not make out—presumably, “he’s on!” (Dep. of Mr. LaMarre at Vol. II, 63)

Knowing that Mr. LaMarre had not taken his seat, Mr. Plummer hit the accelerator speeding off in the cart. (Dep. of Mr. LaMarre at Vol. II, 68-69) Because of the speed, Mr. LaMarre could not take his seat and was thrown from the vehicle. (Dep. of Mr. LaMarre at Vol. II, 74) As Mr. LaMarre recalls, he saw Mr. Plummer look directly at him, and then gun the cart knowing he had not been able to take his seat. (Dep. of Mr. LaMarre at Vol. II, 70-71) Mr. LaMarre distinctly remembers getting “launched” off of the cart. (Dep. of Mr. LaMarre at Vol. II, 74-75) After being launched from the cart, Mr. LaMarre struck the pavement with such force that he shattered his skull. Mr. Hill recalls hearing the impact. (Dep. of R. Hill at 67) When questioned, he said it sounded like a pumpkin smashing on the street – that sound was Mr. LaMarre’s skull being shattered by the impact. (*Id.*) Mr. LaMarre suffered a life threatening injury to his brain that has left him permanently injured and likely permanently and totally disabled.

II. PROCEDURAL BACKGROUND

Appellants Timothy J. LaMarre, Theresa J. LaMarre, Nathan LaMarre, and Nicole LaMarre (the “LaMarres”) brought negligence and negligence per se claims against Appellee FMCC for illegally serving alcohol to Defendant Michael Plummer when they

knew or should have known that Mr. Plummer was intoxicated and planned on immediately leaving with the alcohol to drive himself, his wife, and the LaMarres on his family's modified golf cart. (R. at 100-117) FMCC's illegal and unreasonable service of alcohol resulted in further intoxication of Mr. Plummer and thereby contributed to the shortly subsequent incident on the golf cart in which the intoxicated Mr. Plummer purposefully or recklessly threw Mr. LaMarre from the vehicle.

FMCC filed its Motion for Summary Judgment ("Motion") on or about December 11, 2009. (R. at 369-382) The LaMarres argued that the Motion was premature because no trial date had been set and because they had not been given ample time to complete discovery. This objection was made orally at the hearing on April 9, 2010, with supporting case law cited. (Video of Hearing on Motion for Summary Judgment at 10:03:42) FMCC's Motion argues that it is entitled to summary judgment because: (1) the Dram Shop Act protects FMCC in this instance; (2) there is no evidence that Michael Plummer was intoxicated at FMCC or afterward; and (3) there is no evidence that FMCC violated the laws governing the service of alcoholic beverages.²

The LaMarres responded that: (1) FMCC does not enjoy the protection of the Dram Shop Act in this instance because its service of alcohol was both (a) unlicensed and (b) unlawful and violative of its permit and the liquor licensing laws; (2) the motion for summary judgment was premature and the LaMarres needed additional time to complete

² FMCC also raised KRS 413.241(1) for the first time in its Reply Memorandum in Support of Summary Judgment. FMCC appears to cite this provision as part of a causation argument. However, the issue was not raised in its Motion for Summary Judgment, and the Trial Court did not base its summary judgment on causation. As well, the Court of Appeals held KRS 413.241(1) unconstitutional. Thus, the issue is not properly before this Court. This point, with supporting case law, is addressed in more detail below.

discovery and to obtain expert opinion evidence; and (3) notwithstanding the applicability of the Dram Shop Act, evidence exists creating a genuine issue of material fact as to whether FMCC knew or should have known that Michael Plummer was intoxicated when served alcohol at the club.

Following a hearing on the matter, the Trial Court granted FMCC's Motion and dismissed the LaMarres' claims against FMCC on April 15, 2010. The Trial Court designated the summary judgment a final and appealable order with no just cause for delay, and that Order was entered on April 19, 2010. (Summary Judgment, R. at pp. 544-548) The LaMarres appealed.

The Court of Appeals reversed the Trial Court's grant of summary judgment holding that: (1) establishments that serve alcohol in violation of their licenses do not enjoy the protection those licenses provide through the Dram Shop Act; and (2) notwithstanding the applicability of the Dram Shop Act, genuine issues of material fact exist as to whether FMCC employees knew or should have known that Mr. Plummer was intoxicated. The Court of Appeals further stated that, because it had already held that the grant of summary judgment was inappropriate, it was not necessary to address the LaMarres' argument that it was granted prematurely. (Court of Appeals Opinion, *LaMarre, et al. v. Ft. Mitchell Country Club*, Case No. 2010-CA-000813-MR at 7, attached as **Exhibit A** of the Appendix)

As a final note on the procedural history of this case, the LaMarres address FMCC's contention in its Brief before this Court that "[t]he Court of Appeals did not address the Club's alternative argument" "that even if the Dram Shop Act does not apply, the LaMarres' negligence *per se* [claim] fails because the Club owed no duty to the

LaMarres under the licensing statutes.” (FMCC Brief at 4) The Court of Appeals did not address this argument because the Trial Court did not mention it in its summary judgment order as a ground upon which it relied in granting summary judgment, and FMCC did not file a Cross Appeal on the issue. Thus, FMCC did not preserve that issue for consideration by the Court of Appeals, and it is accordingly not preserved for consideration by this Court.

III. LEGAL ARGUMENT

A. The Protections of the Dram Shop Act (KRS 413.241) are Not Available to FMCC as a Defense Against the LaMarres’ Negligence Claims.

The Dram Shop Act, KRS 413.241, limits the liability of those licensed to sell or serve alcohol (dram shops) to instances in which the dram shop knew or reasonably should have known that the intoxicated tortfeasor was intoxicated at the time of serving the alcohol. *Id.*³ FMCC argued that because it holds a permit it enjoys the protection of the Dram Shop Act regardless of whether it serves alcohol lawfully or not. (FMCC Reply in Support of Motion for Summary Judgment at 3-6 (“FMCC Reply”) (R. at 429-443)) The LaMarres argued that dram shops, including FMCC, do not enjoy the special statutory protection of the Dram Shop Act for service of alcohol unlawfully and in

³ “Any other law to the contrary notwithstanding, no person holding a permit under KRS 243.030, 243.040, 243.050, nor any agent, servant, or employee of the person, who sells or serves intoxicating beverages to a person over the age for the lawful purchase thereof, shall be liable to that person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises including but not limited to wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served, unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving.” KRS 413.241(2).

violation of their permit. (LaMarre Response in Opposition to Motion for Summary Judgment at 13-15 (“LaMarre Response”) (R. at 397-418)

By its Order, the Trial Court adopted FMCC’s position and provided it with the protections of the Dram Shop Act. (R. at 544-548) The Court of Appeals disagreed and reversed on this point, stating:

We do not believe it was the intent of the legislature to offer protection of the Dram Shop Act to establishments which distribute alcohol in direct violation of their license(s). To so hold would clearly stifle the interest of all alcohol licensing laws as well as the Dram Shop Act itself.

(Court of Appeals Op., Ex. A at 6) The LaMarres maintain that the interpretation of the Dram Shop Act adopted by FMCC and the Trial Court yields an absurd result that contravenes logic, public policy, multiple rules of statutory construction, and the applicable case law.

1. FMCC Unlawfully Served Michael Plummer Alcohol and Violated its Permit to Sell Alcohol.

In part of the Trial Court’s Summary Judgment Opinion, it stated “[FMCC] does not possess a license to sell package liquor and clearly would not be permitted to sell unopened bottles for take-out.” (R. at 544-548) FMCC was unlicensed and therefore cannot invoke the protections of the Dram Shop Act. This Act protects only those that hold a permit to serve alcohol, and in this case, the FMCC did not have a permit to sell or served package liquor to go. The Act does not apply! The Trial Court’s finding of fact is correct in this regard. Notably, FMCC has not cross-appealed on this point, and it is thus not open for dispute.

Moreover, FMCC violated KRS 243.270 by selling and serving packaged wine/champagne to Michael Plummer in a manner expressly prohibited by statute.

FMCC held a special private club license pursuant to KRS 243.270. (R. at 408)

According to KRS 243.270, “[t]his license shall authorize the licensee to exercise the privilege of a malt beverage or a distilled spirits and wine retail drink licensee” *Id.*

However, “[a] retail drink license shall not authorize the licensee to sell distilled spirits or wine by the package.” KRS 243.250 (“Business authorized by retail drink license”).

FMCC did not have a retail package license. (R. at 545)

FMCC states that the Court of Appeals “assumed” that it violated its license and that the issue was not before the Court of Appeals. In this regard, FMCC ignores the evidence cited in the LaMarres’ factual statements in their Response in Opposition to FMCC’s Motion for Summary Judgment and in their Appellant Brief in the Court of Appeals. (Response at 2-7, R. 398-403; LaMarre Court of Appeals Brief at 1-6) To the extent that this issue needs to be addressed in detail, the LaMarres incorporate by reference their extensive argument on this point in their Response to FMCC’s Petition for rehearing in the Court of Appeals. (Response to Pet. for Rehearing at 3-6)

In short, FMCC unlawfully sold and provided Michael Plummer with an unopened bottle of champagne on September 13, 2008. “‘Sell’ includes to solicit or receive an order for, keep or expose for sale, keep with intent to sell, and the delivery of any alcoholic beverage.” KRS 241.010. FMCC engaged in the business of allowing members to purchase packaged wine from the club at a marked-up price. (Dep. of Beckman at 33-36, 64-66) The club would then store the wine for the member in a “wine locker” at FMCC until that member either consumed the bottle of wine on the premises or removed the unopened bottle off the premises. (*Id.*) Mr. Plummer rents a “wine

locker” from FMCC. Mr. Beckman, the general manager of FMCC, testified to the nature of the “wine locker”:

Q. And what is a wine locker?

A. A wine locker is a locked box that a member rents. And in this box they put wine that they've ***purchased from the club***. And when they visit the club, they can access their wine locker and drink their wine.

(Dep. of Beckman at 33-34 (emphasis added)) The fee for this service is \$12.00 per month. (*Id.* at 33) FMCC charges a 25% premium on the purchase of the alcohol from or through the club. (*Id.* at 35-36)

On September 13, 2008, the bartender at FMCC, Charles Dinolfi, supplied Mr. Plummer with an unopened bottle of champagne. (Dep. of M. Plummer at 126) Specifically, Mr. Plummer handed Mr. Dinolfi an empty wine bottle, and Mr. Dinolfi handed Mr. Plummer back the unopened bottle of champagne. (Dep. of C. Dinolfi at 31) Mr. Plummer traded in the empty bottle for a full to-go bottle of champagne, which FMCC obligingly and unquestioningly provided him. (*Id.*) Mr. Dinolfi knew that Mr. Plummer had consumed a number of glasses of wine in the club prior to providing him with the to-go bottle. (Dep. of C. Dinolfi at 31-35) Mr. Dinolfi also knew that Plummer intended to immediately leave the club upon receiving the to-go bottle (Dep. of C. Dinolfi at 31), and Mr. Plummer's modified golf cart was prominently parked near his table, clearly visible to FMCC employees. (Dep. of M. Plummer at 113-114; *see also* Dep. of A. Marcum at 58-59) In other words, FMCC knew that it had just served a to-go bottle of champagne to a man: (a) who had already consumed an exceptional amount of wine in just an hour, and (b) who was headed to drive his party home on his golf cart in the public street.

The sale and provision of the unopened champagne to Mr. Plummer was unlawful and violated FMCC's liquor license under KRS 243.270.

2. FMCC cannot Shield Itself with the Dram Shop Act for the Repercussions of Unlawful Service that Violates its License.

FMCC violated its liquor license and unlawfully provided Michael Plummer with a bottle of champagne to-go. With that in mind, the legal issue is whether a private club that violates its liquor license and serves alcohol illegally should be able to enjoy the protections of Kentucky's Dram Shop Act to shield itself from liability arising from that unlawful service. FMCC argues that the private club would still be entitled to those protections, and its erroneous argument can be summarized as follows:

(a) The rules of statutory construction dictate that the license holder is protected for unlawful service of alcohol;

(b) The public policy of "personal responsibility" dictates that the license holder is protected for unlawful service of alcohol;

(c) The case law supports its argument; and

(d) The General Assembly declared in the Dram Shop Act that the service, furnishing, or sale of alcohol is not the proximate cause of injuries inflicted by an intoxicated person.

(FMCC Brief at § I) The LaMarres address these erroneous arguments in turn.

a. Statutory construction of the Dram Shop Act.

The rules of statutory construction require that an unlicensed alcohol vendor or a licensee unlawfully serving alcohol in violation of its license does not receive the Dram Shop Act protections for unlawful service. To the contrary, FMCC argues that it should enjoy the protections of the Dram Shop Act even for the consequences of service of

alcohol for which it is not licensed and that is not allowed by the very license through which it claims entitlement to those protections. (FMCC Brief at § I(A)) In purported support for its erroneous conclusion, FMCC cites to the “plain language” of the Dram Shop Act along with the canon of statutory construction *expressio unius est exclusio alterius*. Not only do these rules of statutory construction not help FMCC’s argument, but several other rules of statutory construction establish the fallacy of FMCC’s proffered interpretation.

The statute’s reference to those “holding a permit” does not entitle the permit holder to limited liability for un-permitted, illegal sales. Nor does it permit one not holding a permit to claim this limited liability. FMCC completely relies on its status as a permit holder for its entitlement to the protections of the Dram Shop Act. However, FMCC did not hold a permit for the particular service of alcohol of which the LaMarres complain, namely, handing Mr. Plummer an unopened to-go bottle of champagne after consuming the equivalent of nearly a whole bottle of red wine in under an hour. In *Grayson Fraternal Order of Eagles v. Claywell*, the plaintiffs brought claims against an unlicensed dram shop for over-serving the defendant driver. 736 S.W.2d 328 (Ky. 1987).⁴ The plaintiffs’ cause of action included negligence per se for violating an alcohol statute prohibiting *licensees* from selling alcohol to intoxicated persons. *Id.* at 333 (citing KRS 244.080). The dram shop apparently argued that, because it was not a licensee, it could not technically be held liable under the statute prohibiting licensees from selling alcohol to intoxicated persons. *Id.*

⁴ Portions of this opinion have been abrogated as a result of the subsequent enactment of the Dram Shop Act. The LaMarres, however, do not cite this case for the abrogated points.

The defendant's play on the text of the statute in *Grayson* is similar to the interpretation of the Dram Shop Act offered by FMCC. That is, FMCC argues that because it is licensed (despite not being licensed to serve Mr. Plummer the to-go champagne) it enjoys blanket protection for any service of alcohol, whether lawful or not. This Court in *Grayson* rejected this same sort of illogical and unintended interpretation by the defendant dram shop stating:

The fact that the Eagles Club was not a licensee, but was acting unlawfully dispensing liquor in the same manner, does not avoid the protection [for potential injured persons] of KRS 244.080, but simply compounds it. The unlicensed vendor has no right to sell alcoholic beverages at all, and even less right to do so in violation of standards imposed upon the licensed vendor.

Id. The logic of the foregoing statement by this Court in *Grayson* applies to this case. That is, FMCC had no license to serve the to-go champagne to Mr. Plummer in the first place; thus, it cannot claim the protections as if it held a license to do so.

FMCC has admitted that “the legislature created criminal penalties” for this type of illegal and un-permitted service of alcohol; however, it astonishingly persists in arguing that the legislature intended those very criminals to have an extraordinary limitation of liability for the consequences of the criminal act. (FMCC Court of Appeals Brief at 18; FMCC Brief at 9) This makes no sense and is just the type of “absurd result” that the rules of statutory construction were crafted to guard against.

FMCC states that “[h]ere, the plain language of the statute is clear and unambiguous” in justification for its interpretation. (FMCC Court of Appeals Brief at 8; FMCC Brief at 6) Even assuming *arguendo* that the language is unambiguous, FMCC's interpretation still creates an impermissible absurd result. This Court holds that “[i]f the

language [of a statute] is clear and unambiguous *and if* applying the plain meaning of the words *would not lead to an absurd result*, further interpretation is unwarranted.” *E.g.*, *Autozone, Inc. v. Brewer*, 127 S.W.3d 653, 655 (Ky. 2004) (emphasis added).

Accordingly, any interpretation that would “produce an injustice or ridiculous result” should be ignored by the courts. *Rev. Cabinet v. O’Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). Here, it creates an absurd result to afford special protections to an establishment for an act that violates the law and carries criminal penalties. If the General Assembly intended such a ridiculous result, then it would not have criminalized such conduct.

FMCC next argues that the rule *expressio unius est exclusio alterius* requires an interpretation of the Dram Shop Act that extends its limitation of liability to establishments whose service of alcohol violates their liquor license. (FMCC Brief at 9) The crux of this faulty argument is that un-permitted and illegal service of alcohol is protected because the Dram Shop Act states that service to minors and forcible service of alcohol are not protected. In other words, the faulty logic goes that, because the statute mentioned two unlawful actions, all other unlawful acts in serving alcohol are protected. This is not the correct use of the *expressio unius* canon. The most recent Kentucky Supreme Court opinions on *expressio unius* assure that the rule does not apply in this instance. Specifically, this Court stated:

[The Court of Appeals invoked] the principle of statutory construction known by the oft-used Latin maxim “*expressio unius est exclusio alterius*”, *i.e.*, “to express or include one thing implies the exclusion of the other, or of the alternative.” As this Court recently stated in *Fox v. Grayson*, 317 S.W.3d 1 (Ky.2010), this canon of statutory construction is resorted to only when the relevant language is ambiguous and “only as an aid in arriving at [legislative] intention, and not to defeat it.” *Id.* at 9.

Public Service Com'n of Ky. v. Com., 320 S.W.3d 660, 666-67 (Ky. 2010) (internal citation omitted). Erroneously applying *expressio unius* would defeat the legislative intent of the Dram Shop Act and frustrate the entire alcohol statutory scheme (e.g., rewarding criminal acts with extended civil protections).

This Court provided further, detailed analysis of *expressio unius* in another very recent opinion. In *Fox v. Grayson*, 317 S.W.3d 1 (Ky. 2010), this Court stated:

Because the *expressio unius* maxim is only a rule of construction, and not substantive law, we must use it only “when ... that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment.” In other words, *expressio unius* is most helpful when there is a strong, unmistakable contrast between what is expressed and what is omitted.

Such strong contrasts do not exist with the Dram Shop Act. To the contrary, the concept of extending the Dram Shop Act protections only to establishments that serve adults in no way shows a “strong, unmistakable” intent to also extend those protections to establishments that serve alcohol in violation of the terms of their license. To use the maxim *expressio unius* to extend a limitation of liability to the criminal service of alcohol would violate common sense, several other rules of statutory construction, and the principles set forth by this Court in the *Public Service Com'n* and *Fox* cases.

FMCC’s interpretation also violates the *in pari materia* canon. “Under the doctrine of *in pari materia*, statutes having a common purpose or relating to the same person or thing, must be construed together. *Hardin Co. Fiscal Court v. Hardin Co. Bd. of Health*, 899 S.W.2d 859, 862 (Ky. App. 1995) (citing *Dieruf v. Louisville & Jefferson Co. Bd. of Health*, 200 S.W.2d 300, 302 (Ky. 1947)). Clearly, the alcohol licensing laws

concern the same subject and have a common purpose as the Dram Shop Act (the rules regulating the sale and service of alcohol). They must be construed together. Despite this rule of construction, FMCC claims that the Court of Appeals erred in its consideration of the alcohol licensing statutes in its interpretation of the Dram Shop Act. (FMCC Brief at 8-10) This criticism apparently arises from the fact that the Court of Appeals stated:

We do not believe it was the intent of the legislature to offer protection of the Dram Shop Act to establishments which distribute alcohol in direct violation of their license(s). To hold so would clearly stifle the interest of all alcohol licensing laws as well as the Dram Shop Act itself.

(Court of Appeals Op., Ex. A at 6) In other words, FMCC argues that the Court of Appeals should have ignored the alcohol licensing statutes when construing the Dram Shop Act.

FMCC relies on the phrase “[a]ny other law to the *contrary* notwithstanding” as a means to disregard completely the General Assembly’s statutory scheme concerning the service of alcohol. KRS 413.241(2) (emphasis added). However, the alcohol licensing laws are not *contrary* to the Dram Shop Act. This is not a situation in which two laws conflict. Rather, the LaMarres and the Court of Appeals simply construed the Dram Shop Act *in harmony with* the “other laws” (the alcohol licensing statutes) that the Act expressly references. If an establishment’s avenue to obtain the protections of the Dram Shop Act is its liquor license, then it cannot have the protections of that license for the consequences of the service of alcohol that violates that same license. As well, it cannot invoke a license it does not possess to obtain the Act’s protections.

Furthermore, the Dram Shop Act itself expressly references the alcohol licensing statutes (“KRS 243.030, 243.040, 243.050”). KRS 413.241(2). The licensing statutes and Dram Shop Act are inextricably intertwined. The license provided pursuant to the licensing statutes is the mechanism through which an establishment may obtain protection of the Dram Shop Act. Thus, it is axiomatic that the service of alcohol outside the limits of one’s license does not carry the protections of that license for such unlawful service. To hold otherwise would be to construe the Dram Shop Act in contravention of the statutory scheme in which it fits. That would violate the doctrine of *in pari materia*.

FMCC also argues that, “[the licensing statutes] contain their own enforcement provisions for violators.” (FMCC Brief at 8 citing the Dram Shop Act and liquor licensing statutes) FMCC then delineates the criminal penalties for violating one’s liquor license. In making this argument, FMCC is hoist by its own petard, as providing civil limitations for liability for the consequences of a criminal act would create an absurd result and contravene the General Assembly’s intent. If the General Assembly intended to criminally punish those that serve alcohol in violation of their liquor license, then it would be absurd to construe the Dram Shop Act as awarding those same violators with exceptional protection from civil liability for the same acts. Likewise and despite FMCC’s intimations to the contrary, it is well-established that criminal penalties do not preclude civil liability for the same conduct. This includes the violation of a statute. KRS 446.070 (“A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.”)

Thus, not only does FMCC's argument violate the *in pari materia* canon, but it also violates the prohibition against construing statutes in such a manner as to create an unjust, ridiculous, or absurd result. This Court in *Rev. Cabinet v. O'Daniel* held that any interpretation of a statute that would "produce an injustice or ridiculous result" should be ignored by the courts. 153 S.W.3d 815, 819 (Ky. 2005). FMCC's interpretation produces both. To interpret the Dram Shop Act to extend an exceptional limitation of liability to establishments for the criminally punishable service of alcohol would be unjust, absurd, and ridiculous. This conclusion likewise follows the predecessor of this Court's holding in *Johnson v. Frankfort & C. R. R.* stating:

A cardinal rule for the interpretation of statutes—if there is any doubt from the language employed as to the intent and purpose of the Legislature in enacting it—is that courts should avoid adopting a construction which would be unreasonable and absurd in preference to one that is reasonable, rational, sensible and intelligent

197 S.W.2d 432, 434 (Ky. 1946). FMCC's interpretation that establishments are entitled to the protections of the Dram Shop Act for the consequences of illegal service of alcohol that violates their licenses is "unreasonable and absurd," whereas the LaMarres' and the Court of Appeals' interpretation that does not extend such protections to criminal service of alcohol is "reasonable, rational, sensible, and intelligent." *Compare O'Daniel*, 153 S.W.3d at 819 *with Johnson*, 197 S.W.2d at 434 (Ky. 1946).

b. Public policy strongly favors the LaMarres' interpretation of the Dram Shop Act.

Public policy and equity demand that illegal sales of alcohol not be awarded the protection of the Dram Shop Act for the consequences of the illegal sale. To allow an establishment the limitation of liability contained in the Dram Shop Act to shield itself

from the repercussions of its illegal service of alcohol flies in the face of both public policy and equitable principles. The interpretation espoused by FMCC and adopted by the Trial Court results in the party that is breaking the law being rewarded with an exceptional limitation of liability for the consequences of that party's illegal act.

The public policy problems with such a scenario are obvious. Limiting the liability of the illegal actor for the consequences of its illegal act encourages both that actor and others to continue their illegal actions, particularly when they profit from those actions (*e.g.*, illegal alcohol sales). This would also counteract the deterrent principles of the criminal penalties for such illegal conduct. The Dram Shop Act already derogates common law tort principles of deterrence and the victim's entitlement to relief. Expanding its limitation of liability to protect illegal actions will diminish deterrence for even unlawful behavior and will trample upon the rights of the victims of those illegal acts.

FMCC's position is that, so long as the entity has a license, it enjoys the protection of the Dram Shop Act, even if the licensee does not have the appropriate license or if the licensee is serving alcohol illegally and outside the authority of the license it holds. FMCC goes on to state that its interpretation promotes a policy of "personal responsibility." (FMCC Brief at 11) FMCC's erroneous conclusion completely shirks the "personal responsibility" of the person or establishment that over-serves a patron. As well, this so-called public policy pronouncement is offensive to the public conscience. Mr. LaMarre suffered a grievous injury at the hands of a drunk driver that FMCC over-served. It is thus preposterous for FMCC to argue that it shoulder no responsibility for the consequences of its own illegal conduct under the guise of personal

responsibility—such a statement hypocritically ignores its *own responsibility* in this tragedy.

Similarly, FMCC’s proffered interpretation ignores the “personal responsibility” establishments have to comply with statutory law. Rather, FMCC’s interpretation places the entirety of the responsibility on the intoxicated person and none on the entity that profited from intoxicating him or her—even when such dram shop does so illegally. Ironically, from one in FMCC’s position, this is a policy of refusing to take personal responsibility by placing the entire blame elsewhere.

Under such an untenable interpretation, FMCC would enjoy the protection of the Dram Shop Act, for example, if it were selling glasses of bourbon to patrons pulling out of its parking lot, or if it were selling drive-up margaritas at a neighborhood lemonade stand. In both scenarios FMCC would be unlawfully serving alcohol. However, under FMCC’s interpretation, it would still enjoy the protections of the Dram Shop Act for the consequences of those actions merely because it holds a license (despite the license’s inapplicability to that illegal service). Providing a patron with a to-go bottle of champagne who has consumed a large quantity of wine in an hour and who is driving home on city streets in a golf cart is not far removed from these outrageous scenarios. An interpretation of the law protecting this conduct cannot stand.

c. The case law on dram shop liability referenced by FMCC.

FMCC next argues that the case law on the dram shop supports its position. (FMCC Brief at 12-13) For this argument, FMCC first cites *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328 (Ky. 1987). In doing so, FMCC erroneously states the holding as: “the Court ultimately held that the seller’s liability, if any, must be

premised [sic] foreseeability of harm, and completely ignored the fact that the alcohol service was technically illegal.” (FMCC Brief at 13) While the first part of this statement is accurate, the second part, that the Court ignored the fact that the alcohol service was illegal, is unambiguously false. Directly contrary to FMCC’s false statement of the law, this Court in *Grayson* spent several pages and a large portion of its legal analysis discussing the fact that the establishment had violated liquor laws and the fact that such violations can result in negligence per se. *Grayson*, 736 S.W.2d at 333-34.

For example, the Court in *Grayson* stated:

KRS 446.070 is styled, “ Penalty no bar to civil recovery.” It provides that “[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.” The purpose of this statute is to permit a person injured by the violation of a statute to recover damages by reason of the violation. ...

If the presently alleged violations of the standard of care imposed by KRS 244.080 were committed by a retail licensee, such violation would be treated as negligence per se under KRS 446.070. The fact that the Eagles Club was not a licensee, but was acting unlawfully dispensing liquor in the same manner, does not avoid the protection of KRS 244.080, but simply compounds it. The unlicensed vendor has no right to sell alcoholic beverages at all, and even less right to do so in violation of standards imposed upon the licensed vendor.

Id. at 333 (internal citations omitted). The Court went on to hold in *Grayson*:

We hold simply that the standard expressed in the statute, the violation of which could result in a criminal sanction against a licensee, is misconduct of a nature which will result in civil liability under the negligence principle, as a failure to exercise reasonable care, when the evidence establishes circumstances from which a jury could reasonably infer that the subsequent accident was within the scope of the foreseeable risk.

Id. at 334. FMCC cannot credibly say that the Court “completely ignored” the fact that the service of alcohol was illegal. Unfortunately, this sort of misstatement of the law avoids addressing the real issues and unnecessarily forces the LaMarres to spend pages of its brief debunking it.

Contrary to FMCC’s argument, the *Grayson* opinion strongly favors the LaMarres’ position. As in *Grayson*, the dram shop here committed a violation of the liquor laws that constitutes a criminal act. In accordance with *Grayson*, FMCC’s “violation of [the statute] which could result in a criminal sanction against a licensee, is misconduct of a nature which will result in civil liability under the negligence principle ...” if the resulting injury was a foreseeable risk. *Id.* The fact that FMCC was not licensed to make the service of the to-go bottle to Mr. Plummer does not allow FMCC to avoid liability, rather, it “compounds it.” *See id.*

FMCC did correctly state that negligence (whether dram shop or otherwise) contains an element of foreseeability that harm will result from the breach. However, this point also helps the LaMarres’ case. The fact that harm could result from serving Mr. Plummer the to-go champagne, after having consumed a large quantity of wine in about one hour, was foreseeable to FMCC. FMCC’s servers and bartenders either served, opened, or poured (or opened and poured) all the bottles of wine and champagne for the Plummer and LaMarres. (Dep. of C. Dinolfi at 11-14, 16, 17, 18, 31; Dep. of J. Boaz at 10-11, 14-15; Dep. of M. Plummer at 126) FMCC also knew that Mr. Plummer had driven his golf cart to the club that evening (it was parked in plain view near the gazebo where they ate) and that Mr. Plummer was immediately leaving with the bottle of champagne. (Dep. of M. Plummer at 113-114; *see also* Dep. of A. Marcum at 58-59) At

a bare minimum, the foreseeability of harm by serving Mr. Plummer the additional to-go champagne is a genuine issue of material fact best resolved by a jury.⁵

FMCC's citations to *Britton's, Admin. v. Samuels*, 136 S.W. 143 (Ky. 1911), and *Waller's Admin. v. Collinsworth*, 137 S.W. 766 (Ky. 1911), also warrant a brief mention. FMCC apparently pulled these citations from page 331 of this Court's opinion in *Grayson*. The problems with the citations, however, include the facts that: (a) this Court heavily criticized the value of those opinions; and (b) FMCC's parenthetical statement of their holdings does not tell the full story. This Court in *Grayson* did not cite *Britton's Admin.* or *Waller's Admin.* favorably. *Grayson*, 736 S.W.2d at 331. Rather, *Grayson* stated that the opinions were 76 years old (now 101 years old) and went on at length as to why they do not apply in the present-day society where motor vehicles and alcohol can cause a deadly combination. *Id.* at 331-32. This Court's insight on that point applies here, where an intoxicated driver (Mr. Plummer) threw Mr. LaMarre from a motor vehicle by quickly accelerating from a stopped position.

Concerning FMCC's parenthetical statements of the holdings, they leave out critical information. In *Britton's Admin.*, FMCC failed to mention that the case concerned plaintiffs attempting to recover for the "wrongful" death of a person who drank himself to death, not injuries to third persons. *Id.* at 143. The Court found that the self-inflicted death was not the proximate result of the sale of alcohol to the decedent⁶ and that plaintiffs did not follow the requirements of the statute under which they sued.

⁵ This point is addressed in more detail below as part of the LaMarres' argument that the Trial Court committed error in finding no issue of material fact on this point. Put simply, whether Mr. Plummer was intoxicated and whether harm was foreseeable are jury issues.

⁶ The difference between a person drinking alcohol until he dies is clearly different than the facts of the present case.

Id. at 144. Similarly, FMCC's statement of the holding in *Waller's Admin.* leaves out the Court's rationale for holding that the sale of alcohol was not the proximate cause. In *Waller's Admin.*, the intoxicated defendant murdered the decedent by purposefully shooting and killing him. *Waller's Admins.*, 137 S.W. at 766. Considering these facts, the Court opined that murder is so rare following intoxication (as opposed to non-murder homicides) that dram shops cannot be expected to foresee that murder will follow selling intoxicating beverages. *Id.* at 767. This is clearly a different scenario than the present case involving negligence, and neither *Britton's Admin.* nor *Waller's Admin.* stand for the broad proposition that FMCC advocates.

d. FMCC's reliance on the unconstitutional section (1) of the Dram Shop Act should be disregarded.

In multiple areas of its Brief, FMCC relies on the declaration of the General Assembly contained in section (1) of the Dram Shop Act. (*e.g.*, FMCC Brief at 11, 25-26) This section states the General Assembly declares that the consumption of alcohol, rather than the service of alcohol, is the proximate cause of injuries inflicted by an intoxicated person. KRS 413.241(1). FMCC attempts to use this provision to support its arguments that the LaMarres cannot establish the proximate cause element of their negligence per se claim and that the Dram Shop Act has a public policy of "personal responsibility." (FMCC Brief at 11, 25-26) These arguments have multiple problems, the first of which is that the Court of Appeals in *Taylor v. King* held that section (1) of the Dram Shop Act is unconstitutional. *Taylor v. King*, 345 S.W.3d 237, 243-44 (Ky. App. 2010).

FMCC attempts to circumvent the holding in *Taylor* through a patently false statement of the law in its Brief, wherein it states:

The Court of Appeals has recently called the constitutionality of KRS 413.241(1) into question. See *Taylor v. King*, 345 S.W.3d 237, (Ky. App. 2010). The Court of Appeals cited *Taylor* in its Opinion (See Exhibit B at 6.) However, *Taylor* was concerned solely with punitive damages and therefore has no application here.

(FMCC Brief at 26 n. 6) Contrary to this false statement, *Taylor* clearly holds:

We conclude that the General Assembly's adoption of a proximate causation standard runs afoul of the limits imposed by the Kentucky Constitution. We also conclude that the legislative finding regarding proximate causation in KRS 413.241(1) intrudes upon the fact-finding role of the courts, in violation of Sections 27, 28, and 109 of the Kentucky Constitution. ... Consequently, we must find that KRS 413.241(1) is unconstitutional to the extent that it would prevent a fact-finder from determining whether an injury was a foreseeable consequence of a dram shop's improper service of alcohol.

Taylor, 345 S.W.3d at 243-44. Despite FMCC's assertions to the contrary, the *Taylor* opinion does not merely "call[] the constitutionality of KRS 413.214(1) into question" – it unmistakably holds it unconstitutional. *Id.* Similarly, *Taylor* is not "solely concerned with punitive damages"⁷ and certainly has applicability to the case before this Court. *Id.* Considering the unambiguous holding that section (1) of the Dram Shop Act is unconstitutional, it is improper for FMCC to rely on it as a central part of its argument in this Court. The LaMarres admittedly did not appeal the Trial Court's grant of summary judgment based on the constitutionality of section (1) of the Dram Shop Act; however, this is because FMCC's Motion for Summary Judgment does not challenge the

⁷ "First, the Estate argues that this Court erroneously held in *Jackson v. Tullar*, *supra*, that punitive damages may not be recovered for a claim under KRS 413.241. And second, the Estate maintains that KRS 413.241 violates the Kentucky Constitution in several respects. ... "Rather, we hold only that KRS 413.241 may not be constitutionally interpreted as prohibiting a recovery of punitive damages against a dram shop *or establishing the standard for proximate cause*. *Taylor v. King*, 345 S.W.3d 237, 240, 244 (Ky. App. 2010) (emphasis added).

LaMarres' claims on a causation basis or under KRS 413.241(1). (Motion at 9-12, R. at 377-381) Instead, FMCC raises KRS 413.241(1) for the first time in its Reply Memorandum in Support of Summary Judgment. For this reason, FMCC's argument related to KRS 413.241(1) was not a part of its CR 56 motion for summary judgment, not properly before the Trial Court or Court of Appeals, and is not preserved for this Court. *White v. Rainbo Baking Co.*, 765 S.W.2d 26, 30 (Ky. App. 1989) (holding that a new basis for summary judgment may not be raised by the moving party in its reply memorandum).

The unconstitutionality of KRS 413.241(1) and its exclusion from FMCC's motion for summary judgment make it improper for FMCC to rely on this unconstitutional statute before this Court. Yet, FMCC claims that this provision somehow supports its public policy argument. (FMCC Brief at 11) Relying on an unconstitutional statutory provision, however, is undoubtedly against public policy and would constitute a backward step from the provident decision by the Court of Appeals in *Taylor*. The public policy of this Commonwealth must be consistent with its Constitution. This Court should disregard FMCC's arguments related to the unconstitutional KRS 413.241(1) for the reasons stated above.

In contravention of the logical interpretation of the LaMarres and the Court of Appeals, FMCC proffers an interpretation in which, so long as an entity is licensed, it can disregard that license, dangerously serve alcohol in violation of that license and the law, but still enjoy the protections of that license for that very service—which is criminal conduct. This Court should not endorse such an illogical interpretation. Accordingly, this Court should not award FMCC the extraordinary protection of the Dram Shop Act.

Allowing FMCC to insulate itself from liability for the illegal service of alcohol to Michael Plummer, in violation of its liquor license, contravenes public policy and equity, and contravenes the only logical interpretation of the Dram Shop Act. A jury should be permitted to hear of FMCC's malfeasance and determine its accountability for the grave injuries to the LaMarres that resulted.

B. The Motion for Summary Judgment was premature, and the Trial Court Prematurely Granted it.

The law in Kentucky is well-established on this point: A party opposing a motion for summary judgment must have a reasonable time to conduct discovery.

A summary judgment is a final order and, therefore, should not be entered "as a form of penalty for failure of the plaintiff to prove his case quickly enough." *Conley v. Hall*, 395 S.W.2d 575, 580 (Ky. 1965). It is proper only after the party opposing the motion has been given ample opportunity to complete discovery and then fails to offer controverting evidence. *Pendleton Bros. Vending, Inc. v. Com. Finance & Admin. Cab.*, 758 S.W.2d 24, 29 (Ky. 1988) (citing *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky. App. 1979)).

Suter v. Mazyck, 226 S.W.3d 837, 841 (Ky. App. 2007). In this case, the LaMarres had not been given ample opportunity to complete discovery prior to summary judgment. At the time FMCC filed its Motion, no trial date had been set, no scheduling order was in place, experts had not been disclosed, and discovery was ongoing.

The fact that the LaMarres were in the process of retaining an expert toxicologist at the time FMCC filed its motion highlights the summary judgment's prematurity and the undue prejudice the LaMarres suffered as a result. Although plenty of direct evidence existed in the record at the time of the motion to create a genuine issue of material fact and to defeat the summary judgment standard in Kentucky, the analysis of an expert

toxicologist would have provided further evidence of Mr. Plummer's intoxication at FMCC.

The LaMarres acknowledge that this evidence is not a part of the Trial Record for the purpose of this appeal, nevertheless the toxicology report of Henry A. Spiller, procured for use against Defendant Plummer after the Trial Court's grant of summary judgment, clearly shows that Mr. Plummer was intoxicated well-beyond the legal limit for operating a motor vehicle after consuming the wine *on the premises of FMCC*. This would have been a part of the Trial Record had the Trial Court not decided the motion for summary judgment, over the LaMarres' objection, prior to the completion of discovery, prior to the disclosure of experts, and prior to the LaMarres' having retained their expert. The Trial Court denied the LaMarres the opportunity to complete their discovery without prior notice.

This litigation involves severe, permanent injuries and should be resolved on the merits, not because the LaMarres were at a disadvantage having not completed discovery. The court in *Roberson v. Lampton*, 516 S.W.2d 838 (Ky. 1974), cautioned against the unfair advantage one side might gain with an early motion for summary judgment. It described such an event as a "premature showdown." "Absent a sufficient opportunity to develop the facts, however, summary judgment cannot be used as a tool to terminate the litigation." *Suter*, 226 S.W.3d at 842. The LaMarres must be allowed to enter this showdown with the protections provided by the opportunity to complete their discovery, obtain their experts, and fully develop their evidence. Counsel objected to the prematurity of summary judgment at the hearing on this matter, citing *Suter v. Mazyck*, and requested the opportunity to complete discovery. (Video of Hearing on Motion for

Summary Judgment at 10:03:42) The Trial Court summarily rejected this argument along with the opportunity to complete discovery prior to adjudication of the motion. Summary judgment should be reversed for these reasons.

C. The Legal Standard for Summary Judgment in Kentucky.

A motion for summary judgment “should only be used ‘to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.’” *Steevest, Inc. v. Scansteel Service Center*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)). Likewise, the Kentucky Supreme Court stated in *Hubble v. Johnson* that “[a] movant should not succeed in a motion for summary judgment unless the right to judgment is shown with such clarity that there is no room left for controversy and it appears impossible for a nonmoving party to produce evidence at trial warranting judgment in his favor.” *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992).

Furthermore, the Kentucky Courts have firmly established the following rules that solidify the strict reluctance to grant summary judgment in the Commonwealth: (1) The movant bears the burden of “show[ing] that the adverse party could not prevail under any circumstances.” *Steevest*, 807 S.W.2d at 480 (citing *Paintsville Hosp.*, 683 S.W.2d 255); (2) “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Id.* (citing *Dossett v. New York Mining and Mfg. Co.*, 451 S.W.2d 843 (Ky. 1970)); (3) The court must not sever a litigant’s right to trial for expediency. *Id.* at 483; and (4) “Summary judgment is to be cautiously applied and should not be used as a substitute for trial.” *Id.*

D. Genuine Issues of Material Fact Exist and Preclude Summary Judgment.

This case provides the Court the opportunity to hand down an opinion directly on point interpreting the troubled and beleaguered Dram Shop Act. However, despite this unique issue, the grant of summary judgment by the Trial Court should be reversed on an entirely independent basis. Specifically, the Trial Court erred in granting summary judgment despite the fact that movant, FMCC, did not satisfy the summary judgment standard in Kentucky. The LaMarres agree with FMCC that appellate courts review a trial court's grant of summary judgment *de novo* as to whether the trial court correctly found that there were no issues of material fact and that the moving party was entitled to judgment as a matter of law. (FMCC Brief at 14 (citing *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996)) The LaMarres strongly believe that a *de novo* review of the record, under the summary judgment standard, clearly shows that a genuine issue of material fact exists prohibiting judgment as a matter of law. The Court of Appeals agreed. The LaMarres ask this Court to affirm the Court of Appeals on this point and remand this case to the trial court.

For an establishment to incur liability despite the protection of the Dram Shop Act, the service of alcohol must be where "a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving." KRS 413.241(2). The Trial Court granted summary judgment because it: (1) concluded that the Dram Shop Act applied; and (2) found no evidence that FMCC knew or should have known that Michael Plummer was intoxicated at the time of service. (R. at 546) Notwithstanding whether the protections of the Dram Shop Act apply to FMCC for the illegal service to Mr. Plummer, the LaMarres have presented evidence creating a

genuine issue of material fact as to whether FMCC knew or should have known that Mr. Plummer was intoxicated at the time of service.

Considering the standard for summary judgment set forth above, the LaMarres do not have to *prove* their case at this stage. Rather, they must merely present *some* evidence that an issue of material fact exists. The Trial Court committed the errors of weighing conflicting evidence, misunderstanding evidence, and disregarding evidence that creates an issue of fact as to Mr. Plummer's intoxication. Specifically, the Trial Court considered only lay opinion evidence, ignored concrete and direct evidence, and misunderstood the evidence concerning the police officer. The LaMarres received none of the favorable inferences or resolution of doubts in their favor, and neither did FMCC prove that the LaMarres could not produce evidence at trial warranting judgment in their favor.

1. **Evidence Exists Showing that it is not Impossible for the LaMarres to Produce Evidence at Trial Establishing that Michael Plummer was Intoxicated when Served the To-Go Bottle of Champagne.**

- a. **Amount of alcohol consumed.**

Assuming *arguendo* that the Dram Shop Act applies, the pivotal "time of service" concerning liability is when the FMCC bartender, Charles Dinolfi, served Michael Plummer the to-go bottle of champagne. Thus, the relevant question is whether FMCC knew or should have known that Mr. Plummer was intoxicated when it illegally served him the bottle of champagne to-go as he was on his way to leave on the golf cart.

The best evidence as to whether a person is intoxicated is simply how much alcohol he or she had to drink. Of course, other factors apply such as that person's weight and how much time elapses during/after consumption, but the primary indicator of

intoxication is the amount consumed of the intoxicating agent. This concept is fundamental. To become intoxicated by alcohol, one must drink alcohol. Whether or not one is intoxicated depends on *the amount consumed*. While at FMCC, Mr. Plummer, Mrs. LaMarre, and Mr. LaMarre shared two bottles of red wine. (Dep. of M. Plummer at 151) Mr. Plummer consumed more of the two bottles than the others: Mr. LaMarre left for a period of fifteen minutes or so (a quarter of the length of their entire dinner and an even larger portion of the time during which the parties consumed alcohol) to take food home to his son while Mr. Plummer continued drinking (Dep. of Mrs. LaMarre at Vol. I, 201-02); and Mrs. LaMarre only consumed two glasses total (Dep. of Mrs. LaMarre at Vol. I, 197, 216). Thus, Mr. Plummer likely consumed the equivalent of nearly an entire bottle of red wine himself in about an hour. This creates a genuine issue of material fact as to whether he was intoxicated after he had consumed all of that wine and was handed the bottle of champagne as he left.

After consuming about an entire bottle of red wine in just around an hour at FMCC, Mr. Plummer handed the FMCC bartender, Mr. Dinolfi, an empty bottle of wine and requested a bottle of champagne to-go. (Dep. of M. Plummer at 126) Mr. Dinolfi obliged and served Mr. Plummer the bottle of champagne, despite knowing that Mr. Plummer was on his way to leave FMCC immediately. (Dep. of C. Dinolfi at 31) Shortly thereafter, while on Mr. Plummer's golf cart "tour" of Ft. Mitchell, Mr. Plummer pulled over the cart, popped the cork on the champagne, and poured a glass for Mrs. Plummer, Mrs. LaMarre, and himself. (Dep. of Mrs. LaMarre at Vol. I, 253-256; Dep. of Mrs. LaMarre at Vol. II, 92; Dep. of Mr. LaMarre at Vol. II, 36-38) Mr. Plummer then

consumed the champagne and continued the tour on the golf cart to its tragic conclusion. (Dep. of Mrs. LaMarre at Vol. II, 92)

The standard for "intoxication" under Kentucky law is somewhat elusive, and a number of standards exist for different circumstances; for example a different standard exists for using intoxication as a defense to a crime than for holding a person culpable under the DUI statute. *Compare* KRS 501.101 *with* KRS 189A.010. In this case, because the intoxication involved the use of a motorized vehicle, the standard for intoxication under the DUI statute would be most appropriate. *See DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952 (Ky. 1999) (dram shop liability case involving auto accident; refers to the KRS 189A.010 standard). The standard under KRS 189A.010 is set forth as follows:

A blood alcohol concentration of 0.08 or more presumes intoxication; blood alcohol concentration between 0.05 and 0.08 carries no presumption either way (and other competent evidence as to intoxication must be considered); and blood alcohol concentration below 0.05 carries a presumption of no intoxication.

See KRS 189A.010.

Although the LaMarres were deprived of the opportunity to present this evidence in the Trial Court as a result of FMCC's premature motion for summary judgment, their expert toxicologist later concluded that Mr. Plummer's blood alcohol concentration was approximately 0.109 to 0.106 without even considering the to-go champagne he consumed. This is well-above the amount at which Mr. Plummer would be presumed intoxicated under the DUI statute. KRS 189A.010 Moreover, common knowledge indicates that Mr. Plummer was intoxicated after consuming the equivalent of approximately an entire bottle of red wine in an hour. Forgetting about the toxicology report for the moment, FMCC and the Trial Court completely disregarded the evidence

that: (a) Mr. Plummer consumed a large quantity of wine in a short period of time; and (b) that FMCC served that wine to him (Mr. LaMarre brought the second bottle to the club, but FMCC employees opened and served it to Mr. Plummer). FMCC employees served (and poured) Mr. Plummer his wine and should have known by the quantity consumed that he was intoxicated when they served him the additional to-go bottle as he walked out the door to his golf cart.

While it is true that the opponent of summary judgment must show “some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial,” the LaMarres need not conclusively prove that Mr. Plummer was intoxicated at this preliminary stage. *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992) (citing *Steelvest, Inc. v. Scan Steel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991)). Rather, summary judgment should not be granted “unless the right to judgment is shown with such clarity that there is no room left for controversy and it appears impossible for a nonmoving party to produce evidence at trial warranting judgment in his favor.” *Id.* It is anomalous that the Trial Court could make such a determination bearing in mind that discovery was not complete, experts had not been identified, and no scheduling order was in place.

Considering the amount of alcohol Mr. Plummer consumed in a short period of time and his belligerent and dangerous conduct that immediately followed, it cannot be said that it is impossible for the LaMarres to produce evidence at trial proving that Mr. Plummer was intoxicated both when served the additional champagne and at the time he recklessly operated the golf cart. Whether a reasonable person in the circumstances of the FMCC, its servers, and bartender should have known this, considering the amount of alcohol they served Mr. Plummer, is an archetypical issue of fact and jury question. Very

rarely is it the trial judge's province to decide whether conduct is reasonable. Because a genuine issue of material fact exists as to whether FMCC should have known that Michael Plummer was intoxicated when it served him the to-go bottle of champagne, summary judgment was inappropriate, whether the Dram Shop Act applies or not.

The jury must have the opportunity to weigh the conflicting evidence that was in the record at the time the premature motion for summary judgment was granted along with the subsequent evidence that was being obtained during the ongoing discovery process that the trial court cut short (*e.g.*, the expert opinions). This Court should uphold the Court of Appeals' reversal of the Trial Court's ruling on FMCC's Motion and vacate summary judgment.

b. The Police Officer did not Speak with Michael Plummer.

As additional justification for its ruling, the Trial Court states in its opinion that "a police officer who investigated the accident, [sic] saw no indication that Mr. Plummer was intoxicated." (R. at 545) However, the Trial Court ignored or misunderstood clear evidence of record proving that the investigating police officer, Erica Schrand, did not speak with or observe the intoxicated Michael Plummer; rather, she spoke with Mr. Plummer's friend, Ron Hill, who was helping at the scene of the incident and mistook him for Mr. Plummer. The Trial Court did not provide the nonmoving party, the LaMarres, with the benefit of viewing the evidence in the light most favorable to them nor did it resolve doubts in favor of the LaMarres, as required by law.

Officer Schrand had never met Michael Plummer before and had no prior experience with him. (Dep. of E. Schrand at 47) She did not know what Mr. Plummer looked like. Never having met Mr. Plummer before, Ms. Schrand stated that "he was

holding a flashlight to help the life squad see Mr. LaMarre better.” (*Id.* at 48) Ms. Schrand said that the person holding the flashlight (whom she believed was Mr. Plummer) told her that “he believed – they were going up the hill and he thought that Mr. LaMarre was trying to stand up when he fell off.” (*Id.*) This statement further shows that the person was not Mr. Plummer. Mr. Plummer was the driver—he would not “believe” that “they were going up the hill.” Rather, the driver would know where he was driving. A person speculating as to where the cart was going would clearly be a bystander—Mr. Hill. Michael Plummer stated in his deposition:

“I do not recall holding a flashlight, no sir.”

(Dep. of M. Plummer at 232) When describing his actions after he heard Mr. LaMarre fall off the golf cart in his deposition, Ron Hill stated: “[I] ran to my truck, back to the SUV, *got a flashlight*, and turned to head south down Summit Lane.” (Dep. of R. Hill at 67) Officer Schrand’s identification of Mr. Plummer was erroneous.

Thus, Ron Hill held the flashlight and spoke with Officer Schrand, not Michael Plummer. Officer Schrand, who testified that she had no idea what Plummer actually looked like, clearly mistook Ron Hill for Michael Plummer. Ron Hill had not been drinking that evening, which explains why Officer Schrand did not believe Mr. Plummer was intoxicated and also explains why Officer Schrand did not administer field sobriety tests. The Trial Court heavily relied on the mistaken testimony of Officer Schrand, which is indicated by its specific reference in the Trial Court’s Summary Judgment Opinion. (R. at 545) This clear error by the Trial Court further warrants reversal of its summary judgment.

2 . Evidence Exists Showing that Michael Plummer was Intoxicated after Consuming a Portion of the To-Go Bottle of Champagne.

After getting behind the wheel of the golf cart and consuming the additional glass of champagne, Mr. Plummer's behavior became erratic, obnoxious, bizarre, and dangerous. These sorts of behavioral indicators further support the conclusion that Mr. Plummer was intoxicated both minutes before at FMCC and after. Behavior indicating that Mr. Plummer was under the influence includes: (1) blaring the radio on the golf cart (Dep. of Mrs. LaMarre at Vol. I, 266; Dep. of R. Hill at 42-43); (2) driving in a hazardous and erratic manner (Dep. of Mrs. LaMarre at Vol. I, 266-268); (3) making unwelcome, sexually suggestive remarks to Mrs. Susan Hill (Dep. of Mrs. LaMarre at Vol. I, 272, 276); and, worst of all, (4) declaring "Let's leave Timmy" and gunning the golf cart knowing that Mr. LaMarre had not taken his seat (Dep. of Mrs. LaMarre at Vol. I, 279, 289, Dep. of Mr. LaMarre at Vol. II, 68-69). Moreover, during the golf cart ride, Mrs. LaMarre realized from Mr. Plummer's obnoxious behavior that his alcohol from the evening was "catching up to him." (Dep. of Mrs. LaMarre at Vol. I, 271) Mr. Plummer was "becoming more belligerent." (*Id.*) "He was crossing that line." (*Id.*).

Thus, overwhelming evidence exists showing that Mr. Plummer was intoxicated while driving the golf cart. That fact is important for two reasons. First, Mr. Plummer's clear intoxication minutes after leaving FMCC provides circumstantial evidence that a jury should be able to consider for the genuine issue of material fact of whether he was intoxicated when handed the to-go champagne just minutes earlier and whether FMCC should have known it. Second, if the Dram Shop Act does not apply to FMCC's illegal service, then this evidence of intoxication after Mr. Plummer left the club absolutely precludes summary judgment.

3. FMCC's Arguments to the Contrary are Erroneous.

Despite the facts and evidence set forth above, FMCC argues that:

In this case, it is impossible for the LaMarres to produce evidence supporting judgment on the issue of intoxication because the testimony is unanimous that Mr. Plummer was not intoxicated, and there is no evidence from which a reasonable person should have known he was intoxicated.

(FMCC Brief at 14) One must ask why it would be impossible for the LaMarres to produce such evidence at trial and how FMCC could know this prior to discovery being complete and prior to the disclosure of expert witnesses. FMCC's answer to this question is that its own employees (who could be subject to indemnity actions and liability if FMCC is found liable) stated in their depositions that they did not think Mr. Plummer was intoxicated and that Mr. Plummer himself stated that he was not intoxicated. Potential bias of this testimony is self-evident, and a jury should be permitted to adjudge the witnesses' credibility.

FMCC also points out that Mr. and Mrs. LaMarre stated honestly in their depositions that they did not believe Mr. Plummer seemed intoxicated when he left the club. However, as the Court of Appeals pointed out, they had also consumed alcohol and were not in the same or similar circumstances as the sober and trained FMCC servers and bartender. (Court of Appeals Op., Ex. A at 7) FMCC may benefit from the LaMarres' judgment through apportionment of liability at trial, but their perceptions do not eliminate the extensive, direct evidence cited above creating an issue of fact as to the intoxication issues. As well, it was not the LaMarres' duty to judge Mr. Plummer's level of intoxication while FMCC was serving him—that was the duty of the dram shop, FMCC, and its servers.

FMCC also argues at length that evidence subsequent to the service of alcohol is irrelevant to the issues of whether Mr. Plummer was intoxicated when served at FMCC and whether FMCC should have known this. It makes this argument due to the fact that FMCC would like to avoid the consideration of Mr. Plummer's reckless conduct immediately upon leaving the club. (Dep. of Mrs. LaMarre at Vol. I, 245, Vol. II, 32-33, 97-98)⁸ These facts provide strong circumstantial evidence that Mr. Plummer was intoxicated just minutes before while served the to-go champagne at the club. FMCC misconstrues the relevance standard and ignores the basic concept of circumstantial evidence by making its contrary argument.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence.” KRE 401. Mr. Plummer's reckless conduct immediately upon leaving FMCC, set forth at length above, certainly makes his intoxication at the FMCC, minutes before, more probable under this standard. Mr. Plummer being intoxicated at the club, combined with the fact that the servers and bartender served, opened, and poured a substantial amount of wine for Mr. Plummer in an hour, creates a material issue of fact as to whether they should have known that he was intoxicated. The evidence of Mr. Plummer's conduct after leaving FMCC is relevant.

Finally, FMCC never truly addresses why Mr. Plummer being served and consuming the equivalent of approximately one entire bottle of red wine in an hour does not create an issue of fact as to whether it should have known that he was intoxicated when it handed him a to-go bottle on the way out the door (as Mr. Plummer traded in an

⁸ The reckless conduct evinced by this testimony occurred before Mr. Plummer drank additional champagne on the road.

empty bottle to the bartender). Particularly considering the fact that all inferences and doubts must be resolved in favor of the LaMarres, FMCC cannot escape that this evidence defeats summary judgment. FMCC's argument over these facts is appropriate to a jury during closing but not at the summary judgment stage.

FMCC did not satisfy its burden of establishing that it is impossible for the LaMarres to produce evidence at trial warranting judgment in their favor. This fact is particularly true, since the FMCC elected to file its Motion for Summary Judgment prior to the completion of discovery, prior to the disclosure of expert witnesses, and prior to trial being set. The Trial Court did not resolve doubts in favor of the LaMarres, did not view the record in the light most favorable to the LaMarres, did not allow the LaMarres to complete their discovery or retain their experts (despite no scheduling order or no trial being set), and did not hold FMCC to its burden of having to show that there is no room left for controversy and that it appears impossible for the LaMarres to produce evidence at trial warranting judgment in their favor. For these reasons, this Court should affirm the Court of Appeals' reversal of summary judgment.

IV. CONCLUSION

The Court of Appeals' decision in favor of the LaMarres is a commonsense application of the law that this Court should adopt as the undisputed law of the land. No court in the Commonwealth should interpret the Dram Shop Act to say that an establishment that serves alcohol without a license or in violation of the license it holds can hide behind the protections of the Act to help it avoid civil liability for its criminal conduct.

Only one conclusion promotes the Commonwealth's prudent approach to licensing dram shops: when a dram shop serves alcohol, it must have a license for the type of service it undertakes. When it does not have a license for the service (or serves alcohol in violation of the license it has), the dram shop acts illegally and cannot assert the protections of the Dram Shop Act. To conclude otherwise ignores the relevant case law, contravenes public policy and principles of equity, and disregards the only logical interpretation of the Dram Shop Act.

An independently decisive point in this case is that the Plaintiffs/Appellees have presented substantial evidence to demonstrate multiple issues of material fact as to Plummer's intoxication while at FMCC and while driving the golf cart. The LaMarres have also introduced evidence that FMCC knew or should have known that Mr. Plummer was intoxicated when it illegally served him the to-go champagne. This evidence includes: (a) While at the Club, Plummer consumed the equivalent of one full bottle of red wine in about an hour; (b) FMCC employees opened, served, and poured the wine for Mr. Plummer; (c) FMCC employees collected the empty bottles; (d) Mr. Plummer even handed one of the empty bottles to the bartender in exchange for the to-go champagne; and (e) FMCC had a practice of allowing patrons to leave the club with wine glasses, which Mr. Plummer apparently did that evening.

Only minutes after being served the to-go champagne and leaving on the golf cart, Mr. Plummer exhibited a number of overt signs of intoxication including erratic, obnoxious, bizarre, and dangerous behavior. Those facts provide further evidence that Mr. Plummer was intoxicated shortly before the ride on the cart when he was illegally served the to-go champagne. The amount of red wine consumed at FMCC and the

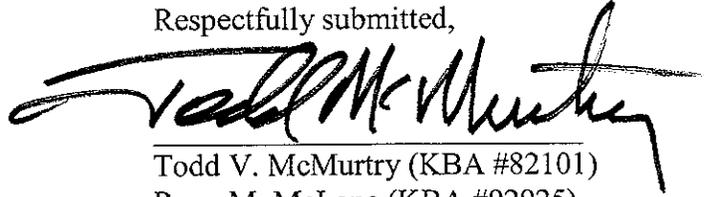
behavior immediately following creates a genuine issue of material fact as to Mr. Plummer's intoxication when FMCC illegally served him the champagne and whether its trained staff knew or should have known it. Notwithstanding the substantial amount of evidence in the record to defeat summary judgment, the Trial Court committed error in prematurely adjudicating FMCC's Motion over the LaMarres' objection. At that time, discovery was ongoing, experts had not and were not required to be identified, and trial had not been set. The Trial Court erroneously forbid the LaMarres the opportunity to develop their evidence fully prior to facing summary judgment. Thus, the Trial Court could not have been in a position to conclude that it would be impossible for the LaMarres to produce evidence at trial warranting judgment in their favor—they were still properly and timely gathering evidence.

No matter this Court's decision on the applicability of the Dram Shop Act, the LaMarres have presented enough evidence to withstand a motion for summary judgment. Further evidence shows that the last drink FMCC served Mr. Plummer (the to-go bottle) was enough to take him from intoxicated to drunk. FMCC served the to-go bottle at the Club, and it should shoulder its share of the responsibility for the consequences of its illegal conduct. An opinion by this Court affirming the decision of the Court of Appeals will send a clear signal to Kentucky's purveyors of alcohol that they must be properly licensed, must abide by the license that they have, and must be diligent about over-service.

For the foregoing reasons, Plaintiffs Timothy J. LaMarre, Theresa J. LaMarre, Nathan LaMarre, and Nicole LaMarre respectfully ask this Court to affirm the Court of

Appeals opinion reversing the Trial Court's April 19, 2010, order granting Fort Mitchell Country Club's motion, and to vacate summary judgment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Todd V. McMurtry". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Todd V. McMurtry (KBA #82101)

Ryan M. McLane (KBA #92925)

Dressman Benzinger LaVelle psc

Counsel for Appellees

INDEX OF THE APPENDIX

A. Court of Appeals Opinion, *LaMarre, et al. v. Ft. Mitchell Country Club*, Case No. 2010-CA-000813-MR.

The Court of Appeals Opinion may be found as part of the appellate records in this case.

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