

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

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FORT MITCHELL COUNTRY CLUB

APPELLANT

KENTUCKY COURT OF APPEALS
CASE NO. 2010 CA 00813

VS.

APPEAL FROM KENTON CIRCUIT COURT
CIVIL ACTION NO. 08-CI-3207

TIMOTHY LAMARRE, THERESE LAMARRE,
NATHAN LAMARRE, AND NICOLE LAMARRE

RESPONDENTS

BRIEF FOR APPELLANT, FORT MITCHELL COUNTRY CLUB

Submitted by

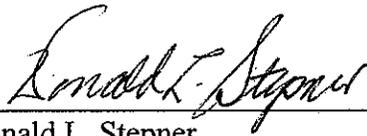
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The undersigned does hereby certify that ten copies of this brief have been served via First Class U.S. Mail to Susan Stokley Clary, Clerk, Kentucky Supreme Court, New Capitol Building, Room 235, 700 Capital Avenue, Frankfort, KY 40601; one copy has been mailed to the Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601; and that one copy has been served upon: Hon. Gregory M. Bartlett, Kenton Circuit Court, 230 Madison Ave., Suite 701, Covington, KY 41011, William Kathman, Busald Funk & Zevely, PSC, 226 Main Street PO Box 6910, Florence, KY 41042, Tom Sweeney, Sweeney & Fiser, PLLC, 2519 Ritchie Street, Crescent Springs, KY 41017, and Todd V. McMurtry, Dressman, Benzinger & LaVelle, PSC, 441 Vine Street, 3500 Carew Tower, Cincinnati, OH 45202-3007 on this the 7th day of May, 2012.



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INTRODUCTION

This case presents a question not yet addressed by this Court: Whether a private club that is claimed to have violated its liquor license by returning a sealed bottle of alcohol to an adult patron is entitled to the protection of the Dram Shop Act as to claims for injuries the patron causes to a third party while off of the club's premises. Appellant Fort Mitchell Country Club seeks review of a Court of Appeals decision which answered the question in the negative, despite the lack of any evidence that the patron was intoxicated at the time the Club returned his unopened bottle to him.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument. This case presents an issue of first impression that has significant importance to alcoholic beverage licenses across the Commonwealth, and the Appellant believes that oral argument will assist the Court in addressing factual issues which appeared to confuse the Court of Appeals.

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STATEMENT OF THE CASE

On the evening of September 13, 2008, Appellees Timothy and Theresa LaMarre (“the LaMarres”) had dinner with their friends and neighbors, Michael and Kimberly Plummer, at the Appellant Fort Mitchell Country Club (“the Club”). Prior to the couples’ arrival at the Club, Michael Plummer called and instructed a bartender to remove two bottles of champagne from Plummer’s private wine locker at the Club and put them on ice. (Depo. of Michael Plummer at 103-104.) Around 7:30 p.m., the Plummers drove their four-seat golf cart to the LaMarres’ residence and the four of them then drove to the Club on the golf cart. (Depo. of Timothy LaMarre, Vol. I., at p. 102-103; 105.)

Upon arriving at the Club, Michael Plummer retrieved a bottle of wine from his private wine locker. (Depo. of Michael Plummer at 116). Michael Plummer, Timothy LaMarre, and Theresa LaMarre each drank wine from this bottle during the meal while Kimberly Plummer drank champagne from one of the bottles that Michael Plummer had arranged to be chilled. (Depo. of Kimberly Plummer at 44; Depo. of Timothy LaMarre, Vol. I, at 108-110; Depo. of Kimberly Plummer at 44.) At some point during the meal, Timothy LaMarre left and drove the Plummers’ golf cart back to his residence in order to deliver a meal to his son. (Deposition of Timothy LaMarre Vol. I, at 117.) When Mr. LaMarre returned, he brought a second bottle of wine which he presented to Michael Plummer as a gift. (*Id.* at 121.) Michael Plummer, Timothy LaMarre, and Theresa LaMarre then dumped out the wine that remained in their glasses and began drinking from this second bottle of wine. (Depo. of Kimberly Plummer at 50; Depo. of Michael Plummer at 142; Depo. of Timothy LaMarre, Vol. I, at 125; 128.)

During the course of the meal, various Club employees observed and spoke with the group. None of the foursome exhibited signs of intoxication, such as slurred speech, stumbling, or scent of alcohol according to the waitress who served them, who did not believe any of them to be intoxicated. (Depo. of Anna Marcum at 35, attached hereto as Exhibit A.) The Snack Shop Manager spoke with the group eight or ten times as she walked back and forth while closing the pool area, (Depo. Sharon Ottaway at 14-15, attached hereto as Exhibit B.), and none of the group appeared intoxicated or exhibiting any signs of intoxication. (*Id.* at 22.) The Food and Beverage Manager visited the foursome's table and did not believe any of them to be intoxicated. (Depo. of James John Rosati at 19-20, attached hereto as Exhibit C.) The night supervisor visited the table, heard everyone speak and did not believe any of them were intoxicated. (Depo. of January Maria Boaz at 16-17, attached hereto as Exhibit D.)

After the group completed their meal, on their way out of the Club, Michael Plummer requested the second of his two champagne bottles from the bartender. (Depo. of Michael Plummer at 126; 158.) Mr. Plummer did not exhibit slurred speech, bloodshot eyes, or problems walking during this conversation with the bartender. (Depo. of Charles Dinolfi at 40, attached hereto as Exhibit E.) Mr. Plummer gave the unopened bottle to his wife, who put it in her purse. (Depo. of Michael Plummer at 126; 158.)

The Club is licensed to sell alcohol on its premises by virtue of its status as a special private club licensee. See KRS 243.270. This license permits retail alcohol sales for consumption on the Club's premises. It does not permit "package" sales of unopened bottles of alcohol for consumption off the premises. See *Id.*; KRS 243.240; 243.250. The record does not disclose whether the champagne bottles in Michael Plummer's wine

locker were purchased at the Club. Club members may purchase alcohol from the Club for storage in their wine locker and consumption later, but members also occasionally purchase liquor elsewhere and bring it to the Club for storage in their wine locker. (Depo. of Jeffrey Beckman at 46.)

After completing their meal, the group boarded the golf cart and left the Club. (Depo. of Timothy LaMarre, Vol. II, at 20.) Michael Plummer drove and did not appear to be intoxicated. ((Depo. of Timothy LaMarre, Vol. II, at 22, attached hereto as Exhibit F; Depo. of Theresa LaMarre, Vol. I, at p. 149, attached hereto as Exhibit G; Depo. of Michael Plummer at p. 166, attached hereto as Exhibit H; Depo. of Kimberly Plummer at 55, attached hereto as Exhibit I.) The group embarked on an impromptu "tour" of the neighborhood, stopping along the way to visit neighbors. (Depo. of Michael Plummer at 171). Later that evening, as the group left their neighbors' driveway, Timothy LaMarre, who was standing on the back of the golf cart, fell and suffered the injuries which gave rise to this action. (Depo. of Kimberly Plummer at 32-33.)

On October 6, 2008, Theresa LaMarre, Nathaniel LaMarre and Nicole LaMarre filed a Complaint naming Michael Plummer as the sole defendant. (Record at pp. 1-5.) On May 5, 2009, they amended their Complaint to add Timothy LaMarre as a plaintiff and the Club as defendant. Record at pp. 100-117. The Amended Complaint contains two substantive claims against the Club. First, the LaMarres allege that the Club is liable under KRS 413.241 ("the Dram Shop Act") for serving Michael Plummer alcohol after he had become intoxicated. (*Id.*, Count VIII). Second, they allege negligence *per se* based

upon the Club's alleged violation of its liquor license. (*Id.*, Count IX.) They also claim loss of marital consortium and loss of parental consortium.¹ (*Id.*, Counts X, XI.)

Following discovery, the Club moved for summary judgment arguing that the Dram Shop Act is the exclusive basis for the Club's liability and, citing the unanimous testimony summarized above, that the LaMarres had failed to produce any evidence of the necessary element of intoxication. (Record at 383-396.) In the alternative, the Club argued that even if the Dram Shop Act does not apply, the LaMarre's negligence *per se* fails because the Club owed no duty to the LaMarres under the licensing statutes. (*Id.*)

The Kenton Circuit Court granted summary judgment to the Club. It held that the Dram Shop Act is the exclusive basis for the Club's liability, and therefore that any claim required proof of intoxication. (Record at 544-548; Exhibit J.) Citing the absence of any evidence of intoxication in the record, it found that there was no issue of fact as to Michael Plummer's intoxication. (*Id.*) Based on these holdings, the Circuit Court did not reach the Club's alternative argument. (*Id.*) The LaMarres appealed and the Court of Appeals reversed, holding that the Club's possible violation of its liquor license rendered the Dram Shop Act inapplicable. (See Exhibit K.) As to the issue of Michael Plummer's intoxication, the Court held that an issue of fact exists as to whether Michael Plummer was intoxicated. (*Id.*) The Court of Appeals did not address the Club's alternative argument. (*Id.*)

Upon the Club's Motion, this Court granted discretionary review of the Court of Appeals' Opinion.

¹ The loss of consortium claims are wholly dependent upon a finding of liability under one of the two negligence claims. KRS 411.145(2).

ARGUMENT

The Court of Appeals reversed the trial court's ruling that the Dram Shop Act applies to the LaMarres' claims and is the exclusive basis of the Club's liability. It also reversed the trial court by holding that an issue of fact exists as to Michael Plummer's intoxication. Sections I and II below address these issues and demonstrate that the Court of Appeals' holdings are in error. Section III addresses the Club's alternative argument, that it cannot be liable under the LaMarres' negligence *per se* theory.

I. THE DRAM SHOP ACT IS APPLICABLE TO THE LAMARRES' CLAIMS REGARDLESS OF WHETHER THE CLUB VIOLATED ITS LICENSE.

The Dram Shop Act provides as follows:

(1) The General Assembly finds and declares that the consumption of intoxicating beverages, rather than the serving, furnishing, or sale of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or another person.

(2) 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.

(3) The intoxicated person shall be primarily liable with respect to injuries suffered by third persons.

(4) The limitation of liability provided by this section shall not apply to any person who causes or contributes to the

consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol.

(5) This section shall not apply to civil actions filed prior to July 15, 1988.

KRS 413.241.

The trial court and the Court of Appeals came to differing conclusions over the applicability of the statute to the LaMarres' claims. Correctly construed, the statute is not only applicable, but is the exclusive basis for determining the Club's liability.

A. Under the Rules of Statutory Construction, the Alleged Violation of the Club's Liquor License Does Not Negate Application of the Dram Shop Act.

A court's main objective in construing a statute is to do so, "in accordance with its plain language and in order to effectuate the legislative intent." *Cabinet for Families and Children v. Cummings*, 163 S.W.3d 425, 430 (Ky. 2005). A court must ascertain the intention of the legislature from words used in the statutes rather than surmising what may have been intended but was not expressed. *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). Examination of the plain language of the Dram Shop Act reveals that the LaMarres' claims are precisely the type the General Assembly intended to address by enacting the statute.

Subsection (1) of the Dram Shop Act explicitly sets out the General Assembly's intent to hold intoxicated persons, not those who serve intoxicants, civilly liable for injury inflicted by the intoxicated person. It does so by expressly declaring that the intoxicated person is the proximate cause of any such injury. Similarly, subsection (3) makes clear that the intoxicated person is primarily liable. Further, by its plain terms, the Dram Shop Act applies where: (1) the defendant holds a permit under KRS 243.030, and (2) serves alcohol to a person over the age for the lawful purchase of alcohol, and (3) the

claimant was injured off the premises of the permit holder. KRS 413.241(2). Each of these preliminary elements is established in this case. There is no dispute that the Club holds a Special Private Club license authorized by KRS 243.030. See KRS 243.030(17). Similarly, it is undisputed that Michael Plummer was over the age of 21 at all relevant times. Finally, the LaMarres' injuries were suffered off the Club's premises. Therefore, the LaMarres' claims fall directly within the plain language of the Dram Shop Act, and the Club cannot be liable for injuries except by operation of the Act.

The LaMarres have argued, and the Court of Appeals apparently agreed, that a license holder must "qualify" before the Act may be applied. They contend that the Club cannot "qualify" because it handed Mr. Plummer his unopened bottle of champagne for consumption off the premises, in apparent violation of the Club's license. This argument finds no support in the plain language of the statute. The Dram Shop Act cannot be fairly read to require a permit holder's "qualification," since no such language appears in the statute. Such an interpretation ignores words used in the statute and improperly assumes an idea "that was not expressed." See, *Revenue Cabinet v. O'Daniel*, 153 S.W.3d at 819.

The LaMarres have further argued that a permit holder which serves alcohol in violation of its license, is not a "person holding a permit" under the Dram Shop Act. This argument is obviously not based on the plain language of the statute, which creates no qualifications or conditions on the "holding" of a permit. The argument is similarly unsupported by the record, as it is undisputed that the Club has at all times held a permit under KRS 243.030. The LaMarres essentially ask this Court to ignore this clear, unambiguous language by holding that an entity which holds a permit, such as the Club,

is not a “person holding a permit.” The argument strains credulity, and clearly violates the rule that the plain language of a statute must control.

Comparison of the plain language of the Dram Shop Act to the licensing statutes reveals the General Assembly’s intent for the Dram Shop Act to apply more broadly than the licensing statutes. The LaMarres’ contention that the Club violated its license is based upon KRS 243.250, which provides, “A retail drink license shall not authorize the licensee to *sell* distilled spirits or wine by the package.” (emphasis added). On the other hand, the Dram Shop Act provides, “that the consumption of intoxicating beverages, rather than the *servicing, furnishing, or sale* of such beverages, is the proximate cause of any injury...” KRS 413.241(1). It further provides that a dram shop’s liability may attach where “intoxicating beverages were sold *or served*.” KRS 413.241(2). Thus, the licensing statutes are concerned solely with “sales” of alcohol, while the Dram Shop Act addresses not only sales, but also the service and furnishing of alcohol. This plain language demonstrates the broader scope of the Dram Shop Act.

Moreover, “where there is both a specific statute and a general statute seemingly applicable to the same subject, the specific statute controls.” *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 819 (Ky. 1992). The Dram Shop Act is a specific statute enacted to address only the very specific situation in which an injured person seeks to hold a licensed seller of alcohol civilly liable for the acts of an intoxicated third party. It does not address nor concern itself with the broader and more general regulation of liquor licenses, which are handled within the licensing statutes. Indeed, the Act operates independent of and “notwithstanding” the licensing statutes, which contain their own enforcement provisions for violators. See, KRS 413.241(2); KRS 244.990; 243.990

“Any person who, by himself or herself or acting through another, directly or indirectly, violates any of the provisions of KRS 243.020 to 243.670, for which no other penalty is provided, shall, for the first offense, be guilty of a Class B misdemeanor; and for the second and each subsequent violation, he or she shall be guilty of a Class A misdemeanor. The penalties provided for in this subsection shall be in addition to the revocation of the offender’s license.”). The Court of Appeals’ interpretation offends this rule since it applies the general pronouncements of the licensing statutes to the LaMarres’ claims, the very type of claims the General Assembly sought to be addressed with the specific provisions of the Dram Shop Act.

Another familiar and general rule of statutory interpretation is that the expression of one thing implies the exclusion of another. This basic tenet of statutory construction is usually referred to by the Latin phrase *expressio unius est exclusio alterius*. See, *Jefferson County v. Gray*, 198 Ky. 600, 249 S.W. 771, 772 (1923). The General Assembly has expressed specific limitations and exceptions within the Dram Shop Act which imply the exclusion of all other exceptions.

Subsection (2) provides that the Act does not apply where the purchaser is not of legal age or is already intoxicated. Each of these types of sales constitutes a violation of a seller’s license. See KRS 244.080. Thus, the General Assembly identified two specific license violations which preclude application of a seller’s license. Moreover, the General Assembly created an express exception to the Dram Shop Act in subsection (4), which precludes application of the Act where the permit holder causes the consumption of alcoholic beverages “by force or by falsely representing that a beverage contains no alcohol.” KRS 413.241(4).

With these clearly articulated exceptions, the General Assembly demonstrated its ability and intent to limit the applicability of the Dram Shop Act in specific situations. In singling out sales to minors and intoxicated persons, the General Assembly identified two, *and only two*, specific license violations which limit the scope of the Act. It also identified one, *and only one*, specific exception for instances in which alcohol is consumed due to force or fraud. Tellingly, the legislature did not create any other exceptions or limitations, such as to require that a permit holder's service be "consistent with its permit" or that the Act applies only to "authorized sales." Quite clearly the General Assembly could have included such limiting language, but chose not to. Applying the concept of *expressio unius est exclusio alterius*, it is clear that the General Assembly did not intend to limit the Act's scope except in those specific situations set out in the statute. The lack of any expression of limitations based on violation of a dram shop's license is an indication of the General Assembly's intent not to limit the applicability of the Act in the manner advanced by the LaMarres and adopted by the Court of Appeals.

Application of these rules of statutory construction makes clear that the General Assembly intended to cover a broad range of alcohol service by various types of permit holders. As correctly noted by the trial court, the legislature intended for the Dram Shop Act to grant broad protection to permit holders, subject only to the limited exceptions which are specifically delineated in the statute.

B. Public Policy Dictates that the Dram Shop Act Apply, Notwithstanding the Alleged Violation of the Club's Liquor License.

The Court of Appeals assumed that that the Club violated the terms of its license² and concluded that the protection of the Dram Shop Act should therefore not be extended to the Club. The Court stated that to permit application of the Act to the Club would “clearly stifle the interest of all alcohol licensing laws as well as the Dram Shop Act itself.” This statement is inconsistent with the policy stated subsection (1) of the Dram Shop Act, “The General Assembly finds and declares that the consumption of intoxicating beverages, rather than the serving, furnishing, or sale of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or another person.” Subsections (2), (3), and (4) make clear that, so long as the purchaser is of age, and not already intoxicated, ultimate responsibility for the purchaser’s conduct lies with the purchaser, not the seller. In short, the policy sought to be advanced by the Dram Shop Act is one of personal responsibility.

This policy is consistent with the licensing statutes, which do not concern themselves with the problem of individuals becoming intoxicated outside the presence of licensed alcohol vendors. The licensing statutes specifically permit package sales and anticipate that alcohol will be consumed outside the presence of license holders in certain situations. See KRS 243.030; 243.230. The policy behind the licensing statutes is not violated when a person purchases package alcohol and becomes intoxicated at some later point, since the licensing statutes permit this conduct in certain situations. The licensing statutes make no distinction between package sales and retail drink sales in terms of precautions to be taken by the seller. Indeed, both merely require that the buyer be of legal age and not intoxicated at the time of the purchase. See, KRS 244.080; KRS

²The issue of whether the Club actually violated its license was not decided by the trial court and was never before the Court of Appeals.

413.241(2). Thus, had Michael Plummer left the Club, driven to a package liquor vendor, purchased alcohol, become intoxicated, and injured Timothy LaMarre, neither the licensing statutes nor the policy underlying them would have been offended in any way.

Moreover, the LaMarres suggest that the Club should be held liable if Michael Plummer became intoxicated *after* he left the Club. They assert that Michael Plummer's consumption of the champagne bottle constitutes continuing "service" for which the Club is responsible. Presumably, under this view, the Club could be held liable for injuries caused by Michael Plummer after consuming the bottle days or weeks later. The Court of Appeals' Opinion did not specifically address this issue, but its holding that a violation of the Club's liquor license provides a cause of action to the LaMarres indicates that it also holds this view. It is this notion which truly offends the "interests of the licensing laws and the Dram Shop Act."

The "policies" sought to be advanced by the LaMarres' and the Court of Appeals actually do harm to the true policy behind the Dram Shop Act. Their argument flies in the face of personal responsibility and would call into question the General Assembly's tolerance of even licensed package liquor sales.

C. Kentucky Decisional Law Dictates that the Dram Shop Act Apply, Notwithstanding the Alleged Violation of the Club's Liquor License.

There is no support in Kentucky case law for the proposition that the Dram Shop Act is inapplicable due to a technical violation of permit holder's license, since there is no Kentucky case which so holds. In fact, case law predating the Dram Shop Act suggests that liability against a dram shop must be premised on evidence that the person served was intoxicated at the time of service, rather than on the basis of an "illegal" service. In *Grayson Fraternal Order of Eagles v. Claywell*, Ky., 736 S.W.2d 328 (1987),

the plaintiff alleged that the seller was liable because it “illegally” sold alcohol in a dry county. The Court ultimately held that the seller’s liability, if any, must be premised on foreseeability of harm, and completely ignored the fact that the alcohol service was technically illegal. *Id.* at 333. The Court reasoned that a cause of action for negligence could lie against a dram shop who sells to a minor or an intoxicated person because “the intoxicated person and the minor are high risk drinkers, with substantial likelihood that selling them liquor will cause such person to have an accident. *Id.* See also, *Britton’s Admin. v. Samuels*, 136 S.W.143 (Ky. 1911) (holding that consumption, rather than “illegal” sale was the proximate cause of death); *Waller’s Admin. v. Collinsworth*, 137 S.W. 766 (Ky. 1911) (holding that consumption, rather than “illegal” sale, was the proximate cause of homicide).

The case law interpreting the Dram Shop Act is similarly unsupportive of the LaMarres’ interpretation. The LaMarres have previously relied upon *Sixty-Eight Liquors v. Colvin*, 118 S.W.3d 171 (Ky. 2003) for the proposition that a technical violation of a licensing statute strips a permit holder of the application of the Dram Shop Act. But the holding of *Sixty-Eight Liquors*, is not so broad. *Sixty-Eight Liquors* concerned the sale of alcohol to a minor, an act which unequivocally places a permit holder outside the plain language of the Dram Shop Act. The Court’s use of the term “lawful sale” in its opinion referred to the Act’s requirement that the buyer be “a person over the age for the *lawful* purchase thereof.” KRS 243.241(2)(emphasis added.) *Sixty-Eight Liquors* contained no discussion relevant to an alleged violation of a seller’s liquor license, as distinguished from an illegal sale, and the LaMarres’ reliance on the case is simply misplaced.

II. UNDER THE DRAM SHOP ACT, THE CLUB CANNOT BE LIABLE TO THE LAMARRES BECAUSE THERE IS NO EVIDENCE THAT MICHAEL PLUMMER WAS INTOXICATED.

This court reviews a trial court's grant of summary judgment *de novo* to determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). 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.

A. Under the Dram Shop Act, the LaMarres Must Establish That Michael Plummer Was Actually Intoxicated While Present at the Club and that the Club Unreasonably Failed to Recognize His Intoxication.

Before examining the evidence relating to the LaMarres' claim that Michael Plummer was intoxicated, a discussion of the relevant evidence on the issue is necessary. The Court of Appeals did not specifically identify the evidence which it considered in determining that an issue of fact exists as to Michael Plummer's intoxication. However, it referenced evidence of Michael Plummer's conduct after leaving the Club; an indication that the Court of Appeals viewed that evidence as pertinent to the inquiry. (See Exhibit K

at 2.) For their part, the LaMarres have consistently argued that evidence of Michael Plummer's intoxication after he left the Club should be considered in determining the Club's liability under the Dram Shop Act. The Dram Shop Act explicitly states the evidence which should be considered, and to the extent the Court of Appeals considered other evidence, it erred.

1. The Dram Shop Act Requires Evidence of Actual Intoxication And Evidence From Which a Reasonable Person Should Recognize Intoxication.

Subsection (2) of the Dram Shop Act provides that no liability will be imposed against a dram shop "unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated..."

The plain language employed by the General Assembly makes clear that the person being served must "already" be intoxicated and further that a reasonable person should know that he is intoxicated. The factual elements to be established under this section are twofold, 1) actual intoxication and 2) evidence from which a reasonable person should notice such intoxication. Importantly, the statute does not provide that the person served appears to be intoxicated, or even that he has consumed a volume of alcohol from which a person of average tolerance would be intoxicated. Thus, when faced with a Motion for Summary Judgment, a claimant under the Act must point to affirmative evidence of each of these two elements. *See, Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991).

2. Only Evidence of Intoxication on the Dram Shop Premises at the Time of Serving is Relevant to the Intoxication Issue.

Again, subsection (2) provides that no permit holder shall be liable “unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated *at the time of serving.*”

Simple application of the plain language of this subsection demonstrates that only conduct which is observable to the dram shop employees at the time of serving are relevant. Conduct occurring outside the dram shop premises or subsequent to the service can have no bearing on this issue.

If the LaMarres are correct, and evidence of intoxication after the purchaser leaves the dram shop is relevant, then every package sale of liquor would subject the license holder to liability. This is precisely why the General Assembly included the “at the time of serving” language. Without that limitation, package license holders would have exposure until such time as the liquor is consumed and the effects on the buyer wear off.

Accordingly, the only relevant evidence which may be considered in determining the liability of dram shop is that which occurs on the dram shop premises at the time of serving. Any evidence of conduct occurring off the premises and after the service is irrelevant and may not be considered.

B. There Is No Evidence that Michael Plummer Was Intoxicated When The Club Handed Him His Second Champagne Bottle.

As established above, the pertinent question under the Dram Shop Act is whether “a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving.” The statute requires evidence of actual intoxication as well as evidence from which a reasonable person should know

that he is intoxicated. There is no evidence in the record here which creates an issue of fact as to either of these elements.

The LaMarres cannot point to any evidence in the record which establishes that Michael Plummer was actually intoxicated. In fact, both Timothy and Theresa LaMarre testified to their belief that Michael Plummer *was not intoxicated*. To summarize the parties' testimony:

- Timothy LaMarre testified that Michael Plummer did not seem intoxicated when the group left the Club. (Depo. of Timothy LaMarre, Vol. II, at 22, attached hereto as Exhibit F.)
- Theresa LaMarre did not believe Michael Plummer was under the influence while at the Club, and was not concerned about his driving the golf cart, as he was "perfectly capable" of getting the LaMarres home. (Depo. of Theresa LaMarre, Vol. I, at p. 149, attached hereto as Exhibit G.)
- Michael Plummer was specifically asked whether any of the foursome appeared to be intoxicated, slurring their speech, stumbling, or unsteady on their feet, to which he replied, "Absolutely not." (Depo. of Michael Plummer at p. 166, attached hereto as Exhibit H.)
- Kimberly Plummer observed Michael Plummer when he left the Club and termed his demeanor "normal." (Depo. of Kimberly Plummer at 55, attached hereto as Exhibit I.)

The Court of Appeals took issue with this testimony, finding it insufficient to support summary judgment in favor of the Club. It stated, "Mr. Plummer's dinner guests, who had also been consuming alcohol, could arguably be neither reasonable nor under the same or similar circumstances as the employees who were not consuming alcohol." (Appendix, Exhibit B at p. 9.) The Court correctly observed that, "the appropriate test is whether "a *reasonable person under the same or similar circumstances* should know that the person served is already intoxicated *at the time of serving*." (*Id.* citing KRS 413.241.) The Court of Appeals further recognized that the best evidence under this test would be

“the employees who were not consuming alcohol.” (*Id.*) Despite this, the Court of Appeals did not address the testimony of those employees. Again, to summarize their testimony:

- The waitress who served the foursome at the Club, observed nothing in Michael Plummer’s conduct that led her to believe he was intoxicated. (Depo. of Anna Marcum at p. 35, attached hereto as Exhibit A.)
- The Snack Shop Manager observed the group and spoke with Michael Plummer several times during his dinner at the Club and believed he was “fine.” Deposition of (Sharon Ottaway at 14-15, 22, attached hereto as Exhibit B.)
- The Food and Beverage Manager at the Club. He observed the foursome having dinner briefly and has never seen Michael Plummer intoxicated. (Deposition of James John Rosati at 19-20, attached hereto as Exhibit C.)
- The night supervisor at the Club, did not believe Michael Plummer was intoxicated. (Depo. of January Boaz at 16-17, 28, attached hereto as Exhibit D.)
- The bartender on duty at the Club that night, observed the group at the table, spoke with Michael Plummer, and handed him the second bottle of champagne did not believe he was intoxicated. (Depo. of Charles Dinolfi, III at 19, attached hereto as Exhibit E.)

The very evidence that the Court of Appeals identified as being pertinent to the issue of intoxication under the Dram Shop Act is in the record and establishes that Michael Plummer was not intoxicated. What’s more, each of these individuals has completed training in the recognition of intoxication. (Depo. of Anna Marcum at 48, Exhibit A; Depo. of Sharon Ottaway at 21, Exhibit B; Depo. of James John Rosati at 8-10, Exhibit C; Depo. of January Maria Boaz at 17-18, Exhibit D; Depo. of Charles Dinolfi, III at 19-20, Exhibit E.) Counsel for the LaMarres conceded in oral argument before the trial court that there is no evidence in the record of stumbling or belligerent conduct that might serve as an indicator of intoxication. (See video tape of oral argument at 10:15:23 “There is no evidence of record on that point.”) The Court of Appeals nevertheless reversed the

trial court on this issue and did so without any discussion of the employee testimony or the lack of evidence of intoxication.

Further, the Court of Appeals held that an issue of fact exists, but it failed to point to any evidence in the record which supports a finding that a reasonable person should have known that Michael Plummer was intoxicated. CR 56 requires the LaMarres, as the nonmovant, to show some “affirmative evidence demonstrating that there is a genuine issue for trial. *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). During oral argument in the trial court, Judge Bartlett repeatedly asked LaMarres’ counsel to identify the evidence which satisfies this burden. (See video tape of oral argument at 10:03:03; 10:10:35; 10:11:37; 10:15:23; 10:19:14). LaMarres’ counsel responded by referencing conduct which occurred outside the Club, both before and after the meal. (*Id.* at 10:06:36; 10:11:37; 10:53:45). Indeed, the only evidence the LaMarres have ever identified which occurred while the group was at the Club is the alcohol the group consumed while there. This evidence does not satisfy the LaMarres’ burden in light of the explicit testimony of all witnesses, including the LaMarres themselves, that Michael Plummer was not intoxicated and exhibited no signs of intoxication. Since there is no evidence from which Club employees could have inferred intoxication, like slurred speech or unsteady gait, it is impossible for the LaMarres to produce evidence at trial supporting a judgment in their favor on this issue, and the trial court correctly granted summary judgment to the Club.

C. There Is No Evidence of Michael Plummer’s Intoxication Even After Leaving The Club, And Such Evidence is Irrelevant in Any Case.

Even assuming that evidence of Michael Plummer's conduct after he left the Club were relevant, which it clearly is not, there is no testimony that Michael Plummer was intoxicated even after leaving the Club. To summarize:

- Timothy LaMarre boarded the golf cart when the group originally left the Hills' residence, but would not have done so had he believed him to be intoxicated. (Depo. of Timothy LaMarre, Vol. II, at 40.)
- Ron Hill, Michael Plummer's neighbor, observed the foursome in his driveway just prior to the accident and rode as a passenger on the golf cart, driven by Michael Plummer, after the accident. He did not believe him to be intoxicated. (Deposition of Ron Hill at 58, 92.)
- Officer Schrand was on duty and responded to the accident scene. She has received training to identify intoxicated motorists and has participated in DUI investigations. (Deposition of Erica Schrand at 24.) Officer Schrand spoke with Michael Plummer at the accident scene and testified that he did not exhibit any signs of intoxication. *Id.* at 56. She also testified that Michael Plummer's eyes were not bloodshot, that he was not slurring his speech, and he had no smell of alcohol on him during her conversation. (*Id.* at 88.)

Thus, even if the LaMarres are correct, and evidence of Michael Plummer's intoxication after leaving the Club is relevant, there is still no evidence that supports a finding of intoxication. Therefore, the Court of Appeals must be reversed and the trial court's grant of summary judgment reinstated.

D. The Court of Appeals Improperly Shifted the Burden to The Club to Establish That Michael Plummer *Was Not* Intoxicated, When the Dram Shop Act Clearly Places the Burden on the LaMarres to Establish That Michael Plummer *Was* Intoxicated.

The standard for summary judgment in Kentucky is familiar and well-established, but it was misapplied by the Court of Appeals in this case. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to

produce evidence at trial warranting a judgment in his favor.” CR 56; *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citing *Steelvest* 807 S.W.2d at 480-82).

Under CR 56, the Club bore the initial burden of establishing an absence of material fact. *Id.* at 436. It did so by pointing to the evidentiary record in which all witnesses testified that Michael Plummer was not intoxicated. Thereafter, the LaMarres, as the nonmovant, bore the burden to present ‘at least some affirmative evidence showing that there is a genuine issue of material fact for trial.’” *Id.* at 436. The LaMarres have wholly failed to present any such evidence.

Relying on this lack of evidence, the trial court found “there is no evidence that the Club staff or employees knew or reasonably should have known that Mr. Plummer was intoxicated while being served and prior to leaving the Club.” (Exhibit J at 2.) Since *no* evidence of intoxication exists, the trial court correctly found that it is impossible for the LaMarres to produce evidence at trial warranting judgment in their favor.

The Court of Appeals disagreed, stating that the Circuit Court improperly relied upon the unanimous testimony that Michael Plummer was *not* intoxicated. (Appendix, Exhibit K at 9.) Again, the trial court’s ruling was not based *solely* on this testimony. It was based upon the entire evidentiary record which contains no evidence from which a reasonable person could conclude he was intoxicated.

More importantly, the Court of Appeals’ focus on the sufficiency of the evidence which supports the Club’s position, that Michael Plummer was *not* intoxicated, rather than the lack of evidence which supports the LaMarre’s position, is improper. The Club need not establish that Michael Plummer was not intoxicated as a matter of law. It need only establish that there is no evidence which supports a finding that he was intoxicated.

Steelvest 807 S.W.2d at 480-82. In the absence of any such evidence, it “appears impossible that the [the LaMarres] will be able to produce evidence at trial warranting a judgment in [their] favor. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citing *Steelvest* 807 S.W.2d at 480-82).

The Court of Appeals did not require the LaMarres to produce any evidence in support of their claim and therefore it improperly applied CR 56. Properly applied, CR 56 forecloses the LaMarres’ intoxication claim because of the absence of any testimony supporting an inference that Michael Plummer was intoxicated is fatal to the LaMarres’ factual claim. Accordingly, the Court of Appeals Opinion must be reversed.

III. ALTERNATIVELY, EVEN IF THE DRAM SHOP ACT DOES NOT APPLY, THE CLUB CANNOT BE LIABLE UNDER THE LAMARRES’ NEGLIGENCE *PER SE* CLAIM.

Assuming, *arguendo*, that the Dram Shop Act does not apply, then the issue becomes what theory of liability may be applied to FMCC. The LaMarres’ pleaded only two alternative theories against FMCC, negligence under the Dram Shop Act and negligence *per se* based on FMCC’s alleged violation of the liquor licensing laws under Count IX.³ The Court of Appeals held that the duty created under the Dram Shop Act does not apply, but did not articulate the duty that is owed by FMCC. The LaMarres have never adequately addressed the nature of the Club’s liability under the negligence *per se* theory; they appear to suggest that a permit holder is strictly liable for all injuries which arise after an apparent violation of the permit holder’s license. The theory is untenable,

³ Again, no factual determination has ever been made that FMCC actually violated its license, and FMCC disputes that it did.

because the Club owed no duty to the LaMarres under the licensing statutes. Accordingly, there can be no liability under the LaMarres' negligence *per se* claim.⁴

The LaMarres' negligence *per se* claim is premised on the allegation Club violated its license by providing "take out" alcohol to Michael Plummer. Even assuming the Club's did violate its license,⁵ this claim fails for at least three reasons.

First, the plain language of the Dram Shop Act demonstrates that it is the exclusive avenue available for recovery against a liquor license holder for off-premises injuries caused by an adult patron. Again, a Kentucky court's main objective in construing a statute is to do so in accordance with its plain language. *Cabinet for Families and Children v. Cummings*, 163 S.W.3d 425, 430 (Ky. 2005). In other words, a court must assume that the legislature "meant exactly what it said, and said exactly what it meant." *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (citing *Stone v. Pryor*, 103 Ky. 645, 45 S.W. 1136, 1142 (Ky. 1898) (Waddle, S.J., dissenting.))

The introductory phrase, "Any other law to the contrary notwithstanding" in subsection (2) makes clear the General Assembly's intent that the Dram Shop Act forecloses all other legal theories of recovery in this context. Since the Act applies "notwithstanding any law to the contrary," an alleged violation of *any other law*, including the alcohol licensing laws, does not prevent application of the Dram Shop Act. A permit holder cannot be liable for injuries suffered off the premises except under the Dram Shop Act's framework, and therefore, the LaMarres negligence *per se* theory fails as a matter of law.

⁴ The discussion in this section is equally applicable to the LaMarres' additional negligence *per se* claim, which was included in the tendered Third Amended Complaint, filed with their Motion to File a Third Amended Complaint. That Motion was deemed moot after the trial court granted summary judgment to the Club.

⁵ Again, the Club does not concede that it actually violated its license.

Second, neither KRS 243.270, nor any of the licensing statutes, provides for a private right of action for its violation. The duties created by KRS 243.270 have nothing to do with the injuries suffered by the LaMarres, and the LaMarres have pointed to no Kentucky authority which grants them a right of recovery for license violation. While the legislature created penalties for violations, including revocation of the license see KRS 243.990, there is no provision providing for a civil cause of action. Moreover, nothing in the licensing statutes or the Dram Shop Act indicates that a licensee may lose the protection of the Dram Shop Act for violation of its license.

The violation of a statute does not necessarily create liability unless the statute was specifically intended to prevent the type of occurrence which has taken place. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). Quite clearly, the legislature's enactment of KRS 243.270 was not aimed specifically at preventing the injuries suffered by the LaMarres. Had the General Assembly intended to eliminate the danger posed by adult patrons who intend to consume alcohol off the premises of the dram shop, it would not tolerate package sales under any circumstances. Moreover, if the General Assembly truly intended the licensing statutes to address the danger of purchasers becoming intoxicated on package liquor after leaving the seller's premises, one would expect that the licensing statutes would place additional requirements upon package licensees, beyond those in place for retail drink licensees. No such additional requirements appear in the statute, but all licensees are prohibited from selling to clearly intoxicated persons and under age persons. See KRS 244.080.

Further, KRS 243.115 specifically permits restaurant patrons to purchase and consume wine on restaurant premises and then reseal and take the leftover alcohol with

them when they leave. The General Assembly therefore would condone the very actions that Michael Plummer took at the Club, had it occurred in a restaurant. Following the LaMarres' theory of liability, the General Assembly intended for patrons of a private club to have a cause of action which would be unavailable to general restaurant patrons even under an otherwise identical set of facts. If the legislature *specifically* intended to prevent such harms, why would it protect some, but not all, innocents who are injured by intoxicated patrons? The answer, of course, is that the KRS Chapter 243 is not specifically intended to prevent the injuries at issue herein. KRS 243.115 demonstrates that the General Assembly's enactment of the licensing statutes was not intended to address the danger posed by those who may wish to consume alcohol both on a dram shop's presence and off the premises after they leave. The issuance of a particular license to a seller does nothing to prevent one who appears sober from later becoming intoxicated and hurting himself or others. And the licensing statutes were certainly not specifically intended as a basis for liability for a seller who serves one who later becomes intoxicated off the premises. Rather, the General Assembly enacted the Dram Shop Act to specifically address such situations.

Third, assuming that such a private right of action exists for violation of KRS 243.270, the LaMarres must prove that the Club's violation of the statute was the proximate cause of their injuries, a necessary element of a negligence *per se* claim. See, *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436-437 (Ky. App. 2001). The LaMarres cannot establish this element because the Kentucky General Assembly has declared that "the consumption of intoxicating beverages, *rather than the serving, furnishing, or sale of such beverages*, is the proximate cause of any injury, including death and property

damage, inflicted by an intoxicated person upon himself or another person.” KRS 413.241(1) (emphasis added). This provision contains no prerequisite that the alcohol be “furnished” by a permit holder. Thus, even assuming a violation of KRS 243.270, this subsection of the Dram Shop Act prohibits the LaMarres from proving the causation element of their negligence *per se* claim.⁶

By the same token, any alternate cause of action that the LaMarres could bring against the Club would ultimately depend on a showing that the Club knew or should have known that Michael Plummer was intoxicated at the time of service. This is evident from Kentucky common law in effect prior to the enactment of the Dram Shop Act, which held that dram shop liability must be premised upon evidence from which it can be reasonably inferred that the tavern keeper knows or should know that he is serving a person actually or apparently under the influence of alcoholic beverages. *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328 (Ky. 1987). This is consistent with the guiding principle of all tort law, that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury. *M & T Chemicals, Inc. v. Westrick*, 525 S.W.2d 740 (Ky. 1974); *Greyhound Corp. v. White*, 323 S.W.2d 578 (Ky. 1959). Absent proof that Michael Plummer was intoxicated while he was present at the Club, injuries caused by him after leaving the premises were simply unforeseeable to the Club. Were such injuries deemed foreseeable, every sale of alcohol, regardless of the sobriety of the purchaser, would expose the seller to potential liability in the event the purchaser later became intoxicated.

⁶ 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.

For these reasons, a negligence *per se* claim cannot be maintained against the Club and the trial court's dismissal of the LaMarres' claims should be affirmed.

CONCLUSION

In light of the foregoing, Appellant, Fort Mitchell Country Club., respectfully requests that the Court overrule the decision of the Kentucky Court of Appeals and reinstate the April 19, 2010 decision of the Kenton Circuit Court.

Respectfully submitted,



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APPENDIX

- A. Selected pages from the deposition of transcript of Anna Marcum
- B. Selected pages from the deposition of transcript of Sharon Ottaway
- C. Selected pages from the deposition of transcript of James John Rosati
- D. Selected pages from the deposition of transcript of January Boaz
- E. Selected pages from the deposition of transcript of Charles Dinolfi
- F. Selected pages from the deposition transcript of Timothy LaMarre
- G. Selected pages from the deposition transcript of Theresa LaMarre
- H. Selected pages from the deposition transcript of Michael Plummer
- I. Selected pages from the deposition of transcript of Kimberly Plummer
- J. April 19, 2010 Order of the Kenton Circuit Court
- K. June 24, 2011 Opinion of the Kentucky Court of Appeals