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

FORT MITCHELL COUNTRY CLUB — **APPELLANT**

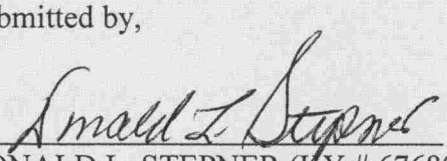
v.

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

TIMOTHY LAMARRE, THERESA LAMARRE
NATHAN LAMARRE, AND NICOLE LAMARRE — **APPELLEES**

REPLY BRIEF FOR APPELLANT, FORT MITCHELL COUNTRY CLUB

Submitted by,



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CERTIFICATE REQUIRED BY CR 76.12(6)

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 19th day of July, 2012.

STATEMENT OF POINTS AND AUTHORITIES

APPENDIX

A. Selected pages from the deposition of transcript of Michael Plummer

B. Selected pages from the deposition of transcript of Jeffrey Beckman

INTRODUCTION

In issue is whether the Appellant, Fort Mitchell Country Club ("FMCC"), an alcohol permit holder, may be held liable for injuries that were suffered because of the alleged intoxication of co-Defendant Michael Plummer off of FMCC's premises. According to the Appellees ("LaMarres"), FMCC should have ascertained that Plummer was intoxicated because, although he exhibited no signs of intoxication and all of the witnesses deposed agree that he was *not* intoxicated, he was one of three people who shared two bottles of wine while dining at FMCC. As is clear from the LaMarres' Brief, the only factual basis for their claim that Plummer was intoxicated is limited to speculation as to the amount of alcohol he drank that night. The LaMarres therefore assert that FMCC's liability flows from a failure to monitor the precise alcohol consumption of every person at FMCC that night, regardless of whether they showed any sign of intoxication. This claimed duty is not only utterly unreasonable, it is completely undermined by KRS 413.241 ("the Dram Shop Act"), which specifically addresses civil liability in this context.

Though nothing in the LaMarres' Brief should convince this Court that the Dram Shop Act should not be applied in this case, FMCC files this Reply Brief for the purpose of addressing certain of the LaMarres' erroneous factual and legal arguments.

ARGUMENT

I. FMCC HAS NOT WAIVED OR OTHERWISE FAILED TO PRESERVE ITS ARGUMENTS.

The LaMarres' claim that FMCC's alternative argument has not been preserved is contrary to Kentucky law. The judgment of a lower court can be affirmed for any reason in the record. *See Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326

S.W.3d 803, 812 n.3 (Ky. 2010). Where the prevailing party seeks only to have the judgment affirmed, it is entitled to argue without filing a cross-appeal that the trial court reached the correct result for the reasons it expressed and for any other reasons appropriately brought to its attention. *Com., Corrections Cabinet v. Vester*, 956 S.W.2d 204, 205-06 (Ky. 1997). Thus, FMCC was not required to file a Cross-Appeal in the Court of Appeals to preserve its alternative argument.

Further, the LaMarres claim that FMCC raised the alternative argument for the first time in their Reply Brief. The alternative argument was raised in response to the LaMarres' assertion in their Memorandum in Response to FMCC's Motion for Summary Judgment that their negligence *per se* claim was not based on a violation of KRS 243.270, but actually upon their allegation that FMCC sold Plummer package liquor, a violation of KRS 243.250 or KRS 243.020. (Record at 409) The LaMarres then moved to amend their Complaint to allege violation of these additional statutes. (Record at 422-428). The proposed amendment was rendered moot by the trial court's holding that the Dram Shop Act is the exclusive cause of action available to the LaMarres against FMCC. (Record at 544-548, attached as Exhibit J to Appellant's Brief) Thus, the issue came about as the result of the LaMarres' failure to set out the statute they relied upon and FMCC cannot be deemed to have failed to preserve this argument. This Court is free to consider FMCC's alternative argument should it become necessary, despite the fact that neither the trial court nor the Court of Appeals has yet formally addressed it.

III. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT WAS NOT PREMATURE.

The LaMarres' contention that the trial court prematurely ruled on FMCC's motion for summary judgment is meritless. The decision to allow or deny additional

discovery is committed to the discretion of the trial court. *Ford v. Courier-Journal Job Printing Co.*, 639 S.W.2d 553, 557 (Ky. App. 1982). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The LaMarres have failed to demonstrate that the court abused its discretion in deciding FMCC's summary judgment motion.

Far from being premature, the trial court's Order granting summary judgment was entered nearly fifteen months after the LaMarres' initial Complaint, which was filed on October 6, 2008. (Record at pp. 1-5.) On April 17, 2009, they moved to amend the Complaint to include allegations against FMCC. (Record at pp. 94-97). FMCC completed its discovery and filed its Motion for Summary Judgment eight months later, on December 18, 2009. (Record at p. 383) At no time during this period did the LaMarres identify any expert witness or indicate that they intended to do so.

More importantly, if the LaMarres sought more time to conduct discovery before responding to FMCC's summary judgment motion, their remedy was to invoke CR 56.06. The rule required the LaMarres to file an affidavit stating the reasons they could not present the necessary evidence absent a continuance.[1] Instead of presenting such an affidavit, the LaMarres filed a Response Memorandum on January 19, 2010 in which they relied solely on speculation as to Michael Plummer's intoxication. They wrote that they had not consulted an expert toxicologist, but that their "own research and common knowledge" indicated that Plummer was intoxicated. (Record at pp. 406-407) Several

[1] CR 56.06 provides, "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

weeks later, they filed a Response to Defendant Plummer's Motion to Set Trial Date, in which they set forth the discovery they intended to complete prior to trial. They stated that they sought to develop expert evidence on the issue of damages, but did not mention expert evidence addressing intoxication. (Record at pp. 453-455).

It was not until the LaMarres appeared at the hearing on the FMCC's Motion for Summary Judgment, held on April 9, 2010, that they first objected to the court's consideration of FMCC's Motion for Summary Judgment. Even then the LaMarres' counsel indicated only that he objected to FMCC's Motion because he intended to present testimony from other *fact* witnesses located by the LaMarres' private investigator. Counsel did not claim that he needed more time to develop testimony from an expert toxicologist. (See video tape of oral argument,4/9/10; 10:03:24) In response, Judge Bartlett quite rightly pointed out that it was incumbent upon the LaMarres to produce affidavits from such fact witnesses and LaMarres' counsel did not request a continuance to do so. (*Id.*) The trial court cannot be deemed to have denied the LaMarres ample opportunity to complete discovery since the LaMarres failed to follow CR 56.06 or alert the Court as to the nature of the evidence they intended to develop.

Finally, the cases cited by the LaMarres are easily distinguished. In *Suter v. Mazyck*, 226 S.W.3d 837, 841 (Ky. App. 2007), the Court found that the nonmoving party had not had ample opportunity to complete discovery because it had not yet deposed the opposing party, nor received documents requested from the opposing party. Similarly, *Robertson v. Lampton*, 516 S.W.2d 838 (Ky. 1974) concerned a four car motor vehicle accident. At the time summary judgment was awarded, only one of the eye witnesses and none of the involved drivers had been deposed. *Id.* at 838. Thus, in both

cases relied upon by the LaMarres, the nonmovant was prejudiced by an inability to discover facts known by an opposing party. In contrast, the LaMarres complain of an inability to present their own expert's opinion. They cannot complain that FMCC possesses the information they needed, as they deposed of all the employees on duty at FMCC that night. Kentucky law is clear that the LaMarres are entitled not to complete discovery, but only an opportunity to do so. *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.* 579 S.W.2d 628, 630 (Ky. 1979). Under such circumstances, the trial court's ruling on FMCC's Motion for Summary Judgment was not arbitrary, unreasonable, unfair. This Court need not seriously consider the LaMarres' contention otherwise.

III. THE DRAM SHOP ACT APPLIES TO THE LAMARRES' CLAIMS

A. There is No Evidence that FMCC Sold the Champagne to Plummer.

The LaMarres repeatedly assert in their brief that FMCC "sold" a bottle of champagne to Mr. Plummer. (See e.g. Brief for Appellees at 11) There is no dispute that the champagne came from the Plummers' wine locker at FMCC (Depo. of Michael Plummer at 116, attached as Exhibit A), but there is no evidence that FMCC sold it to him. In fact, FMCC members occasionally purchase alcohol elsewhere and store it in their wine locker. (Depo. of Jeffrey Beckman at 46, attached as Exhibit B) Since no testimony establishes where the champagne bottle came from, the LaMarres repeated misrepresentation of this fact is improper. As FMCC has acknowledged repeatedly, the issue of whether it violated its license is a disputed issue of fact in this case.[2]

B. The Rules of Statutory Construction Dictate that the Act Applies to the LaMarres' Claims.

[2] The violation issue is not a *material* fact, since FMCC cannot be liable for all the reasons stated in its Appellant's Brief.

Not surprisingly, the LaMarres spend little time in their brief discussing the plain language of the Act, since it unambiguously applies to all license holders. At its core, the LaMarres' plain language argument is that "Any law to the contrary notwithstanding, no person holding a permit shall be liable…" means "other contrary laws should be utilized to hold a permit holder liable..." Rather than make this frivolous argument, the LaMarres disguise a policy argument as a statutory construction argument. The recurring theme of the LaMarres' statutory construction argument is that the legislature's clearly articulated policy to hold the person who consumes alcohol and actually causes injury liable instead of the person who served alcohol is "absurd." As explained in FMCC's Appellant's Brief, the policy of holding the consumer, rather than the server, of alcoholic beverages is not only prudent, but completely necessary in a system in which package sales are permitted.

Moreover, the LaMarres' strained interpretation would itself yield absurd results which would subject dram shops to liability even for trifling, technical license violations that have no relation to an injury. For example, under the LaMarres' interpretation, a permit holder could be liable for injuries caused by a person who becomes intoxicated two weeks after purchasing package alcohol if the permit holder failed to post a sign addressing sales to underage persons or failed to furnish a clear view from the sidewalk. See KRS 244.083; 244.110. Obviously such a result was not intended.

In their desperate attempt to distort the clear language of the statute, the LaMarres contend that the canon *expression unius est exclusion alterious* ("the expression of one thing implies the exclusion of the other") does not apply to the Dram Shop Act. (Brief for Appellees at p. 16) This represents a complete about face since the LaMarres themselves

applied the doctrine to the Dram Shop Act in support their statutory construction arguments before the trial court. (Record 410-411)

As correctly noted by the trial court, the Dram Shop Act applies broadly and is subject only to those exceptions which are specified within the Act. The *only* exceptions the legislature intended to create were for egregious violations which are not authorized at any time under any license: sales to minors, sales to intoxicated persons. See KRS 244.080. To interpret the Act any other way is to violate each of the statutory canons discussed in FMCC's Appellant's Brief and to ignore the legislature's stated intent.

C. Application of the Act is Consistent With Public Policy.

The LaMarres' discussion of public policy demonstrates not that application of the Act in this case would violate public policy, but instead that they disagree with the General Assembly's stated policy in this area. That policy recognizes that package liquor is available for sale, and that an adult who exhibits no signs of intoxication is free to buy it from any number of authorized licensees. It therefore makes alcohol consumers, rather than sellers, civilly responsible for their own conduct. Though they decline to set forth the public policy they claim is served by their position in this case, it would appear to be strict liability for license violations. This approach improperly focuses on technical licensing issues, rather than a broader public policy addressed to the risk posed to the public by a particular alcohol service. Adherence to the LaMarres' policy would subject the public to inconsistent standards while having no appreciable effect on public safety.

The factual basis for the LaMarres' contention that the Act does not apply is that FMCC provided an adult with package alcohol. It goes without saying that package sales are permitted by the licensing statutes, so the act of providing package alcohol to an adult

cannot offend public policy. Further, the licensing statutes permit a licensee to hold both a retail drink license and a package license. KRS 243.110 provides, "The holder of a retail package license may also hold either a retail drink license or a special nonindustrial alcohol license." Similarly, the licensing statutes permit restaurant patrons to consume wine on the premises and take leftover wine home with them when they leave. See KRS 243.115. In both of these examples, the licensing statutes specifically authorize conduct which is nearly identical to that of FMCC. More importantly for public policy considerations, both examples pose identical risks to the public as FMCC's conduct. That risk is that a seemingly sober person may become intoxicated in the future and may then cause injury. If such risks are expressly permitted by the legislature in these contexts, they cannot be deemed to violate public policy in some other context if the policy is truly concerned with safety.

As demonstrated in FMCC's Appellant's Brief, the Dram Shop Act advances the important policy of personal responsibility by allocating civil liability to the parties who are truly responsible for injuries. In this case, those parties are Plummer and the LaMarres themselves.

IV. THE *TAYLOR* CASE IS NOT APPLICABLE

The LaMarres cite *Taylor v. Skyline Motel II Corp.*, 345 S.W.3d 237 (Ky. App. 2010) for the proposition that section 1 of the Dram Shop Act is unconstitutional, an argument that by their own admission they never made below. (Appellee's Brief at 27) While FMCC certainly agrees that the holding and reasoning of *Taylor* should be reviewed by this Court, it is apparent that *Taylor* was limited to the availability of punitive damages under the Dram Shop Act, an issue not litigated herein.

In the opening paragraph, the Court of Appeals described the lower court order it was reviewing as a declaratory judgment finding that the Dram Shop Act "prohibits recovery of punitive damages." *Id.* at 239. The Court related the relevant procedural history:

> [T]he Estate filed a motion for declaratory relief pursuant to KRS 418.040. The Estate sought a declaration that the [Dram Shop Act] is unconstitutional *to the extent that it prohibits recovery of punitive damages against a seller or provider of alcohol.* After reviewing the recent opinion by this Court in *Jackson v. Tullar*, 285 S.W.3d 290 (Ky. App. 2007), the trial court denied the Estate's motion for declaratory relief and *dismissed its claim for punitive damages*...This appeal followed. *Id.* at 240. (emphasis added)

The Court's holding was set out in the initial paragraph as follows:

> We conclude that the prior interpretations of the Act are consistent with the clear language of the statute. *Id.* However, we further find that the Act's implicit prohibition on recovery of punitive damages violates the jural rights and separation-of-powers provisions of the Kentucky Constitution. Therefore, we hold that the Dram Shop Act is unconstitutional to the extent that it prohibits recovery of punitive damages, and we remand this matter for further proceedings on the merits of that claim. *Id* at 239.

Consistent with this statement, in its opinion in the case at bar, the Court of Appeals described *Taylor* as holding that the Dram Shop Act is "unconstitutional to the extent that it prohibits recovery of punitive damages." (Exhibit K to FMCC's Appellant's Brief at 5)

Admittedly, the *Taylor* opinion contains language suggesting its holding is broader, but the two constitutional provisions identified by the Court, the jural rights doctrine and the traditional fact-finding role of the courts, are offended only by the prohibition of punitive damages, since compensatory damages have never been limited by the Dram Shop Act. The Court acknowledged that its opinion did not affect the Dram

Shop's Act standard for imposing liability upon a dram shop or its creation of a priority of liability between the dram shop and the intoxicated tortfeasor. *Id.* at 244. It further stressed that the factual inquiry for compensatory damages differs from the inquiry for punitive damages, "While the liability of the intoxicated tortfeasor remains relevant to determine the dram shop's liability for compensatory damages, it is not relevant to an award of punitive damages against the dram shop." *Id.*

Properly understood, the *Taylor* case is limited to punitive damages, an issue which has not been addressed at any level in the case at bar. As such, it has no application and the Court of Appeals should not have relied on *Taylor* in addressing the issues presented herein.

CONCLUSION

For the reasons set out herein and in FMCC's Appellant's Brief, this Court should reverse the Court of Appeals and restore summary judgment in favor FMCC as to all of the LaMarres' claims.

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