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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000813-MR

TIMOTHY J. LAMARRE; THERESA J. LAMARRE;
NATHAN LAMARRE; AND NICOLE LAMARRE — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 08-CI-03207

FORT MITCHELL COUNTRY CLUB — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Appellants seek review of the April 19, 2010, order of the Kenton Circuit Court granting summary judgment in favor of Fort Mitchell Country Club ("FMCC") and dismissing Appellants' negligence claims against FMCC. Because we hold that it would have been possible for Appellants to

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

produce evidence at trial in their favor and also that genuine issues of material fact exist, we reverse.

This appeal comes to us from a personal injury action initiated by Appellants against Michael Plummer, Kimberly Plummer, and FMCC. The facts of the underlying action are as follows: on the evening of Saturday, September 13, 2008, the Plummers drove their modified golf cart vehicle to the home of Timothy LaMarre and Theresa LaMarre and together the couples drove to FMCC. While at FMCC, the LaMarres and the Plummers dined and consumed a total of two bottles of wine and a bottle of champagne. Upon their departure from FMCC, Mr. Plummer obtained a second bottle of champagne from FMCC's bartender to take with him. The entire FMCC visit of the LaMarres and the Plummers was approximately 70 minutes.

Upon their departure from FMCC, the LaMarres and the Plummers again boarded the Plummers' modified golf cart vehicle, with Mr. Plummer driving. Mr. Plummer began driving the parties through the streets of Ft. Mitchell, at which time Mrs. LaMarre became concerned with Mr. Plummer's reckless driving. Mr. LaMarre asked Mr. Plummer to stop the vehicle, at which time Mr. LaMarre traded seats with Mrs. LaMarre. During the stop, Mr. Plummer opened the second bottle of champagne and proceeded to serve champagne to Mrs. Plummer, Mrs. LaMarre, and himself. Mrs. LaMarre would later testify that Mr. Plummer was playing the stereo system loudly and driving in a hazardous and erratic manner.

As the group was returning to the Plummers' home, they noticed that some neighbors, the Hills, were arriving at their home. Mr. Plummer then turned the vehicle around and drove it to the Hills' residence. After Mr. Plummer pulled the vehicle into the Hills' driveway, Mr. LaMarre exited the vehicle and began conversing with Mr. Hill. While Mr. LaMarre and Mr. Hill were still conversing, Mr. Plummer backed the golf cart to the end of the driveway and out onto the street. As Mr. LaMarre was moving to board the vehicle, but before he had taken his seat, Mr. Plummer accelerated the vehicle, throwing Mr. LaMarre from the vehicle and into the street. Mr. LaMarre struck the pavement and shattered his skull, resulting in permanent injury and possible permanent and total disability.

The LaMarres, along with their two children, brought suit against the Plummers, FMCC, and State Auto Insurance. The LaMarres alleged that FMCC had acted negligently by illegally serving alcohol to Mr. Plummer when its employees knew or should have known that Mr. Plummer was intoxicated. FMCC filed a motion for summary judgment, claiming protection under KRS[2] 413.241, also known as the Dram Shop Act. FMCC argued that the evidence neither supported the assertion that Mr. Plummer was intoxicated nor that FMCC had violated the laws governing the service of alcoholic beverages. The trial court agreed and granted FMCC's motion for summary judgment on April 15, 2010. This appeal followed.

We review a trial court's grant of summary judgment to determine "whether the trial court correctly found that there were no genuine issues as to any

[2] Kentucky Revised Statutes.

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).

Appellants make three arguments to this court: 1) the motion for summary judgment was premature; 2) the protection of the Dram Shop Act is not an available defense to FMCC; and 3) genuine issues of fact exist which preclude summary judgment.

The Dram Shop Act states:

> (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(held to be unconstitutional to the extent that it prohibits recovery of punitive damages by *Taylor v. King*, 2010 WL 3810797 (Ky. App. 2010)(2009-CA-001599-MR)(not yet final; motion for discretionary review of Kentucky Supreme Court pending).

In support of their argument that FMCC is not entitled to protection under the Dram Shop Act, Appellants assert that FMCC's service of alcohol to Mr. Plummer was in violation of its alcohol permit, therefore exempting it from the Act's protection. Appellants cite to *Sixty-Eight Liquors, Inc. v. Colvin*, 118 S.W.3d 171 (Ky. 2003), in which the Kentucky Supreme Court held that a dram shop which sells alcohol to a minor does not enjoy the protections of the Act. The trial court, in disagreeing with Appellants' argument, distinguished the *Sixty-Eight Liquors* case as being applicable to only those situations in which an establishment had sold alcohol to a minor. The trial court went on to conclude that "the only exception carved out from that broad limitation of liability is the aforementioned

language pertaining to sale to a person not over the lawful age to purchase alcohol." Our interpretation of the Dram Shop Act is not so broad.

As Appellants point out, and as the trial court found, FMCC did not have a retail package license. Instead, FMCC possessed a special private club license, pursuant to KRS 243.270, which only permits the distribution of retail alcoholic drinks. "A distilled spirits and wine retail drink license shall authorize the licensee to purchase, receive, possess, and sell distilled spirits and wine at retail *by the drink for consumption on the licensed premises*." KRS 243.250 (emphasis added). The evidence indicates that FMCC sold Mr. Plummer a *bottle* of champagne to be consumed *off the premises*. "A retail drink license shall not authorize the licensee to sell distilled spirits or wine by the package." *Id.* The language of the licensing statutes is clear that the licenses are not interchangeable. Nonetheless, the evidence indicates that FMCC treated them as such. 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. Accordingly, the trial court's determination that FMCC was entitled to protection of the Dram Shop Act was incorrect, making it possible for Appellants to produce evidence at trial supporting a judgment in their favor. *See James Graham Brown Foundation*, 814 S.W.2d at 276.

Assuming arguendo that FMCC had not acted in direct contravention of its license, summary judgment would still be inappropriate. The trial court erred

when it determined that there was no evidence that the FMCC employees knew or should have known that Mr. Plummer was intoxicated. The trial court based its finding on the fact that the LaMarres had not believed Mr. Plummer to be intoxicated and that a police officer who investigated the accident saw no indication of Mr. Plummer's intoxication. Setting aside the question of whether the police officer actually spoke to Mr. Plummer that night, this is not the appropriate test to determine whether the FMCC employees knew or should have known if Mr. Plummer was intoxicated. Instead, 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*." KRS 413.241(emphasis added). 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. Furthermore, a police officer filing a report at a later-occurring accident would not be privy to Mr. Plummer's condition at the time he was served the fourth bottle of alcohol. Accordingly, genuine issues of material fact exist whether FMCC employees knew or should have known that Mr. Plummer was intoxicated, making summary judgment improper.

Because we have already held that the grant of summary judgment was inappropriate, it is not necessary for us to address Appellants' argument that it was granted prematurely. We further note that our holding pertains only to the trial

court's grant of summary judgment and has no bearing on Appellants' ability to succeed on the merits of their claim.

For the foregoing reasons, the April 19, 2010, order of the Kenton Circuit Court is reversed.

ALL CONCUR.

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