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NO. 96-CA-001603-MR

HEATHER ALVEY; and
LINDA J. REID, MOTHER
AND NEXT FRIEND OF CHRISTOPHER
REID, A MINOR — APPELLANTS

APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE JAMES R. DANIELS, JUDGE
ACTION NO. 95-CI-00364

DESTOCK #14, INC. D/B/A
APPLEBEE'S NEIGHBORHOOD GRILL & BAR — APPELLEES

AND NO. 96-CA-001635-MR

DESTOCK #14, INC. D/B/A
APPLEBEE'S NEIGHBORHOOD GRILL & BAR — APPELLANTS

APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE JAMES R. DANIELS, JUDGE
ACTION NO. 95-CI-00364

JAMES LOGSDON — APPELLEES

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: WILHOIT, CHIEF JUDGE;[1] GUIDUGLI and JOHNSON, Judges.

JOHNSON, JUDGE: This is a consolidated appeal in which Heather Alvey (Alvey) and Linda J. Reid (Reid), mother and next friend of Christopher Reid, appeal from a May 2, 1996 summary judgment of the McCracken Circuit Court in favor of Destock #14, Inc., doing business as Applebee's Neighborhood Grill & Bar (Applebee's) that dismissed Alvey's and Reid's complaint against Applebee's. Applebee's has also appealed from a December 27, 1995 summary judgment which dismissed its cross-claim of indemnity against James Logsdon (Logsdon). We reverse and remand in both appeals.

This case involves personal injury claims arising from an automobile accident caused by Logsdon, who was driving his vehicle while under the influence of alcohol. Logsdon testified by deposition that on June 9, 1994, he spent approximately two and one-half (2 1/2) hours at Applebee's in Paducah, McCracken County, Kentucky, and consumed approximately four to six beers ten to twelve ounces in size. Logsdon contended that when he left Applebee's at approximately 9:30 p.m. he was not impaired. He drove less than a mile to another grill and bar, Ruby Tuesday's, and stayed there for approximately twenty minutes, consuming only one non-alcoholic O'Doul's. Logsdon then drove a few hundred yards to a Steak & Shake restaurant and purchased a hamburger and drink at the drive-through window. Logsdon exited the Steak & Shake parking lot, approached a stop light, and reached over to the passenger seat to retrieve his sandwich when he rear-ended a car

[1] Chief Judge Wilhoit concurred in this Opinion prior to his retirement effective November 15, 1997. Release of this Opinion was delayed by normal administrative handling.

driven by Christopher Reid. Alvey was a passenger in the Reid vehicle. Police arrived at the scene of the accident and Logsdon was arrested for driving under the influence of alcohol. A breath analyzer reading taken that evening indicated a blood alcohol level of 0.235%. The accident occurred approximately forty-five minutes after Logsdon left Applebee's.

Alvey and Reid brought suit against both Logsdon and Applebee's alleging that Logsdon was negligent in operating his automobile while intoxicated and that Applebee's negligently served Logsdon intoxicating beverages when he was already intoxicated. Applebee's filed a cross-claim for indemnity and/or contribution against Logsdon. Logsdon settled with Alvey and Reid for an amount less than Logsdon's liability policy limits and was released by Alvey and Reid from further liability. The circuit court entered an order dismissing Alvey's and Reid's claims against Logsdon on July 25, 1995.

On November 30, 1995, Logsdon moved the trial court for summary judgment against Applebee's on Applebee's cross-claim for contribution and/or indemnity. Citing case law on apportionment of liability, Logsdon argued that a tortfeasor can only be held liable for his share of fault--no more, no less--and that Applebee's had no claim for indemnity or contribution against him. See Kevin Tucker & Associates, Inc. v. Scott & Ritter, Inc., Ky.App., 842 S.W.2d 873 (1992); and Dix & Associates Pipeline Contractors, Inc. v. Key, Ky., 799 S.W.2d 24 (1990). The circuit court entered summary judgment for Logsdon on December 27, 1995. This summary judgment was not made final and appealable.

On April 15, 1996, Applebee's moved for summary judgment against Alvey and Reid. Applebee's argued that since Kentucky Revised Statutes (KRS) 413.241 (Kentucky's Dram Shop Liability Act, hereafter referred to as "the Dram Shop Act") provides that Logsdon's negligence was the proximate cause of all damages arising from the accident, Logsdon was primarily liable for Alvey's and Reid's damages and their release of Logsdon also released Applebee's of any liability. The circuit court entered summary judgment on May 2, 1996, dismissing Alvey's and Reid's claims against Applebee's. Alvey and Reid appealed from the May 2, 1996 summary judgment and Applebee's appealed from the December 27, 1995 summary judgment. The two appeals have been consolidated.

Since there is no genuine issue as to the material facts of this case, we must determine whether the moving parties were entitled to summary judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that this Court defer to the trial court since factual findings are not in issue. Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996), and Keeton v. City of Ashland, Ky.App., 883 S.W.2d 894, 896 (1994).

This is a case of first impression dealing with the Dram Shop Act, KRS 413.241, which states 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

> 243.010, 243.030, 243.040, 243.050, nor any agent, servant, or employee of such a person, who sells or serves intoxicating beverages to a person over the age for the lawful purchase thereof, shall be liable to such 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.

The Dram Shop Act was enacted in 1988 in apparent response to Grayson Fraternal Order of Eagles v. Claywell, Ky., 736 S.W.2d 328 (1987). Claywell involved the question of "whether and under what circumstances one may recover damages against a dram shop furnishing intoxicating liquor to a person actually or apparently under the influence of alcoholic beverages, who, because of his intoxicated condition, subsequently injures a third party." Id. at 329. The Supreme Court answered the question in the affirmative and stated:

> We hold simply that the standard expressed in the statute [KRS 244.080], 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.
>
> * * *
>
> By enacting KRS 244.080 the General Assembly has defined a standard of conduct against which negligence can and should be measured, and liability should be imposed where, from the circumstances of the violation, subsequent injury is reasonably foreseeable.
>
> * * *
>
> This means that where there is 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 (KRS 244.080(2))" and that there is a reasonable likelihood that upon leaving the tavern that person will operate a motor vehicle, the elements necessary to establish a negligence action are proved.

Id. at 334.

In Claywell the Supreme Court was critical of jurisdictions that had not recognized common law dram shop liability or enacted a Dram Shop Act. The Supreme Court stated that "[o]nly a handful still cling to the indefensible notion that a dram shop has no liability for subsequent injury caused by intoxicating liquor where the circumstances support a common law negligence action." Id. at 332. Claywell was followed shortly by the enactment of legislation that limited its application.

Our research has revealed a variety of approaches to this issue by the various states' Dram Shop Acts. Some states by legislation have recognized common law dram shop liability and others have restricted such claims. Louisiana appears to be the only other state that has adopted a provision similar to KRS

413.241(3) that provides that the intoxicated person is primarily liable. Louisiana Revised Statutes (La.R.S.) 9:2800.1 D. states: "The insurer of the intoxicated person shall be primarily liable with respect to injuries suffered by third persons."[2]

Alvey and Reid argue that KRS 413.241(2) establishes a claim against Applebee's and that Applebee's liability for its negligence should be apportioned pursuant to Hilen v. Hays, Ky., 673 S.W.2d 713 (1984), and Dix & Associates v. Key, supra. Alvey and Reid also argue that their release of claims against Logsdon was not a release of claims against Applebee's. The issues raised by Alvey and Reid require us to consider the applicability of KRS 411.182, which provides in pertinent part in Section (1) as follows: "In all tort actions . . . involving fault of more than one party to the action, . . . the court . . . shall instruct the jury to . . . [apportion fault] to each claimant, defendant, third-party defendant, and person who has been released from liability. . . ." KRS 411.182(4) provides that a release discharges "that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides."

Applebee's argues that pursuant to KRS 413.241(1) Logsdon is the proximate cause of Alvey's and Reid's damages and that pursuant to KRS 413.241(3) Logsdon is primarily liable for those damages. Applebee's position is that any liability that it has

[2] Section A. of that statute is almost identical to KRS 413.241(1) and likewise declares the consumption of intoxicating beverages to be the proximate cause of an injury inflicted by an intoxicated person.

under KRS 413.241(3) for negligently serving alcohol to Logsdon is secondary to Logsdon's liability.

Section 1 of KRS 413.241 states the General Assembly's finding "that the consumption of intoxicating beverages, rather than the serving, furnishing or sale of such beverages, is the proximate cause of any injury . . . inflicted by an intoxicated person. . . ." This statute is an attempt to legislatively establish causation, when generally, the question of proximate cause is left for the jury. McCoy v. Carter, Ky., 323 S.W.2d 210, 215 (1959); and Clardy v. Robinson, Ky., 284 S.W.2d 651, 654 (1955). In Section (2) of KRS 413.241, the Legislature further mandated that regardless of any other provision of law a seller or server of intoxicating beverages shall not be liable for damages caused by an intoxicated person, "unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving."

"Interpretation of statutes is a matter of law, White v. McAllister, Ky., 443 S.W.2d 541, 542 (1969), and a proper judicial function, Masonic Widows and Orphans Home and Infirmary v. City of Louisville, 309 Ky. 532, 544, 217 S.W.2d 815, 822 (1949)." Keeton v. City of Ashland, Ky.App., 883 S.W.2d 894, 896 (1994). "We have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion. Department of Revenue v. Greyhound Corp., Ky., 321 S.W.2d 60 (1959)." Bailey v. Reeves, Ky., 662 S.W.2d 832, 834 (1984). "As with any case involving statutory interpretation, our duty is to ascertain and give effect to the intent of the General Assembly.

We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used. Gateway Construction Co. v. Wallbaum, Ky., 356 S.W.2d 247 (1962)." Beckham v. Board of Education of Jefferson County, Ky., 873 S.W.2d 575, 577 (1994). "'[A] Statute should be construed, if possible, so that no part of it is meaningless or ineffectual.'" Keeton, supra at 896, quoting Brooks v. Meyers, Ky., 279 S.W.2d 764, 766 (1955).

In order for us to interpret KRS 413.241, we must first understand the statute's use of the term "primarily liable." The terms "primary liability" and "secondary liability" have different meanings depending upon their usage.[3] We believe, as indicated by the use of the term "proximate cause" in KRS 413.241, that the Legislature intended the term "primary liability" to have its meaning that is associated with tort law and not its meaning that is associated with insurance law. The following discussion is helpful in understanding the different meanings of "primary liability."

> Generally, a party who is guilty of only passive or secondary negligence may recover indemnity against the person primarily responsible or actively negligent. The mere failure to discover an unsafe or dangerous condition created by a joint tortfeasor constitutes passive negligence which will not bar indemnity against the active tortfeasor whose primary negligence created the dangerous condition. In addition, the negligence of a buyer in failing to discover and correct latent defects in the brakes of a truck does not make the buyer and seller joint tortfea-

[3] Our discussion of common law concepts is intended for the sole purpose of giving effect to the meaning of the statute. This discussion should not be used to alter the common law.

> sors, nor does it defeat the buyer's right to recover indemnity from the seller.

41 Am.Jur.2d Indemnity § 29 (1995) (footnotes omitted). See Brown Hotel Company v. Pittsburgh Fuel Company, 311 Ky. 396, 224 S.W.2d 165 (1949). See also Radcliff Homes, Inc. v. Jackson, Ky.App., 766 S.W.2d 63 (1989); Eichberger v. Reid, Ky., 728 S.W.2d 533 (1987); and 73 Am.Jur.2d Subrogation § 39 (1974). By comparison, when "primary liability" is used in regard to insurance coverage it denotes which insurance carrier must pay first, with the carrier that is secondarily liable paying only if there is an excess amount to pay. See Omni Insurance Co. v. Coates, Ky.App., 939 S.W.2d 879 (1997); Empire Fire and Marine Insurance Co. v. Haddix, Ky.App., 927 S.W.2d 843 (1996); and Brown v. Atlanta Casualty Co., Ky.App., 875 S.W.2d 103 (1994).

A situation, such as the case at bar, where the acts of a single tortfeasor alone would not have been sufficient to cause the damage has been referred to as "concurrent negligence."

> [W]here the acts by the tortfeasors would not have been sufficient by themselves to cause any of the injury, the large majority of jurisdictions have imposed joint and several liability. Typical situations under this category are the "collision cases" where the individual act of a tortfeasor, in and of itself, would not have caused the accident.

H. Wesley Williams, III, Tort "Reform" in Mississippi: Modification of Joint and Several Liability and the Adoption of Comparative Contribution, 13 Miss. C. L. Rev. 133, 141-142 (1992) (footnote omitted). The following example from Gulf Refining Company v. Ferrell, 147 So. 476 (Miss. 1933), illustrates this point.

> Tatum, superintendent of a filling station, instructed Ferrell, his employee, to paint

> "Don't Park" signs in the street in front of the property. Tatum assured Ferrell that he would watch for any oncoming cars. Ferrell was struck by a car and was given no prior warning by Tatum or the driver of the vehicle. The court stated the following: "It is too well settled in our jurisprudence to need citation of authorities that the concurring negligence of two or more persons proximately contributing to an injury does not constitute independent causes. . . . The negligence of [the driver] was a proximate contributing cause, and, together with the negligence of the master in not warning the servant of the imminent danger, contributed to the result. Useless each without the other."

13 Miss. C. L. Rev. at 142 quoting Ferrell (footnotes omitted). Similarly, Applebee's alleged negligence in serving Logsdon would not have harmed Alvey and Reid if Logsdon had not driven his car; and Logsdon's driving would not have harmed Alvey and Reid if Logsdon had not been intoxicated.

Thus, we hold that KRS 413.241 provides (1) that the server of intoxicating beverages has a legal duty to the person injured by the intoxicated person if "a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving"; (2) that if the conditions in (1) are met, the injured person has a tort claim against both the intoxicated person and the server; and (3) that the server has the right of indemnity against the intoxicated person. Under this interpretation of KRS 413.241, all parts of the statute have meaning and its application is reasonable since the intoxicated person has primary liability for the tort, and the negligent server has secondary liability. While a negligent server retains the right of indemnity against the intoxicated person, the

negligent server runs the risk of not being able to recover against an intoxicated person that is judgment-proof.

On remand, Alvey and Reid shall be allowed to proceed to trial against Applebee's on their tort claim for damages. Any award that Alvey and Reid receive shall have credited against it the amount of Alvey's and Reid's settlement with Logsdon. Alvey and Reid shall be entitled to a judgment against Applebee's to the extent that the amount of any damages awarded to them exceeds their settlement with Logsdon. To the extent that Applebee's is liable to Alvey and Reid, Applebee's shall have the right of indemnity against Logsdon.

For the foregoing reasons, the summary judgments of the trial court are reversed and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS, ALVEY AND REID:

Hon. James W. Owens
Hon. Donald R. Green, Jr.
JAMES W. OWENS, CHARTERED
Paducah, KY

BRIEFS FOR APPELLANTS/APPELLEES, APPLEBEE'S:

Hon. Daniel S. Stratemeyer
Paducah, KY

ORAL ARGUMENTS FOR APPELLANTS, ALVEY AND REID:

Hon. James W. Owens
Paducah, KY

ORAL ARGUMENTS FOR APPELLANTS/APPELLEES, APPLEBEE'S:

Hon. Daniel S. Stratemeyer
Paducah, KY

BRIEF FOR APPELLEE, LOGSDON:

Hon. E. Frederick Straub, Jr.
WHITLOW, ROBERTS, HOUSTON & STRAUB
Paducah, KY

ORAL ARGUMENTS FOR APPELLEE, LOGSDON:

Hon. Richard C. Roberts
Paducah, KY