CASE NO.: 18-CI-007456

JEFFERSON CIRCUIT COURT
DIVISION THREE (3)
JUDGE MITCH PERRY

Electronically Filed

JENNIFER SAINATO

PLAINTIFF

v.

NIKOLA JAJIC;
MARRIOTT INTERNATIONAL, INC.;
WHITE LODGING SERVICES CORP;
and RLJ LODGING TRUST

DEFENDANTS

MARRIOTT INTERNATIONAL, INC., WHITE LODGING SERVICES CORP., AND RLJ LODGING TRUST'S PRETRIAL MEMORANDUM

Come the Defendants, Marriott International, Inc., White Lodging Services Corp., and RLJ Lodging Trust, ("Marriott Defendants") and for their Pretrial Memorandum state as follows:

I. Facts

This matter arises from an alleged sexual assault that occurred at the Louisville Marriott on January 3, 2018. The Plaintiff, Jennifer Sainato claims she was sexually assaulted by another guest, Nikola Jajic in her hotel room. The hotel is franchised by Marriott International, Inc., operated by White Lodging, and owned by RLJ Lodging Trust.

On the evening of January 3, 2018, Ms. Sainato was in town on a business trip. She attended a business dinner with several colleagues where she admitted to consuming at least two glasses of wine. Ms. Sainato then drove to the Marriott Hotel where she checked in but did not go to her room. She instead went to the bar to go over paperwork where she ordered at least one more glass of wine. Ms. Sainato then struck up a conversation with Nikola Jajic who was also sitting in the bar. They conversed for several hours, and it is believed that Mr. Jajic consumed at least three drinks during this period of time.

This is where the story of the two individuals begins to diverge. Mr. Jajic claims they went outside and smoked a cigarette then came back in and following some additional conversation they went up to Ms. Sainato's room where they had consensual sex. Ms. Sainato on the other hand claims that she was drugged by a substance in the cigarette and has no memory of what occurred after she left the bar aside from asking a lone hotel employee if there was a separate elevator. Ms. Sainato did not seek help from any Marriott employees nor did she appear intoxicated or otherwise in distress. There is no evidence of any kind to support Ms. Sainato's claim that she was drugged. Ms. Sainato claims she awakened to being gang raped by at least two men, one of whom was Mr. Jajic. There is no physical evidence to support the presence of a second individual in the room with Ms. Sainato.

Ms. Sainato then called her son and reported that she had been sexually assaulted in her hotel room. Ms. Sainato's son then called the Marriott who reported the assault to the police. The police interviewed Ms. Sainato in her hotel room and she was then taken to University of Louisville Hospital for a rape examination. The post-incident drug screen failed to show any substance in Ms. Sainato's blood that she did not admit to consuming herself. Ms. Sainato's toxicology results showed the presence of alcohol, Adderall, and marijuana. Following a police investigation, no charges were brought against Mr. Jajic. Ms. Sainato instituted this civil suit against Mr. Jajic and the hotel defendants.

II. Issues of Law

Ms. Sainato's only remaining claim against the Marriott Defendants is a Dram Shop action under KRS 413.241(2). Under KRS 413.241 Ms. Sainato must first show that Mr. Jajic sexually assaulted her and then and only then can it be determined if The Marriott Defendants have any liability in this matter. *Destock #14, Inc. v. Logsdon*, 993 S.W.2d 952 (Ky. 1999), attached hereto as **Exhibit 1**. Further, the Plaintiff must show that a causal relationship exists

between the service of alcohol to Mr. Jajic and the Plaintiff's alleged attack. *Id.* The mere fact that either Ms. Sainato or Mr. Jajic may have been overserved is not sufficient to establish liability.

Additionally, pursuant to statute and applicable law, the Plaintiff is not entitled to punitive damages against the Marriott Defendants. *Jackson v. Tullar*, 285 S.W.3d 290 (Ky. Ct. App. 2007), attached hereto as **Exhibit 2**. The Plaintiff is not entitled to punitive damages because the Marriott Defendants conduct, if any, was not the proximate cause of her injuries. *Id.*

III. Issues of Fact.

The remaining issues of fact are listed below:

1. Was Ms. Sainato sexually assaulted?
2. Was Ms. Sainato served alcohol when a reasonable person would have known she was intoxicated?
3. Was Mr. Jajic served alcohol when a reasonable person would have known he was intoxicated?
4. Is there evidence that Ms. Sainato was intoxicated while in the bar located at the Marriott Hotel?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2022, I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system and served same via electronic mail to the following:

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Document (1)

1. *Destock #14, Inc. v. Logsdon, 993 S.W.2d 952*
   Client/Matter: -None-
   Jackson v. Tullar, 285 S.W.3d 290, 2007 Ky. App. LEXIS 170 (Ky. Ct. App. 2007):
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

EXHIBIT 1

Filed 18-CI-007456 01/04/2022 David L. Nicholson, Jefferson Circuit Clerk

Caution

As of: January 3, 2022 9:35 PM Z

Destock #14, Inc. v. Logsdon

Supreme Court of Kentucky

June 17, 1999, Rendered

97-SC-1072-DG, 97-SC-1086-DG

Reporter

993 S.W.2d 952 *; 1999 Ky. LEXIS 81 **

DESTOCK # 14, INC., d/b/a APPLEBEE'S NEIGHBORHOOD GRILL & BAR, APPELLANT v. JAMES LOGSDON; HEATHER ALVEY; and LINDA J. REID, Mother and Next Friend of CHRISTOPHER REID, APPELLEES AND JAMES LOGSDON, APPELLANT v. HEATHER ALVEY; LINDA J. REID, Mother and Next Friend of CHRISTOPHER REID, A Minor; and DESTOCK # 14, INC., d/b/a APPLEBEE'S NEIGHBORHOOD GRILL & BAR, APPELLEES

Subsequent History: [**1] Released for Publication July 8, 1999.

Prior History: ON REVIEW FROM COURT OF APPEALS. 96-CA-1635. McCRACKEN CIRCUIT COURT. HONORABLE JAMES R. DANIELS, JUDGE. 95-CI-364.

Disposition: AFFIRMED AND REMANDED.

Core Terms

dramshop, intoxicated, intoxicating beverage, indemnity, drunk driver, primarily liable, injuries, fault, secondarily liable, apportionment, settlement, proximate, declares, alcohol, summary judgment, causation, damages, serving, beverages, sections

Case Summary

Procedural Posture

Kentucky court of appeals reversed trial court's decision to dismiss plaintiffs' suit against defendant bar, brought under the Kentucky dram shop statute, *Ky. Rev. Stat. Ann. § 413.241* (Michie 1988), for damages sustained in a car accident caused by a drunk driver, defendant bar's customer. State supreme court granted discretionary review because the case involved an issue of first impression regarding interpretation of *§ 413.241*.

Overview

After plaintiffs settled their claim against defendant, a drunk driver, for damages sustained in a car accident, trial court dismissed plaintiffs' claim against defendant bar, which served alcohol to defendant driver before the accident. Trial court also dismissed defendant bar's cross claim against defendant driver, stating that plaintiffs' release of defendant driver released defendant bar as well. Court of appeals reversed. State supreme court granted discretionary review because the case involved an issue of first impression regarding interpretation of the dram shop statute, *Ky. Rev. Stat. Ann. § 413.241* (Michie 1988). Supreme court explained that although *Ky. Rev. Stat. Ann. § 411.182* required that damages be apportioned according respective percentages of fault, under *§ 413.241(1)*, defendant bar's negligence did not proximately cause plaintiffs'

injuries, so comparative fault did not apply. Defendants were separate tortfeasors, and whether defendant bar was liable depended on different factors. As a result, the trial court improperly dismissed plaintiffs' claim against defendant bar. Supreme court affirmed the court of appeals' decision and remanded the case.

Outcome

State supreme court affirmed reversal of trial court's decision to dismiss plaintiffs' claim against defendant bar after a customer, defendant driver, injured plaintiffs in a car accident. Supreme court explained that defendants were separate tortfeasors whose liability depended on different factors, so plaintiffs' decision to release defendant driver from liability pursuant to settling their claim did not release defendant bar from liability.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Evidence > ... > Scientific Evidence > Bodily Evidence > Blood Alcohol

HN1[] **Vehicular Crimes, Driving Under the Influence**

Under *Ky. Rev. Stat. Ann. § 189A.010(1)(a)*, a person with a blood alcohol concentration of 0.10 percent or more is prohibited from operating a motor vehicle.

Torts > ... > Types of Negligence Actions > Alcohol Providers > General Overview

HN2[] **Types of Negligence Actions, Alcohol Providers**

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 under *Ky. Rev. Stat. Ann. § 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.

Torts > ... > Types of Negligence Actions > Alcohol Providers > General Overview

HN3[] **Types of Negligence Actions, Alcohol Providers**

See *Ky. Rev. Stat. Ann. § 413.241* (Michie 1988).

Governments > Legislation > Interpretation

HN4[] **Legislation, Interpretation**

Any apparent conflict between sections of the same statute should be harmonized if possible so as to give effect to both; and, in so doing, the statute should be construed so that no part of it is meaningless or ineffectual.

Torts > ... > Multiple Defendants > Contribution > General Overview

HN5[] **Multiple Defendants, Contribution**

One wrongdoer less culpable than another may recover over although the wrong of each contributed to bring about the injury.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN6[] **Multiple Defendants, Distinct & Divisible Harms**

Ky. Rev. Stat. Ann. §§ 411.182(2) and *(3)* specify that damages must be apportioned according to the parties' respective percentages of fault, which are determined by considering both the nature of the conduct of each party and the causal relation between the conduct and the damages claimed.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

Torts > ... > Defenses > Comparative Fault > General Overview

HN7[] **Multiple Defendants, Distinct & Divisible Harms**

Absent causation, there can be no comparative fault.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

Torts > ... > Causation > Proximate Cause > General Overview

HN8[] **Multiple Defendants, Distinct & Divisible Harms**

Causation is a necessary condition precedent to consideration of a person's fault, that is, the fault must have "proximately caused or contributed" to the claimant's injuries. Once causation is found the trier of fact must determine and apportion the relative degrees of fault of all parties and nonparties.

Governments > Legislation > Interpretation

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

Torts > ... > Types of Negligence Actions > Alcohol Providers > General Overview

HN9[] **Legislation, Interpretation**

Statutes enacted at the same session of the legislature are entitled to equal dignity and should be construed so as to give effect to both. When two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails.

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ATTORNEYS FOR HEATHER ALVEY and LINDA J. REID, Mother and Next Friend of CHRISTOPHER REID, A Minor: James W. Owens, Donald R. Green, Jr., James W. Owens, Chartered, Paducah, KY.

Judges: OPINION OF THE COURT BY JUSTICE COOPER. Lambert, C.J.; Johnstone, Keller, Stumbo, Wintersheimer, JJ., and Special Justice W. David Denton, concur. Graves, J., not sitting.

Opinion by: COOPER

Opinion

[*954] OPINION OF THE COURT BY JUSTICE COOPER

AFFIRMING AND REMANDING

While stopped at a red light, an automobile operated by

Christopher Reid and occupied by Heather Alvey was struck in the rear by an **[**2]** automobile operated by James Logsdon. The collision pushed Reid's vehicle forward, causing it to collide with a third vehicle which was also stopped at the red light. Reid and Alvey both were injured as a result of the collision and brought this action in the McCracken Circuit Court seeking damages against Logsdon. They also sued DeStock # 14, Inc., d/b/a Applebee's Neighborhood Grill & Bar, asserting liability under Kentucky's dram shop statute, KRS 413.241. DeStock cross-claimed against Logsdon for indemnity for any sums which it might be required to pay in damages to Reid and/or Alvey.

Logsdon testified in his discovery deposition that prior to the accident he had purchased and consumed four to six glasses of draft beer at Applebee's, each glass containing approximately ten to twelve ounces of beer. He had then consumed one non-alcoholic beer at another bar before purchasing a sandwich and a soft drink at a drive-through restaurant. According **[*955]** to Logsdon, the accident occurred when he attempted to retrieve the sandwich from the passenger seat of his vehicle and failed to observe that traffic was stopped in front of him. A breathalyzer test performed after the accident measured **[**3]** Logsdon's blood alcohol concentration at 0.235%. In Kentucky, HN1[↑] a person with a blood alcohol concentration of 0.10% or more is prohibited from operating a motor vehicle. KRS 189A.010 (1) (a).

Logsdon was the named insured of a policy of automobile insurance providing liability coverage of $ 100,000.00 per person/$ 300,000.00 per accident. Upon completion of discovery, the claims of Reid and Alvey against Logsdon were settled by payment of $ 6,000.00 to Reid and $ 45,000.00 to Alvey. Subsequently, summary judgments were entered dismissing the claims of Reid and Alvey against DeStock, as well as the cross claim of DeStock against Logsdon for indemnity. Reid and Alvey appealed the dismissal of their claims against DeStock, and DeStock filed a precautionary appeal of the dismissal of its cross claim against Logsdon. The Court of Appeals reversed both summary judgments and remanded the case to the McCracken Circuit Court for further proceedings. Because this case involves an issue of first impression, *i.e.,* interpretation of the meaning and effect of KRS 413.241, we granted discretionary review.

I.

Prior to 1988, dram shop liability in Kentucky had its basis in the common law. **[**4]** Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell, Ky., 736 S.W.2d 328 (1987).

> HN2[↑] 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. *See also* Pike v. George, Ky., 434 S.W.2d 626 (1968), which had previously created dram shop liability with respect to a sale or service of intoxicating beverages to a minor. The appeals in both *Grayson* and

Pike were from summary dismissals holding that a claim against a dram shop for selling or serving intoxicating beverages to one who subsequently injures another did not state a cause of action. Thus, neither decision reached the issue of the nature of the dram shop's potential liability, *i.e.,* whether the liability of the drunken driver is imputed to the dram shop, as when a motor vehicle is negligently entrusted to one known to be intoxicated, **[**5]** *Owensboro Undertaking & Livery Ass'n v. Henderson, 273 Ky. 112, 115 S.W.2d 563 (1938)*; or whether the dram shop's negligence is deemed concurrent with that of the drunken driver so that their respective liabilities are subject to apportionment, *KRS 411.182*, *Hilen v. Hays, Ky., 673 S.W.2d 713 (1984)*; or whether the drunken driver is deemed primarily liable and the dram shop only secondarily liable, as opposed to being in pan delicto, which affects any claim for indemnity. *Middlesboro Home Tel. Co. v. Louisville & N. R. Co., 214 Ky. 822, 284 S.W. 104, 106 (1926)*. However, *Grayson* did contain some strongly worded *dictum* which might have affected those issues had they been reached:

> By continuing to supply alcohol to a person who is noticeably impaired when the seller knows or should know from the attendant circumstances that the buyer is likely to exit the establishment behind the wheel of an automobile, the seller is as much a wrongdoer as the buyer, often times more so because at least the seller is a sober contributor to the intoxication process.

Grayson, supra, at 332.

At the time *Grayson* was decided, both California and South Dakota had abolished **[**6]** dram shop liability by statute. *Cal. Bus. [*956] & Prof. Code § 25602* (1978 Cal. Stat., ch. 929, p. 2903, § 1), specifically abrogating the common law rule of dram shop liability created in *Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (Cal. 1978)*, *Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (Cal. 1976)*, *cert. denied, 429 U.S. 859, 50 L. Ed. 2d 136, 97 S. Ct. 159 (1976)*, and *Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (Cal. 1971)*; *S.D. Codified Laws Ann. §§ 35-11-1*, *35-4-78* (1985 S.D. Laws, ch. 295, §§ 1, 2), specifically abrogating the common law rule of dram shop liability created in *Walz v. City of Hudson, 327 N.W.2d 120 (S.D. 1982)*. Louisiana and Florida had enacted statutes restricting dram shop liability. La. Rev. Stat. Ann. § 9.2800.1 (1986 La. Acts, No. 18, § 1) (limiting liability to sale or service of intoxicating beverages to a minor); *Fla. Stat. Ann. § 768.125* (1980 Fla. Laws, ch. 80-37, § 1) (limiting liability to sale or service of intoxicating beverages to a minor or to a person known to be habitually addicted to alcoholic beverages). One year after *Grayson* **[**7]** was rendered, Georgia enacted a statute similar to the Florida statute, limiting dram shop liability to sale or service to a minor or to a person "in a state of noticeable intoxication, knowing that such person will soon be driving a motor vehicle . . . ." *Ga. Code Ann. § 51-1-40* (1988 Ga. Laws, p. 1692, § 1).

II.

Also one year after *Grayson* was rendered, our legislature enacted *HN3*[↑] *KRS 413.241* (1988 Ky. Acts, ch. 434, § 1) 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, [1] 243.030, 243.040, 243.050, nor any agent, servant, or employe 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 **[**8]** 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.* (Emphasis added.)

(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.

As introduced in the 1988 General Assembly, House Bill 570, which would become KRS 413.241, was almost identical to the Louisiana dram shop statute cited *supra.* See **[**9]** 1988 Ky. House Journ. 1050-51. The legislative declaration with respect to proximate cause in KRS 413.241(1) is also found in section A of the Louisiana statute, as well as in the South Dakota and Georgia dram shop statutes cited *supra.* Also like the Louisiana statute, the initial version of House Bill 570 did not contain the last clause in section (2); thus, the bill would have abrogated Grayson, supra, to the **[*957]** extent that *Grayson* extended dram shop liability to the sale or service of intoxicating beverages to a person already intoxicated. Subsequent amendments to House Bill 570 culminated in the inclusion of the last clause of section (2), which effectively reinstated the holding in *Grayson.* [2] **[**10]** The "proximate cause" declaration in section (1), and the "primarily liable" language in section (3) remained essentially intact. [3]

III.

Reid and Alvey interpret the addition of the amendatory language to section (2) of House Bill 570 as a legislative intent to emasculate sections (1) and (3), because those sections purport to place liability for damages inflicted by a drunken driver solely on the driver whereas section (2), as amended, extends liability to the dram shop. In fact, sections (1) and (3) could never have been intended to completely immunize dram shops from liability; for even the original version of House Bill 570 did not purport to abrogate dram shop liability with respect to a sale or service to a minor. There is no reason to assume that the legislature intended one result with respect to a sale or service to a minor and a different result with **[**11]** respect to a sale or service to an intoxicated person.

Reid and Alvey next assert that sections (1) and (3) are

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[1] This statutory reference was deleted from the statute during the 1998 legislative session. 1998 Ky. Acts, ch. 121, § 36.

[2] A house floor amendment to what became section (2) added the language "unless the person is or should be aware that the person served is already intoxicated." 1988 Ky. House Journ. 1343. A senate floor amendment substituted the language which is now the last clause of section (2). 1988 Ky. Senate Journ. 1545.

[3] In the original version of House Bill 570, what is now section (3) provided, "The intoxicated person and the insurer of the intoxicated person shall be primarily liable . . . " 1988 Ky. House Journ. 1050-51. The language "and the insurer of the intoxicated person" was deleted by a senate floor amendment immediately prior to passage. 1988 Ky. Senate Journ. 1690.

inherently inconsistent, thus ambiguous, because section (1) declares the drunken driver's negligence to be "the proximate cause" of their injuries, while section (3) declares the drunken driver to be only "primarily liable" for their injuries. HN4[] Any apparent conflict between sections of the same statute should be harmonized if possible so as to give effect to both; and, in so doing, the statute should be construed so that no part of it is meaningless or ineffectual. *Combs v. Hubb Coal Corp., Ky., 934 S.W.2d 250, 252 (1996)*; *see also Commonwealth v. Halsell, Ky., 934 S.W.2d 552, 555 (1996)*; *Ledford v. Faulkner, Ky., 661 S.W.2d 475, 476 (1983)*. There is a distinction between causation and liability. Section (1) of the statute declares that the sale or service of intoxicating beverages to Logsdon by DeStock's employees was not a proximate cause of Reid's and Alvey's injuries. However, section (2) imputes Logsdon's liability to DeStock, if DeStock's employees sold or served intoxicating beverages to Logsdon when a reasonable person under the same or similar circumstances **[**12]** should have known that he was already intoxicated (and, of course, if that fact was a substantial factor in causing him to be intoxicated at the time of the accident, and if his intoxication was a substantial factor in causing the accident). If so, both DeStock and Logsdon are liable for the injuries sustained by Reid and Alvey; but, pursuant to section (3), Logsdon is primarily liable and DeStock only secondarily liable. Thus, *KRS 413.241* dispelled the suggestion in *Grayson* that the dram shop and the drunken driver ought to be considered in pan delicto. [4]

Since Logsdon and DeStock were not in pari delicto and Logsdon is primarily liable and DeStock **[**13]** only secondarily **[*958]** liable to Reid and Alvey, DeStock will be entitled to indemnity against Logsdon for any sums it is required to pay in damages to them. *Lexington Country Club v. Stevenson, Ky., 390 S.W.2d 137, 143 (1965)*. "HN5[] One wrongdoer less culpable than another may recover over although the wrong of each contributed to bring about the injury." *Middlesboro Home Tel. Co. v. Louisville & N. R. Co., supra, 284 S.W. at 105*. Unlike the situation presented in *Crime Fighters Patrol v. Hiles, Ky., 740 S.W.2d 936 (1987)*, we are not required in this case to address the policy issue of whether the dram shop ought to be deemed in pari delicto with the drunken driver or whether it ought to be only secondarily liable, because that policy issue was decided by the legislature when it enacted *KRS 413.241*.

IV.

This conclusion nullifies the basis for Logsdon's summary judgment against DeStock, *i.e.,* that the respective liabilities of the dram shop and the drunken driver must be apportioned in accordance with *KRS 411.182* and *Hilen v. Hays, supra,* and that Logsdon's liability is thus limited to the sums he paid to settle Reid's and Alvey's claims against him. *See Dix & Associates* **[**14]** *Pipeline Contractors, Inc. v. Key, Ky., 799 S.W.2d 24, 30 (1990)*. Logsdon argues that *KRS 411.182(1)* requires apportionment in "all tort actions." However, HN6[] *KRS 411.182(2)* and *(3)* and *Hilen v. Hays, supra, at 720*, also specify that damages must be apportioned according to the parties' respective percentages of fault, which are determined by considering "both the nature of the conduct of each party and *the causal relation between the conduct and the damages claimed*." (Emphasis added.) HN7[] Absent causation, there can be no comparative fault.

[4] Interestingly, Justice Leibson, who authored *Grayson,* used a subsequent dissenting opinion in an unrelated case, *Schilling v. Schoenle, Ky., 782 S.W.2d 630 (1990)*, to opine that *Grayson* required an identical conclusion, *i.e.,* "the dram shop owner may be additionally liable but the drunk driver is still primarily responsible." *Id. at 634*.

> HN8[] Causation . . . is a necessary condition precedent to consideration of a person's fault -- *i.e.,* the fault must have "proximately caused or contributed" to the claimant's injuries . . . -- once causation is found the trier of fact must determine and apportion "the relative degrees of fault" of all parties and nonparties.

Zuern v. Ford Motor Co., 188 Ariz. 486, 937 P.2d 676, 681-82 (Ariz. Ct. App. 1997) (citing *inter alia* W. L. Prosser, *Comparative Neglignce,* 51 Mich. L. Rev. 465, 481 (1953)).

Since it has been legislatively determined in *KRS 413.241(1)* that DeStock's negligence did not proximately cause Reid's **[**15]** and Alvey's injuries, comparative fault and apportionment are inapplicable to a determination of DeStock's liability. As far as Reid and Alvey are concerned, *KRS 413.241(2)* imputes Logsdon's liability to DeStock and recovery can be had against either or both. However, as between Logsdon and DeStock, *KRS 413.241(3)* declares Logsdon to be primarily liable and DeStock only secondarily liable, which entitles DeStock to the remedy of indemnity. We note that *Dix & Associates, supra,* did not involve an issue of primary and secondary liability and was a claim for contribution, not indemnity.

Logsdon argues that the language of *KRS 411.182(1)*, which specifically requires apportionment "in all tort actions" should be. given priority over the language of *KRS 413.241(1)* and *(3)*, which implicates indemnity in favor of the dram shop against the drunken driver. He analogizes *Caterpillar, Inc. v. Brock, Ky., 915 S.W.2d 751 (1996)*, *cert. denied, 520 U.S. 1166, 137 L. Ed. 2d 537, 117 S. Ct. 1428 (1997)*, in which we held that *KRS 411.182* negated the contributory negligence provision in the products liability act, *KRS 411.320(3)*. However, *KRS 411.182(1)* specifically provides that apportionment **[**16]** applies to products liability actions. We held in *Caterpillar* that this language impliedly repealed the contributory negligence provision in *KRS 411.320(3)*, a statute which pre-existed the enactment of *KRS 411.182*. That holding was in accord with the rule of construction that if two statutes involving the same subject matter are in irreconcilable conflict, the later statute controls. **[*959]** *Butcher v. Adams, 310 Ky. 205, 220 S.W.2d 398 (1949)*.

The two statutes at issue here both were enacted during the 1988 regular session of the General Assembly and both took effect on the same date, July 15, 1988. *KRS 411.182* addresses tort actions in general; *KRS 413.241* addresses actions against dram shops in particular. HN9[] Statutes enacted at the same session of the legislature are entitled to equal dignity and should be construed so as to give effect to both. *Sumpter v. Burchett, 304 Ky. 858, 202 S.W.2d 735 (1947)*. When two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails. *Land v. Newsome, Ky., 614 S.W.2d 948 (1981)*. Applying these rules of construction, we conclude that *KRS 411.182* does not require apportionment **[**17]** of liability between the drunken driver and the dram shop in an action brought under *KRS 413.241*. (Of course, evidence of fault on the part of Reid would require an apportionment of liability between him and Logsdon, and DeStock's liability would be limited to the percentage of causation attributable to Logsdon.)

V.

The summary judgment entered in favor of DeStock was premised upon the theory that the release by Reid and Alvey of Logsdon, who was primarily liable, effectuated a concomitant release of DeStock, which was only secondarily liable. DeStock cites *Copeland v. Humana of Kentucky. Inc., Ky. App., 769 S.W.2d 67 (1989)* in

support of this proposition. However, the secondarily liable defendant in *Copeland* was not guilty of any independent wrongdoing, but was vicariously liable for the wrongdoer's negligence only because of an agency relationship. DeStock's liability is premised not only on Logsdon's negligence, but also on its own alleged independent negligent act. Although it can be held liable only if Logsdon's negligence caused Reid's and/or Alvey's injuries, DeStock is regarded as a separate tortfeasor because its liability also depends upon proof that its employees **[**18]** were independently negligent in selling or serving intoxicating beverages to Logsdon. Thus, Reid's and Alvey's release of Logsdon did not effect a release of DeStock. *Richardson v. Eastland, Inc., Ky., 660 S.W.2d 7, 8 (1983)*.

VI.

Logsdon complains that if DeStock is entitled to indemnity against him, he will lose the benefit of his settlements with Reid and Alvey. Perhaps; but he entered into those settlements with knowledge of the existence of DeStock's cross claim for indemnity. Except for the amounts paid, the terms of the settlements are not found in this record, so it is unknown whether the settlement documents include the standard "hold harmless" clause contained in the agreement considered in *Crime Fighters Patrol v. Hiles, 740 S.W.2d at 937*. If so, Reid and Alvey are precluded from any recovery against DeStock; for DeStock would be entitled to indemnity against Logsdon for the amount of that recovery, and Reid and Alvey would be required to hold Logsdon harmless to the extent of the indemnification. *Id.* If not, Reid and Alvey can proceed to trial on their claims against DeStock in accordance with the principles set forth in this opinion. Of course, DeStock will be **[**19]** entitled to credit against any judgments in favor of Reid or Alvey for the amounts which each respectively received in settlement from Logsdon. *Burke Enterprises, Inc. v. Mitchell, Ky., 700 S.W.2d 789, 794-96 (1985)*; *Daniel v. Turner, Ky., 320 S.W.2d 135 (1959)*. DeStock will then be entitled to indemnity against Logsdon for any sums it is required to pay in damages to Reid and/or Alvey.

VII.

Accordingly, the decision of the Court of Appeals is affirmed insofar as it reversed the summary judgments entered in this **[*960]** case, and this action is remanded to the McCracken Circuit Court with these directions:

1. If the settlement documents executed by Reid and Alvey contain a hold harmless clause in favor of Logsdon as in *Crime Fighters Patrol v. Hiles, supra*, the summary judgment in favor of DeStock shall be reinstated and the action dismissed.

2. If not, Reid and Alvey can proceed to a trial against DeStock at which the jury will be instructed to find DeStock liable if (1) its employees sold or served intoxicating beverages to Logsdon when a reasonable person under the same or similar circumstances should have known that Logsdon was already intoxicated, (2) such was a substantial **[**20]** factor in causing Logsdon to be intoxicated at the time of the accident, if he was, and (3) Logsdon's intoxication was a substantial factor in causing Reid's and Alvey's injuries. Since DeStock's liability is imputed from Logsdon, if there is evidence of contributory fault on the part of Reid, DeStock's liability shall be determined by the percentage of causation attributable to Logsdon.

3. The sums received by Reid and Alvey in settlement of their claims against Logsdon shall be credited respectively against any judgment awarded to either against DeStock.

4. DeStock shall be entitled to a judgment against Logsdon for indemnity for the amount of any judgment rendered against it in favor of Reid and/or Alvey.

Lambert, C.J.; Johnstone, Keller, Stumbo, Wintersheimer, JJ., and Special Justice W. David Denton, concur. Graves, J., not sitting.

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1. *Jackson v. Tullar, 285 S.W.3d 290*
   Client/Matter: -None-
   Jackson v. Tullar, 285 S.W.3d 290 (Ky. Ct. App. 2007):
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

EXHIBIT 2

Filed 18-CI-007456 01/04/2022 David L. Nicholson, Jefferson Circuit Clerk

Caution

As of: January 4, 2022 3:35 PM Z

Jackson v. Tullar

Court of Appeals of Kentucky

June 1, 2007, Rendered

NO. 2005-CA-001006-MR AND NO. 2005-CA-001140-MR

Reporter

285 S.W.3d 290 *; 2007 Ky. App. LEXIS 170 **

COLLEEN JACKSON, APPELLANT v. WILLIAM GRANT TULLAR, JR.; JUSTIN B. DUNCAN; SWEET & SASSY, INC., D/B/A GINGER & PICKLES, APPELLEES AND WILLIAM GRANT TULLAR, JR. AND SWEET & SASSY, INC., D/B/A GINGER & PICKLES, CROSS-APPELLANTS v. COLLEEN JACKSON; BIG KAHUNA, INC.; AND JUSTIN B. DUNCAN, CROSS-APPELLEES.

Subsequent History: [**1] PRIOR OPINION OF MARCH 2, 2007, WITHDRAWN.

Review denied by *Jackson v. Tullar, 2008 Ky. LEXIS 635 (Ky., Sept. 10, 2008)*

Related proceeding at *United Nat'l Ins. Co. v. Indian Harbor Ins. Co., 2015 U.S. Dist. LEXIS 12370 (E.D. Pa., Feb. 2, 2015)*

Prior History: APPEAL FROM MCCRACKEN CIRCUIT COURT. HONORABLE CRAIG CLYMER, JUDGE. ACTION NOS. 02-CI-00557 & 03-CI-00408. CROSS-APPEAL FROM MCCRACKEN CIRCUIT COURT. HONORABLE CRAIG CLYMER, JUDGE. ACTION NOS. 02-CI-00557 & 03-CI-00408.

Jackson v. Tullar, 2007 Ky. App. LEXIS 72 (Ky. Ct. App., Mar. 2, 2007)

Disposition: AFFIRMING IN PART AND REVERSING AND REMANDING IN PART.

Core Terms

dramshop, punitive damages, tortfeasor, fault, intoxicated, apportionment, damages, compensatory damages, trial court, apportioned, alcohol, suffer injury, Pickles, injuries, proximate cause of the injury, award of punitive damages, intoxicating beverage, secondarily liable, primarily liable, shop's, dram

Case Summary

Procedural Posture

Appellant passenger filed a negligence action against defendants, a driver, bar one, bar one's owner, bar two, and an insurer. The passenger settled with bar two. The claims against the insurer were bifurcated. The McCracken Circuit Court (Kentucky) entered a judgment awarding compensatory damages against the driver, and compensatory and punitive damages against bar one and its owner. The passenger's new trial motion was denied. She appealed.

Overview

Bar one and its owner cross-appealed. The appellate court held that since the apportionment instruction erroneously assigned a percentage of primary fault

independent of the fault of the driver to the bars, it violated both *Ky. Rev. Stat. Ann. § 413.241* and DeStock. The jury should have been instructed to apportion fault between the driver and the passenger. Whether the bars were secondarily liable should have been considered only after the driver was found to have some percentage of fault. Once the jury found that the *§ 413.241* elements were satisfied such that either or both dram shops could be held secondarily liable, the jury should have been instructed to determine to what degree the sale or service of alcohol by each bar was a substantial factor in causing the driver's intoxication. Punitive damages against bar one and its owner were improperly awarded as a dram shop's sale or service of intoxicating beverages could not be the proximate cause of the injuries caused by the driver at the time of the accident. Finally, postjudgment interest was improperly awarded from the date of the jury verdict, rather than from the date judgment was entered.

Outcome

The judgment of the trial court was affirmed as to the amount of compensatory damages and was reversed as to the punitive damages award. The matter was remanded for a new trial on the issue of apportionment of damages between the parties. On remand, postjudgment interest was to be awarded on the compensatory damages in accordance with *Ky. Rev. Stat. Ann. § 360.040*, from the date of entry of the new judgment.

LexisNexis® Headnotes

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN1[] **Alcohol Providers, Dram Shop Acts**

See *Ky. Rev. Stat. Ann. § 413.241*.

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN2[] **Alcohol Providers, Dram Shop Acts**

Liability may be imposed upon a dram shop despite the express declaration in *Ky. Rev. Stat. Ann. § 413.241* that a dram shop's actions cannot, as a matter of law, be considered the proximate cause of any injury inflicted by an intoxicated person. Under this liability without causation scheme, liability is imputed to the dram shop for injuries to a third person if the dram shop's employees sold or served intoxicating beverages to a person when a reasonable person under the same or similar circumstances would know that he is already intoxicated. If the reasonable person test under *§ 413.241(2)* is met, the sale or service can be considered a substantial factor in the accident.

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN3[] **Alcohol Providers, Dram Shop Acts**

There are several notable distinctions between the statutory treatment of an intoxicated tortfeasor and a dram shop. First, the actions of the intoxicated tortfeasor, and not the dram shop's service of alcohol, are the proximate cause of injury. Second, the tortfeasor remains primarily liable for injuries while the dram shop is secondarily liable with a right of indemnity against the tortfeasor. Finally, the dram shop and the tortfeasor are not concurrently negligent, but instead have committed two separate and independently tortious acts. Liability is imposed on the intoxicated tortfeasor for his actions in

injuring the plaintiff, while liability is imposed upon the dram shop for the entirely separate and "independently negligent" act of serving alcohol to the intoxicated tortfeasor before the accident. Thus, since the actions of the dram shop and the intoxicated tortfeasor are separate, the two ought not to be considered in pari delicto.

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

Torts > Procedural Matters > Multiple Defendants > General Overview

HN4[] **Alcohol Providers, Dram Shop Acts**

Ky. Rev. Stat. Ann. § 411.182(2) and *(3)* and Hilen v. Hays specify that damages must be apportioned according to the parties' respective percentages of fault, which are determined by considering both the nature of the conduct of each party and the causal relation between the conduct and the damages claimed.

Torts > Procedural Matters > Multiple Defendants > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN5[] **Procedural Matters, Multiple Defendants**

The liability of joint tortfeasors is no longer joint and several, but is several only. Thus, because the liability is several as to each tortfeasor, it is necessary to apportion a specific share of the total liability to each of them, and the several liability of each joint tortfeasor with respect to the judgment is limited by the extent of his/her fault.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN6[] **Multiple Defendants, Distinct & Divisible Harms**

Apportionment between an intoxicated tortfeasor and a dram shop is improper because the actions that give rise to liability--directly causing injury and improperly serving alcohol to someone who later causes injury, respectively--do not constitute concurrently negligent acts. Rather, they are separate and independent actions of two fundamentally different characters. The intoxicated tortfeasor's conduct proximately causes injury to a plaintiff, while a dram shop's actions do not. *Ky. Rev. Stat. Ann. § 413.241(1)*. Absent causation, there can be no comparative fault. And the intoxicated tortfeasor is primarily liable while the dram shop is only secondarily liable with a right of indemnity against the tortfeasor.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN7[] **Jury Trials, Jury Instructions**

DeStock only prohibits apportionment between an intoxicated tortfeasor and a dram shop. It does not prevent apportionment between the dram shops themselves. Accordingly, once a jury determines that the elements under *Ky. Rev. Stat. Ann. § 413.241* are

satisfied such that either or both dram shops could be held secondarily liable, the jury should be instructed to apportion that liability between them based on the evidence presented. Specifically, the jury should be instructed to determine to what degree the sale or service of alcohol by each dram shop was a substantial factor in causing the tortfeasor's intoxication at the time of the accident.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

Torts > ... > Punitive Damages > Availability > General Overview

HN8[] **Damages, Punitive Damages**

Kentucky law is clear that a plaintiff cannot recover punitive damages against a defendant unless that defendant's conduct was the proximate cause of any injury to the plaintiff. However, in Ky. Rev. Stat. Ann. § 413.241(1), the Kentucky legislature has expressly stated that a dram shop's sale or service of intoxicating beverages cannot be the proximate cause of any injury caused by the intoxicated tortfeasor. As there can be no punitive damages absent proximate cause, and the legislature has removed proximate cause in this context, punitive damages against a dram shop are unavailable as a matter of law.

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN9[] **Alcohol Providers, Dram Shop Acts**

The dram shop liability imposed in Ky. Rev. Stat. Ann. § 413.241(2) is set forth in the context of "injuries suffered" by a third person. The term "injuries suffered" indicates damages or injuries actually incurred by a party. To "suffer" is defined as to submit to or endure death, affliction, penalty, or pain or distress; to sustain loss or damage. Therefore, the term "suffer" refers to one acted upon as distinguished from the one acting.

Civil Procedure > Remedies > Damages > Compensatory Damages

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Compensatory Damages > General Overview

Torts > ... > Punitive Damages > Availability > General Overview

HN10[] **Damages, Compensatory Damages**

The recovery of damages and recovery for injuries are two separate concepts. While recovery of "damages" can arguably include punitive damages, recovery for "injuries suffered" clearly does not. A plaintiff is compensated for injuries through actual, or compensatory damages. As the name implies, actual or compensatory damages seek to make the plaintiff whole by awarding an amount of money designed to equal the wrong done by the defendant. Punitive damages, in contrast, do not compensate for injuries, but rather serve to punish or deter a person, and others, from committing such acts in the future. Ky. Rev. Stat. Ann. § 411.184(1)(f). Accordingly, punitive damages have no relation to compensating a plaintiff for injury, but instead

exist as a punishment for the wrongdoer. *Ky. Rev. Stat. Ann. § 413.241*'s focus on dram shop liability for "injuries suffered" indicates that the Kentucky legislature does not intend for a dram shop to be liable for an award of punitive damages.

Civil Procedure > Remedies > Damages > Punitive Damages

Governments > Legislation > Interpretation

Torts > ... > Punitive Damages > Availability > General Overview

HN11[] **Damages, Punitive Damages**

In determining whether punitive damages are authorized by a particular statute, Kentucky courts have applied a strict, literal interpretation of the relevant statutory language. The Kentucky Supreme Court has held that the punitive damages statute allows recovery only when a plaintiff has proven that a defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.

Governments > Legislation > Interpretation

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

Torts > ... > Punitive Damages > Availability > General Overview

HN12[] **Legislation, Interpretation**

The Kentucky general assembly has enacted a number of statutes that expressly provide for punitive damages as a remedy for violation of the statute. The express inclusion of punitive damages in these statutes is redundant and unnecessary if *Ky. Rev. Stat. Ann. §§ 411.184* and *411.186* create the right to punitive damages in all cases where the statutory elements for punitive damages are present. Such a result violates the universal rule that in construing statutes it must be presumed that the legislature intended something by what it attempted to do. Considering the plain meaning of the words used and the purposes behind compensatory and punitive damages, the inclusion of the term "injuries suffered" shows legislative intent that dram shop liability extend only to compensatory damages.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Judgment Interest > Postjudgment Interest

HN13[] **Judges, Discretionary Powers**

Pursuant to *Ky. Rev. Stat. Ann. § 360.040*, the statutory rate of interest begins to run from the date of entry of the judgment. Damages that are established by proof offered during the trial are unliquidated and not subject to prejudgment interest. "Unliquidated damages" are damages that have been established by a verdict or award but cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury.

Counsel: BRIEF FOR APPELLANT/CROSS-APPELLEE, COLLEEN JACKSON: David V. Oakes, Paducah, Kentucky.

BRIEF FOR APPELLEE, JUSTIN DUNCAN: Richard L.

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BRIEF FOR APPELLEES/CROSS-APPELLANTS, WILLIAM GRANT TULLAR, JR. AND SWEET & SASSY, INC., D/B/A GINGER & PICKLES: John R. Martin, Jr., Louisville, Kentucky.

BRIEF FOR CROSS-APPELLEE, BIG KAHUNA, INC.: James A. Sigler, James R. Coltharp, Jr., Paducah, Kentucky.

Judges: BEFORE: ABRAMSON AND DIXON, JUDGES; HENRY, [1] SENIOR JUDGE. ALL CONCUR.

Opinion by: DIXON

Opinion

[*293] AFFIRMING IN PART AND REVERSING AND REMANDING IN PART.

DIXON, JUDGE: Appellant/Cross-Appellee, Colleen Jackson, appeals from an order and judgment of the McCracken Circuit Court awarding her $ 310,000 in compensatory damages against **[**2]** Appellee, Justin Duncan; $ 504,000 in compensatory and $ 350,000 in punitive damages against Appellee/Cross-Appellant, Sweet & Sassy d/b/a/ Ginger & Pickles; and $ 150,000 in punitive damages against Appellee/Cross-Appellant, William Tullar, Jr. We conclude that the trial court erred in both the apportionment of fault and the award of punitive damages. Thus, while we affirm the amount of compensatory damages awarded to Jackson, we remand this matter to the circuit court for further proceedings consistent with this opinion.

This case stems from a single car accident that occurred during the early morning hours of May 24, 2001, in Paducah, Kentucky. Justin Duncan was driving his 1990 Chevrolet pickup truck with passenger Colleen Jackson when he veered from the roadway and struck a tree. Both Duncan and Jackson had been drinking prior to the accident. In fact, the pair drank several beers at the Kountry Kastle restaurant before going to the Big Kahuna nightclub where they consumed more alcohol. Duncan and Jackson then went to Ginger & Pickles nightclub where they drank several more beers as well as shared a "pickle bowl," a concoction made from pure grain alcohol and Kool-Aid. It was after **[**3]** leaving Ginger & Pickles around 2:30 a.m. that the accident occurred.

In May 2002, Jackson filed a negligence action in the McCracken Circuit Court against Duncan, Sweet & Sassy, Inc. d/b/a Ginger & Pickles, and the Big Kahuna, Inc. The trial court subsequently granted Jackson's motion to amend the complaint to name her insurer, Progressive Halcyon Insurance Co., as well as Ginger & Pickles' owner William Tullar, Jr., and Big Kahuna shareholders Scott Heidelberg, Bert Bridgewater, and Phillip Jackson as party defendants [2] Shortly before trial, Jackson settled with the Big Kahuna and its shareholders. Those claims were dismissed with prejudice.

In October 2004, the case proceeded to trial against Duncan, Sweet & Sassy, and Tullar. At the close of proof, the jury was instructed to determine whether Duncan, the Big Kahuna, and/or Sweet & Sassy had acted negligently toward Jackson on the **[*294]** date of the accident, as well as to determine whether Jackson had exercised ordinary care for her own safety. The jury

[1] Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Jackson's claims against her insurer were later bifurcated and held in abeyance.

was given a damages instruction and an instruction containing a four-way apportionment of fault between **[**4]** Jackson, Duncan, the Big Kahuna and Sweet & Sassy.

The jury found negligence on the part of all three defendants and a failure to exercise ordinary care by Jackson. Using the four-way apportionment instruction, the jury assessed 10% of the fault to Jackson, 20% to Duncan, and 35% each to the Big Kahuna and to Sweet & Sassy. The jury further determined that Jackson had suffered compensatory damages in the amount of $ 1,600,000.

After returning their verdict on compensatory damages, the jury was instructed to determine the appropriateness of punitive damages against Duncan, Sweet & Sassy, and Tullar. The jury found all three to have been grossly negligent, but only assessed punitive damages against Sweet & Sassy in the amount of $ 350,000, and Tullar in the amount of $ 150,000. The jury did not impose punitive damages upon Duncan. The trial court thereafter entered judgment accordingly.

Following the trial court's denial of her motion for a new trial, Jackson appealed to this Court naming Duncan, Sweet & Sassy, and Tullar as Appellees. Sweet & Sassy and Tullar filed a cross-appeal naming Jackson and the Big Kahuna. [3]

On appeal, all parties challenge the trial court's apportionment of fault. Jackson argues that the apportionment instruction given to the jury was correct, but that the trial court failed to properly follow *KRS 413.241* after the jury rendered its verdict. Essentially, it is Jackson's position that because the statute declares the tortfeasor to be primarily liable, once the jury apportioned liability among all three defendants, the trial court should have deducted Jackson's percentage of fault, i.e., 10%, from the total liability, and thereafter imposed the remainder upon Duncan. As such, Jackson contends that regardless of how the jury apportioned fault, the trial court's judgment should have imposed 90% of the liability upon Duncan. Jackson then argues that Sweet & Sassy should be vicariously liable for all damages that Duncan cannot pay.

In contrast, Sweet & Sassy and Tullar argue that the apportionment instruction was, in fact, improper and in violation of statutory and case law. We note that **[**6]** the Big Kahuna, who settled prior to trial but is a cross-appellee herein, agrees that the apportionment instruction was erroneous in that it should not have included either dram shop.

KRS 413.241, enacted in 1988 and commonly referred to as the Dram Shop Act, provides:

> (1) *HN1*[↑] 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, **[*295]** or survivors of either for any

[3] The Big Kahuna sought dismissal from the appeal on the grounds that it **[**5]** had settled with Jackson prior to trial and thus was not involved in the pre-trial or trial rulings at issue in this appeal. Its motion was denied by order of this Court dated August 8, 2005.

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 **[**7]** 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.

In *DeStock # 14, Inc. v. Logsdon, 993 S.W.2d 952, 46 8 Ky. L. Summary 31 (Ky. 1999)*, the Kentucky Supreme Court examined the language of *KRS 413.241* and concluded that *HN2*[⬆] liability may be imposed upon a dram shop despite the statute's express declaration that a dram shop's actions cannot, as a matter of law, be considered the proximate cause of any injury inflicted by an intoxicated person. *Id. at 957*. Under this liability without causation scheme, liability is imputed to the dram shop for injuries to a third person if the dram shop's employees sold or served intoxicating beverages to a person when a reasonable person under the same or similar circumstances would know that he is already intoxicated. If the reasonable person test **[**8]** under *KRS 413.241(2)* is met, the sale or service can be considered a substantial factor in the accident. *See Sixty-Eight Liquors, Inc. v. Colvin, 118 S.W.3d 171, 174 (Ky. 2003)*.

DeStock enunciated *HN3*[⬆] several notable distinctions between the statutory treatment of the intoxicated tortfeasor and the dram shop. First, the actions of the intoxicated tortfeasor, and not the dram shop's service of alcohol, are the proximate cause of injury. Second, the tortfeasor remains primarily liable for injuries while the dram shop is secondarily liable with a right of indemnity against the tortfeasor. Finally, the dram shop and the tortfeasor are not concurrently negligent, but instead have committed two separate and independently tortious acts. Liability is imposed on the intoxicated tortfeasor for his actions in injuring the plaintiff, while liability is imposed upon the dram shop for the entirely separate and "independently negligent" act of serving alcohol to the intoxicated tortfeasor before the accident. *DeStock, supra, at 959*. Thus, since the actions of the dram shop and the intoxicated tortfeasor are separate, the two "ought [not] to be considered in pari delicto." *Id. at 957*.

It is because of these **[**9]** distinctions between the tortfeasor and the dram shop, that apportionment of fault between the injured party, the tortfeasor, and the dram shop is improper. The Supreme Court recognized as much, explaining:

> Logsdon argues that *KRS 411.182(1)* requires apportionment in "all tort actions." However, *HN4*[⬆] *KRS 411.182(2)* and *(3)* and *Hilen v. Hays, [673 S.W.2d 713, 720 (Ky. 1984)]*, also specify that damages must be apportioned according to the parties' respective percentages of fault, which are determined by considering "both the nature of the conduct of each party and the *causal relation between the conduct and the damages claimed*." (Emphasis added) Absent causation, there can be no comparative fault.
>
> . . .
>
> Since it has been legislatively determined in *KRS 413.241(1)* that DeStock's **[*296]** negligence did not proximately cause Reid's and Alvey's injuries,

> comparative fault and apportionment are inapplicable to a determination of DeStock's liability. As far as Reid and Alvey are concerned, KRS 413.241(2) imputes Logsdon's liability to DeStock and recovery can be had against either or both. However, as between Logsdon and DeStock, KRS 413.241(3) declares Logsdon to be primarily liable and DeStock only secondarily **[**10]** liable, which entitles DeStock to the remedy of indemnity.

DeStock, supra, at 958.

In the case herein, the improper apportionment instruction provided as follows:

> INSTRUCTION 8
>
> You must determine from the evidence what percentage of the total fault was attributable to each party at fault.
>
> In determining the percentage of fault, you should consider both the nature of the conduct of each party at fault and the extent of the causal relation between his or her conduct and the damages claimed.
>
> __ Justin Duncan
>
> __ Colleen Jackson
>
> __ Sweet & Sassy, Inc., d/b/a Ginger & Pickles
>
> __ Big Kahuna, Inc.
>
> TOTAL__
>
> 100%

As a result of the four-way apportionment, Sweet & Sassy and the Big Kahuna were erroneously assigned a percentage of primary fault independent of the fault of Duncan. As such, the instruction violated the mandates of both KRS 413.241 and the *DeStock* decision.

The instruction should have required the jury to apportion fault between just Duncan and Jackson. Then, only after the jury found Duncan to have some percentage of fault, should the jury have determined whether the elements under KRS 413.241 were satisfied such that either or both dram shops could be held secondarily liable.

We are cognizant **[**11]** of the fact that the question of how secondary liability under KRS 413.241 is to be allocated among multiple dram shops is one of first impression in this Commonwealth. Indeed, the statute is silent on the issue and such a fact situation has not been addressed by Kentucky Courts. As such, we turn to the common law rules of apportioning fault.

HN5[] The liability of joint tortfeasors is "no longer joint and several, but is several only." *Degener v. Hall Contracting Corporation, 27 S.W.3d 775, 779 (Ky. 2000)*; KRS 411.182. Thus, "because the liability is several as to each tortfeasor, it is necessary to apportion a specific share of the total liability to each of them, . . . and the several liability of each joint tortfeasor with respect to the judgment is limited by the extent of his/her fault." *Degener, supra.*

As previously discussed, *HN6*[] apportionment between the intoxicated tortfeasor and the dram shop is improper because the actions that give rise to liability -- directly causing injury and improperly serving alcohol to someone who later causes injury, respectively -- do not constitute concurrently negligent acts. Rather, they are separate and independent actions of two fundamentally different **[**12]** characters. The intoxicated tortfeasor's conduct proximately caused injury to the plaintiff, while the dram shop's actions did not. KRS 413.241(1). As observed in *DeStock*, "[a]bsent causation, there can be no comparative fault." *DeStock, supra, at 958*. And the intoxicated tortfeasor is primarily liable **[*297]** while the dram shop is only secondarily liable with a right of indemnity against the tortfeasor. *Id. at 957*.

However, no such differences exist between two dram shops. Multiple dram shops that violate KRS 413.241 would have committed similar acts that would have had a similar relationship to a plaintiff's ultimate injury. In light of this similarity of circumstance and character, liability among multiple dram shops is properly apportioned under comparative fault principles.

Thus, we conclude that HN7[↑] *DeStock* only prohibits apportionment between the intoxicated tortfeasor and the dram shop. It does not prevent apportionment between the dram shops themselves. Accordingly, once a jury determines that the elements under KRS 413.241 are satisfied such that either or both dram shops could be held secondarily liable, the jury should be instructed to apportion that liability between them based on **[**13]** the evidence presented. Specifically, the jury should be instructed to determine to what degree the sale or service of alcohol by each dram shop was a substantial factor in causing the tortfeasor's intoxication at the time of the accident. *See* DeStock, supra, at 960; Sixty-Eight Liquors, Inc. v. Colvin, 118 S.W.2d at 174.

Both parties next challenge the award of punitive damages. Jackson contends that she is entitled to a new trial solely on punitive damages because of (1) the inadequacy of the award against Tullar, and (2) the improper conduct of an alleged business acquaintance of Tullar during the last stage of the trial. Sweet & Sassy and Tullar, on the other hand, argue that the trial court erred in giving any instruction on punitive damages. Because we conclude that punitive damages cannot be recovered in a dram shop action, we necessarily do not reach the issue of any alleged improper conduct on the part of the business acquaintance.

HN8[↑] Kentucky law is clear that a plaintiff cannot recover punitive damages against a defendant unless that defendant's conduct was the proximate cause of any injury to the plaintiff. *See* Fowler v. Mantooth, 683 S.W.2d 250 (Ky. 1984). However, in KRS 413.241(1), **[**14]** the legislature has expressly stated that a dram shop's sale or service of intoxicating beverages cannot be the proximate cause of any injury caused by the intoxicated tortfeasor. *See also* DeStock, supra, at 958. As there can be no punitive damages absent proximate cause, and the legislature has removed proximate cause in this context, punitive damages against a dram shop are unavailable as a matter of law.

We believe such a determination is consistent with the plain language of the statute. HN9[↑] The dram shop liability imposed in KRS 413.241(2) is set forth in the context of "injuries suffered" by a third person. The term "injuries suffered" indicates damages or injuries actually incurred by a party. To "suffer" is defined as "to submit to or endure death, affliction, penalty, or pain or distress; to sustain loss or damage." WEBSTER'S THIRD NEW INT'L DICTIONARY 2284 (1981). Therefore, the term "suffer" refers to one acted upon as distinguished from the one acting. *Id.*

This distinction is significant because HN10[↑] the recovery of damages and recovery for injuries are two separate concepts. While recovery of "damages" could arguably include punitive damages, recovery for "injuries suffered" clearly **[**15]** does not. A plaintiff is compensated for injuries through actual, or compensatory damages. Kentucky Central Insurance Co. v. Schneider, 15 S.W.3d 373 (Ky. 2000). As the name implies, actual or compensatory damages seek to make the plaintiff whole **[*298]** by awarding an amount of money designed to equal the wrong done by the defendant. Punitive damages, in contrast, do not compensate for injuries, but rather serve "to punish or deter a person, and others, from committing such acts in the future." Burgess v. Taylor, 44 S.W.3d 806, 814 (Ky. App. 2001); KRS 411.184(1)(f). Accordingly, punitive damages have no relation to compensating a plaintiff for injury, but instead exist as a punishment for the

wrongdoer. KRS 413.241's focus on dram shop liability for "injuries suffered" indicates that the legislature did not intend for a dram shop to be liable for an award of punitive damages.

HN11[] In determining whether punitive damages are authorized by a particular statute, Kentucky courts have applied a strict, literal interpretation of the relevant statutory language. Kentucky Department of Corrections v. McCullough, 123 S.W.3d 130 (Ky. 2003). In Stewart v. Estate of Cooper, 102 S.W.3d 913 (Ky. 2003), our [**16] Supreme Court held that a plaintiff could not recover punitive damages from the estate of an intoxicated driver because the punitive damages statute allows recovery only when the plaintiff has proven "that *the defendant from whom such damages are sought* acted toward the plaintiff with oppression, fraud or malice." Id. at 915 (*Quoting* KRS 411.184(2). (emphasis added). Because the defendant from whom the punitive damages were sought was the tortfeasor's estate, and the estate itself had not acted toward the plaintiff with the required "oppression fraud, or malice," the court determined that punitive damages were unavailable. Stewart, supra at 916.

We would note that both the Dram Shop Act, KRS 413.241, and the punitive damages statute, KRS 411.184, were debated and adopted during the same legislative session and became effective on the same day. As such, it is reasonable to infer that the General Assembly was aware of the state's punitive damages scheme when it enacted KRS 413.241. Notwithstanding, had the legislature intended for KRS 413.241 to impose liability upon dram shops for punitive damages it certainly could have stated so in the statute. Indeed,

> HN12[] [T]he General Assembly has enacted [**17] a number of statutes that expressly provide for punitive damages as a remedy for violation of the statute. . . . The express inclusion of punitive damages in these statutes is redundant and unnecessary if KRS 411.184 and KRS 411.186 created the right to punitive damages in all cases where the statutory elements for punitive damages are present. Such a result violates the "universal rule . . . that in construing statutes it must be presumed that the Legislature intended *something* by what it attempted to do." Reyes v. Hardin Co., 55 S.W.3d 337, 342 (Ky. 2001) (Emphasis in original).

McCullough, supra, at 140. Thus, considering the plain meaning of the words used and the purposes behind compensatory and punitive damages, we believe that the inclusion of the term "injuries suffered" shows legislative intent that dram shop liability extend only to compensatory damages. *See* Steak & Ale of Texas, Inc. v. Borneman, 62 S.W.3d 898 (Tex. App. 2001).

Our decision on this issue should not be construed in any way to speak to the manner in which Tullar and Sweet & Sassy conducted business. It is obvious from a cursory reading of the evidence herein, that their business practices were abhorrent at best. [**18] Nevertheless, if a plaintiff's cause of action is one for which punitive damages is not an available remedy, it does not matter how the defendant may have acted. It is within the province of the legislature, and not this Court, to specify the statutory remedy. And regardless of how appropriate the defendants' conduct [*299] might be for a punitive damages award, such is simply not available.

Finally, Sweet & Sassy and Tullar argue on cross-appeal that the trial court erred in awarding 12 % interest to Jackson from the date of the jury verdict rather than from the date judgment was entered. We agree.

HN13[] Pursuant to KRS 360.040, the statutory rate of interest begins to run from the date of entry of the

judgment. Jackson contends that once the verdict was returned, her claims were liquidated and easily identifiable. However, damages that were established by proof offered during the trial are unliquidated and not subject to prejudgment interest. *See Atlantic Painting & Contracting Inc. v. Nashville Bridge Company, 670 S.W.2d 841, 847 (Ky. 1984)*. *See also BLACK'S LAW DICTIONARY* (7th Ed. 1999) ("Unliquidated Damages" are "Damages that have been established by a verdict or award but cannot be determined **[**19]** by a fixed formula, so they are left to the discretion of the judge or jury."). Thus, on remand, the trial court shall award interest on the compensatory damages in accordance with *KRS 360.040*, from the date of entry of the new judgment. [4]

Accordingly, the judgment of the McCracken Circuit Court is affirmed as to the amount of compensatory damages and reversed as to the punitive damage award. Further, this matter is remanded for a new trial on the issue of apportionment of damages between the parties.

ALL CONCUR.

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[4] While we find no error in the amount of compensatory damages, the jury must resolve the issue of apportionment before any defendant is responsible for payment of its percentage of the award. Thus, interest can only be awarded from the date of the new judgment rather than the original judgment.