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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001347-MR

WILLIAM GERALD WATSON — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 09-CI-01400

ROOF BROTHERS WINE
& SPIRITS, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, J. LAMBERT, AND TAYLOR, JUDGES.

ACREE, JUDGE: Appellant William Gerald "Jerry" Watson appeals the McCracken Circuit Court's grant of summary judgment in favor of Appellee Roof Brothers Wine & Spirits, Inc. Watson alleged in his complaint that Roof Brothers served and sold alcohol to an obviously intoxicated patron, Joe Taylor, whose subsequent negligence caused Watson's injuries. Roof Brothers' summary

judgment motion convinced the circuit court there was not enough evidence of a sale of alcohol to Taylor to allow the case to go to a jury. We affirm.

FACTS AND PROCEDURE

In the evening hours of December 26, 2008, Watson and Taylor left Benton, Kentucky, and traveled to TGI Fridays in Paducah, Kentucky. Taylor drove his newly-purchased truck, with Watson riding as passenger. At TGI Fridays, Watson and Taylor each consumed one to three Long Island Iced Teas, an alcoholic drink. Watson purchased the drinks.[1]

They left TGI Fridays and traveled to a nearby clothing store. They give inconsistent testimony regarding their next destination, which was either Pure Country, a local bar, or Roof Brothers, appellee's liquor store. Watson claims they visited Pure Country first and then Roof Brothers. Taylor initially agreed with Watson,[2] but later changed his story, testifying in his second deposition that the pair patronized Roof Brothers prior to visiting Pure Country. In any event, they consumed alcohol at Pure Country and Watson alleges Taylor purchased alcohol at Roof Brothers which, according to Taylor, he and Watson partially consumed in his truck while driving down the highway.[3]

Taylor then decided the two should visit a friend in Marion, Kentucky. They did not reach their intended destination. Taylor drove eastbound

[1] According to Watson, Taylor had performed some labor for him. Watson compensated Taylor by purchasing his adult beverages that night. Watson 09/20/2012 Deposition at 52.

[2] Taylor 04/19/2011 Depo. at 67.

[3] Taylor 04/19/2011 Depo. at 104.

on US 60 toward Ledbetter, Kentucky. About 10:50 p.m., Taylor's vehicle left the right shoulder of the roadway, struck a culvert and flipped several times, ejecting Watson from the vehicle. Watson sustained severe spinal and neck injuries.

Trooper Anthony Trotter responded to the scene and found in the truck a partially-empty pint of whiskey (Jim Beam) and seven to eight partially-consumed bottles of beer (Bud Light). The bottles were cool to the touch and "sweating" from the warm air condensing on the cooler bottles.

The trooper spoke briefly to Taylor and smelled alcohol on his breath. A Portable Breathalyzer Test indicated alcohol in his bloodstream. After both men were transported to the hospital, Taylor failed the horizontal gaze nystagmus (HGN)[4] field sobriety test. Taylor's blood test revealed a blood alcohol concentration (BAC) to be 0.11 grams/100 milliliters. We can conclude Taylor was drunk at the time of the accident.

Watson sued Taylor. He also sued Ohio Valley d/b/a TGI Fridays and Pure Country under Kentucky's dram shop law, claiming each establishment served Taylor alcoholic drinks when he was visibly intoxicated.

Watson filed a second suit on June 14, 2011, against Roof Brothers alleging liability under Kentucky's dram shop law. Specifically, Watson alleged Taylor was a customer of and was served alcohol by Roof Brothers employees when reasonable persons would have known Taylor was intoxicated. Roof

[4] "An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus, or HGN." *Leatherman v. Commonealth*, 357 S.W.3d 518, 527 n.4 (Ky. App. 2011) (citation omitted).

Brothers denied serving or selling alcohol to Taylor. The suits were consolidated. Substantial discovery was undertaken.

Roof Brothers moved for judgment on the pleadings based on limitations grounds. The circuit court denied the motion.

Roof Brothers later moved for summary judgment, arguing there was insufficient evidence in the record to submit to a jury the question whether Roof Brothers sold or served alcohol to Taylor on that night.[5] The circuit court agreed and granted Roof Brothers' motion. This appeal followed.

STANDARD OF REVIEW

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Under this standard, an action may be terminated "when no questions of material fact exist or when only one reasonable conclusion can be reached[.]" *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 916 (Ky. 2013). Summary judgment involves only legal questions and the existence, or non-existence, of material facts are considered. *Stathers v. Garrard County Bd. of Educ.*, 405 S.W.3d 473, 478 (Ky. App. 2012). Our review is *de novo*. *Mitchell v. Univ. of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

[5] The summary judgment motion was supported by, among other evidence, an affidavit from Roof Brothers' owner, Kenneth Roof, stating he "reviewed all records, receipts, and available information regarding transactions . . . on December 26, 2008[, and] has no reason to believe that any alcohol was sold to Defendant, Joe Taylor, on December 26, 2008." Affidavit of Kenneth Roof, owner of Roof Brothers, Record at R. 1757.

Additional discussion and application of the standard of review is offered, where appropriate, in the analysis below.

ANALYSIS

Kentucky's dram shop law is codified as KRS[6] 413.241. It provides, in pertinent part, that:

> no person holding a permit under KRS Chapters 241 to 244, 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 . . . for any injury suffered off the premises . . . 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.*

KRS 413.241(2) (emphasis added). This statute has been interpreted as imposing a duty upon vendors of alcoholic beverages, before selling or serving alcohol to a patron, to observe the patron for readily perceivable indicators of intoxication, and to refrain from serving or selling alcohol to an inebriated patron. *Carruthers v. Edwards*, 395 S.W.3d 488, 492 (Ky. App. 2012). "The dram shop liability imposed in KRS 413.241(2) is set forth in the context of 'injuries suffered' by a third person" as a result of conduct of the vendor's patron, provided the vendor's negligent conduct is also a proximate cause of the third person's injuries. *Jackson v. Tullar*, 285 S.W.3d 290, 297 (Ky. App. 2007); *Taylor v. King*, 345 S.W.3d 237, 244 (Ky. App. 2010).

[6] Kentucky Revised Statues.

In granting summary judgment for Roof Brothers, the circuit court looked to the evidence of a fundamental allegation and element of Watson's claim – that Roof Brothers' sold alcohol to Taylor. There is no receipt for the purchase, nor is there video of the transaction. The only evidence Watson offered to defeat the summary judgment motion was deposition testimony, primarily of Watson and Taylor. Having considered that proof, the circuit court concluded that "Watson has had plenty of time to produce any evidence to support his claim that Roof Brothers sold alcohol to himself or Taylor on the night of the accident and he has failed to do so."[7]

Therefore, we focus on the evidence relating to Roof Brothers' sale or serving of alcohol to Taylor as Watson describes that evidence in his brief to this Court.

Watson begins by citing Taylor's testimony that the alcohol came from Roof Brothers.[8] Although Taylor does so testify, he is more specific. More than once he denies having made the purchase himself. In response to an interrogatory cited by Watson in his brief, Taylor said: "Watson purchased a case of beer and a pint of whiskey."[9] Although Taylor's deposition testimony[10] reveals

[7] Order, No. 09-CI-01400, p. 7 (McCracken Circuit Court, June 23, 2014).
[8] Taylor 4/19/2011 Depo. at 64-65.

[9] Taylor's Supplemental Answers to Interrogatories, R. 93, cited in Appellant's brief, p. 1.

[10] The following colloquy is taken from Taylor 6/20/2012 Depo. at 31-44 and Taylor 4/19/2011 Depo. at 65.

some confusion, he is clear on the question of who bought alcohol at Roof Brothers:

> Q: When you went to Roof Brothers, tell me what you remember about that.
>
> A: I don't. I remember getting alcohol, Jim Beam and Bud Light and leaving.
>
> . . . .
>
> Q: All right. Now you were driving; is that right?
>
> A: Yes.
>
> Q: Did you go to the drive-thru at Roof Brothers?
>
> A: I don't recall.
>
> Q: You don't - - you don't know whether you went to the drive-thru or whether somebody walked in?
>
> A: I can't say for sure, no.
>
> . . . .
>
> Q: Who bought the Jim Beam and Bud Light?
>
> A: Jerry [Watson].
>
> Q: . . . [D]id you witness the sale of alcohol to him?
>
> A: I don't recall.
>
> . . . .
>
> A: I remember the parking lot being there.
>
> Q: Okay. Do you remember where in the parking lot you parked?
>
> A: I think we pulled in the front of the building, but

again, I'm not sure if we went through the drive-thru or not.

. . . .

Q: Do you recall whether you waited in the truck while Jerry went inside?

A: No.

Q: Don't recall anything about that?

A: No.

Q: Do you remember if Jerry paid for the alcohol with cash or a debit card?

A: No.

. . . .

Q: Are you sure that you did not go into the store that night?

A: I'm pretty sure, yes.

Q: That you did not?

A: That I did not.

. . . .

Q: Other than your memory, are you aware of anything that would prove that you-all went to . . . Roof Brothers that night?

A: No.

Q: Okay. You don't recall getting any receipts or a bag?

A: I don't.

Q: Do you recall the alcohol being in a bag or anything?

A: I think it was in a brown paper sack. I do remember that.

. . . .

Q. And who purchased that [beer and whiskey]?

A. I believe it's Mr. Watson.

Watson is unable to refute Taylor's testimony because, as he puts it in his brief, "by the time Watson and Taylor arrived at Roof Brothers, shortly before the crash, they were so drunk that Watson has no memory of being there."[11] He said, "I have a flash in my mind of pulling up to Roof Brothers, and it was nighttime, but I don't know. I don't know if it really happened or not."[12] His knowledge is based, in part, on what Taylor told him: "I guess from what Joe [Taylor] said we went to Roof Brothers, but I don't remember that."[13] He also said, "I don't know if [Taylor] stopped by a liquor store and bought him some more alcohol. . . . *There's probably just a good chance I might have*."[14]

So, is there *any* evidence that Taylor purchased package alcohol at Roof Brothers as Watson alleged in his complaint? Watson argues that a jury could surmise that the purchase he alleged in his claim occurred by drawing inferences from the following facts: (1) Watson and Taylor were sober at the beginning of the

[11] Appellant's brief, p. 2 (citing Watson 1/25/2011 Depo. at 134).
[12] Watson 9/10/2012 Depo. at 72.

[13] Watson 1/25/2011 Depo. at 160.

[14] Watson 9/10/2012 Depo. at 49-50 (emphasis added).

night and the truck was void of alcohol; (2) they were drunk at the end of the night and the truck was full of partially consumed package alcohol; (3) like "'trout in the milk,'. . . the package alcohol in this case did not climb into Joe Taylor's truck on its own [and] is more likely than not [from] the one package liquor store visited by Taylor very shortly before the crash"[15]; (4) "Taylor's memory of events [was] impaired because of the alcohol consumed at TGI Friday's"[16] ; and (5) Watson was too drunk to remember the purchase.

To infer from these facts that Taylor was served or sold alcohol by Roof Brothers, the jury would have to conclude Taylor's testimony that Watson made the purchase was erroneous, a false memory of his own inebriation, *and* the jury would have to presume Watson's drunkenness not only impaired his mental faculties, but also so physically incapacitated him that he could not have made the purchase himself. These are not reasonable inferences and they are not enough to survive a summary judgment motion.

In *O'Bryan v. Cave*, the Supreme Court noted that the plaintiff had been "unable to produce any direct evidence in support of his claim" and reinstated a summary judgment this Court had reversed. 202 S.W.3d 585, 587 (Ky. 2006). "[T]he party opposing summary judgment," said the Court, "'cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but

[15] Appellant's brief, pp.4-5. Watson makes his argument by using part of a quote by Henry David Thoreau about a Massachusetts dairyman's strike in 1849. Some dairymen were accused of watering down their milk by dipping their containers in streams along the way to market. He commented: "Some circumstantial evidence is very strong, as when you find a trout in the milk."
[16] Appellant's brief, p. 2.

must present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (quoting *Steelvest,* 807 S.W.2d at 481 (internal quotations omitted) (citation omitted)). Furthermore, "speculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation." *Id.* at 588 (citing *Chesapeake & Ohio Ry. Co. v. Yates,* 239 S.W.2d 953, 955 (Ky.1951)). The evidence in this case is unsatisfactory because it does require the jury's resort to surmise and speculation. Summary judgment was appropriate.

Before affirming, however, we will address an argument Watson presents in his reply brief that he did not present in his primary brief. Watson argues that Roof Brothers "can be liable to Watson whether it served him or Taylor."[17] He cites two Kentucky opinions he says allow his case to go forward even if his allegation that Taylor purchased the alcohol cannot be proved. Those opinions are *Watts By and Through Watts v. K, S & H*, 957 S.W.2d 233 (Ky. 1997) and *Priest ex rel. Estate of Priest v. Black Cat, Inc.*, 74 S.W.3d 769 (Ky. App. 2001). We are not persuaded by Watson's argument for three reasons.

The first reason is that Watson neither cites these cases nor makes this argument in his original brief to this Court.[18] If he had, Roof Brothers could have responded to that argument in its appellee's brief. Because it was not presented in

[17] Appellant's Reply brief, p. 1.

[18] Appellant's brief, p. 1 (Watson argued that "the package alcohol [in Taylor's truck] was purchased from Roof Brothers immediately before the crash.").

Watson's original brief, Roof Brothers was entitled to deem the argument waived. *Cherry v. Augustus,* 245 S.W.3d 766, 780 (Ky. App. 2006) ("As a general rule, assignments of error not argued in an appellant's brief are waived."). The fact that Roof Brothers did not address the issue of Watson's purchase of alcohol in its response brief is a good indicator that it did deem the argument waived. *Cf. Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979) ("In this case, Mears has suffered no prejudice as a result of Milby's failure to address the . . . issue prior to the reply brief. In his appellee's brief, Mears thoroughly argued the merits of the issue . . . ."). Roof Brothers was justified in taking that view.

"The reply brief is not a device for raising new issues which are essential to the success of the appeal" and for good reason. *Best v. West American Inc. Co.,* 270 S.W.3d 398, 405 (Ky. App. 2008) (quoting *Catron v. Citizens Union Bank,* 229 S.W.3d 54, 59 (Ky. App. 2006) (quoting *Milby,* 580 S.W.2d at 728)). Entertaining an argument raised for the first time in the reply brief prejudices the appellee who has no opportunity to respond. If this were a permissible appellate advocacy tactic, appellants routinely would save their best argument for the reply brief when they would not merely have the *last* word – they would have the *only* word on the subject.

Second, Watson's claim in circuit court alleges Taylor, *not Watson*, was served and was sold alcohol by Roof Brothers. That claim was never amended to include an alternative legal theory based on a sale to Watson. There was never an allegation of an alcohol sale to Watson. Roof Brothers' summary judgment motion

appropriately targeted Watson's allegation that it sold or served alcohol to Taylor. The circuit court found the evidence of *that* specific allegation to be "exiguous." Our review of the record leads us to conclude that such evidence is non-existent and that is fatal to Watson's claim.

On the other hand, the circuit court also found "exiguous" the evidence of Watson's purchase of alcohol from Roof Brothers. Such evidence was not relevant to any allegation in Watson's claim. The circuit court's finding regarding the weight of that evidence is extraneous because neither the finding nor the evidence itself was responsive, or relevant, either to Watson's claim or Roof Brothers' motion for summary judgment which focused on a specific allegation of that claim. In terms of summary judgment, Watson's claim made the question whether Taylor was Roof Brothers' patron a material fact about which there turned out to be no genuine issue; that is, no evidence supported allegation of such a fact. Conversely, whether Watson was sold or served alcohol by Roof Brothers was not even a material fact under the theory of liability posed by Watson in his complaint.

Third, the cases Watson cites in his reply brief, *Watts* and *Priest*, involve claims by minors against liquor stores for violating subsection (1) of KRS 244.080(1), not subsection (2) which contemplates drunken adult patrons. Those cases recognized "dram shop liability when there was a sale to one minor who subsequently transferred the alcohol to another minor who then became intoxicated and caused an injury." *Priest*, 74 S.W.3d at 774. Both cases recognized that "[t]he Constitution, statute and case law of this state reflect a policy of special protection

of minors from injury." *Pike v. George*, 434 S.W.2d 626, 629 (Ky. 1968) (reviewing dismissal of claim under KRS 244.080(1)) (cited both by *Priest* and *Watts*). Our special protection of minors is implicit in KRS 413.241(2) because immunity under that statute is available only for someone "who sells or serves intoxicating beverages to a person *over the age for the lawful purchase* thereof[.]" KRS 413.241(2) (emphasis added). For sales of alcohol to minors, the statute offers no immunity whatsoever.

Watson wants his case to be the first in Kentucky to apply the same concept and special protection to drunken adult patrons of liquor stores. That would be contrary to "the clear majority rule . . . that an adult customer may not recover from a negligent dramshop for injuries caused by the customer's own intoxication." Richard Smith, *A Comparative Analysis of Dramshop Liability and A Proposal for Uniform Legislation*, 25 J. Corp. L. 553, 563-64 (2000) (citations omitted). Even those states that permit intoxicated minor customers to recover from the dramshops that illegally sold them alcohol still forbid suits by intoxicated adult customers. *Id.* at 364 (citations omitted).

We need not decide whether extending *Watts* and *Priest* to adult drunk patrons is good policy or justified by our jurisprudence and so do not address that question. Either of our first two reasons for rejecting the argument is sufficient.

Because we are affirming the circuit court on the ground identified in that court's order, we need not address Roof Brothers' alternative ground for affirming based on the statute of limitations.

CONCLUSION

For the foregoing reasons, we affirm the McCracken Circuit Court's June 23, 2014 order granting summary judgment in favor of Roof Brothers.

ALL CONCUR.

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