IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2012

DOCKET NO. 57

William J. Warr, *et al*.,

Petitioners,

v.

JMGM Group, LLC,

Respondent.

CORRECTED BRIEF OF PETITIONERS

John Vail
Admitted Pro Hac Vice
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street, N.W., Suite 520
Washington, DC 20001
Telephone: (202) 944-2887
Fax: (202) 965-0920
john.vail@cclfirm.com

Andrew E. Bederman
Jason W. Fernandez
GREENBERG & BEDERMAN, LLP
1111 Bonifant Street
Silver Spring, MD 20910
Telephone: (301) 589-2200
Fax: (301) 589-6706
abederman@gblawyers.com

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

STATEMENT OF THE CASE

William Warr, individually and as personal representative of the estate of Jazimen L. Warr, his deceased granddaughter; his spouse, Angela T. Warr; and both of them as guardians of the minor, Cortavia M. Harris, sued Defendant Dogfish Head Alehouse, a dram shop, for damages flowing from the death of Jazimen Warr and for personal injuries sustained by the other Appellants. Compl. (E. 13-19). Defendant was timely served. Cir. Court Docket (E. 6). Defendant's motion for summary judgment pursuant to Maryland Rule 2-501 was granted, disposing of all issues against all parties. Mem. Op. & Order Granting Mot. for Summ. J. 13-14 (E. 131-32). Appellants filed a timely appeal to the Court of Special Appeals. Notice of Appeal (E. 134). On June 22, 2012, Petitioner filed a Petition for Certiorari, which was granted by this Court on August 20, 2012, prior to any briefing or argument in the Court of Special Appeals.

QUESTION PRESENTED

1. WHETHER THIS COURT SHOULD RECOGNIZE DRAM SHOP LIABILITY?

This case presents a pure question of law which is reviewed *de novo*. *Schisler v. State*, 394 Md. 519, 535, 907 A.2d 175, 184 (2006) ("[W]here an order involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a *de novo* standard of review.").

STATEMENT OF FACTS

At about 5 p.m. on August 21, 2008, Michael Eaton entered Defendant's Dogfish Head Ale House in Gaithersburg. Compl. ¶¶ 3, 5 (E. 14-15); Mem. Op. & Order Granting Mot. for Summ. J. 2 (E. 120). He was known to the employees there as a habitual drunkard. *Id*. at ¶ 5; *Id*. at 2 (E. 14-15, 120). Mr. Eaton drank at the bar for approximately six hours, with the bar selling to him, and he consuming, at least seventeen bottles of beer. *Id*. Mr. Eaton also purchased, and other patrons purchased for him, shots of whiskey. *Id*.

Before Mr. Eaton departed the bar the influence of alcohol on him was apparent. Compl. ¶ 5 (E. 14-15); Mem. Op. & Order Granting Mot. for Summ. J. 2 (E. 120). Mr. Eaton had displayed aggressive and violent behavior, Compl. ¶ 6 (E. 15), and the bar knew that it had served Eaton at least twenty-one drinks. Compl. ¶ 5 (E. 14-15); Mem. Op. & Order Granting Mot. for Summ. J. 2 (E. 120). Mr. Eaton left the bar at approximately 10:55 p.m. Compl. ¶ 5 (E. 14-15).

About 45 minutes later he killed ten-year-old Jazimen Warr. *Id*. at ¶¶ 1, 3, 8 (E. 14-15). Mr. Eaton was driving on I-270 in Montgomery County and crashed his car into the rear end of a car carrying the Warr family. *Id*. at ¶¶ 3, 8 (E. 14, 15). He was traveling between 88 and 98 miles per hour in a 55 mile per hour zone. *Id*. at ¶ 8 (E. 15). In addition to killing ten year old Jazimen, he seriously injured William Warr, Angela Warr, and thirteen-year-old Cortavia Harris. *Id*. at ¶¶ 1, 14, 15, 17, 19 (E. 17, 18).

After the collision Mr. Eaton abandoned his vehicle and fled on foot. Compl. ¶ 8 (E. 15). Inspecting his vehicle after the collision, police found over seventeen empty

bottles or cans of beer in the back seat. *Id*. On July 30, 2009, Mr. Eaton pleaded guilty to one charge of vehicular manslaughter and one charge of leaving the scene of an accident involving personal injury. *Id*. He is now serving a prison term. *Id*.

ARGUMENT

I. INTRODUCTION AND SUMMARY.

The trial court found, with evident regret, that it was barred by *Felder v. Butler*, 292 Md. 174, 438 A.2d 494 (1981), from recognizing dram shop liability. Mem. Op. & Order Granting Mot. for Summ. J. 13 (E. 131). The Court of Special Appeals similarly has ruled that *Felder* precludes lower courts from providing a remedy for grievous misconduct by dram shops. *Wright v. Sue & Charles, Inc.*, 131 Md. App. 466, 478, 749 A.2d 241, 247 (2000).

Thirty years ago this Court, in *Felder*, declined "*for now*, to join the new trend of cases" recognizing dram shop liability. 292 Md. at 184, 438 A.2d at 499 (emphasis added). That trend is no longer new and is now consensus, not trend. At the time *Felder* was decided, 22 states recognized dram shop liability. *Id.* at 180, 438 A.2d at 497-98. Now, only Maryland and four other states—Delaware, Nebraska, Nevada, and South Dakota—continue to bar innocent victims of drunk drivers from recovering damages from the dram shops that profit from plying patrons with alcohol and then blithely sending them onto the highways.[1]

[1] In *Wright*, 131 Md. App. at 475 n.5, 749 A.2d at 246 n.5, the Court of Special Appeals identified Maryland and two others, Nebraska and Nevada. Delaware and South Dakota should be added. *See* discussion, *infra* at II.

The revolution in dram shop liability was driven in great part by refinement of outmoded common law doctrine regarding proximate cause. The *Felder* court declined to adopt this modern, more expansive view of causality and therefore declined to recognize dram shop liability. 292 Md. at 184, 438 A.2d at 499. Subsequently, however, this Court has adopted the modern view. *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 604 A.2d 445 (1992).

Felder's doctrinal underpinnings have been removed. This Court should now recognize that by straightforward application of existing common law principles, the same principles that led other states to conclude that dram shops should be liable to third parties injured by persons the dram shops had intoxicated and set loose on the world, the cause of action asserted in this case is valid. This recognition would advance the twin goals of the tort system, compensation of victims and deterrence of misconduct. *See Kassama v. Magat*, 136 Md. App. 637, 667-68, 767 A.2d 348, 365 (2001), *aff'd*, 368 Md. 113, 792 A.2d 1102 (2002); and *Tracey v. Solesky*, No. 53, 2012 WL 1432263, *8 (Md. Apr. 26, 2012).

Since *Felder*, despite a national consensus on dram shop liability, the Legislature has been silent. Legislative silence should give this Court no pause in applying general principles of common law to the specific case of dram shop liability. Nor should legislative torpor prevent this Court from recognizing that "changing conditions" and "increased knowledge" have rendered immunity for dram shops "a vestige of the past, no longer suitable to the circumstances of our people." *Felder*, 292 Md. at 182, 438 A.2d at 499.

II. NON-RECOGNITION OF A CAUSE OF ACTION FOR DRAM SHOP LIABILITY IS ROOTED IN OUTMODED NOTIONS OF PROXIMATE CAUSE THAT THIS COURT HAS ABANDONED.

This Court was first asked to recognize a cause of action for dram shop liability in 1951. *State v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951). The Court declined, rooting its ruling in an absence of proximate cause: "Human beings, drunk or sober, are responsible for their own torts. The law (apart from statute) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor." *Id*. at 254, 78 A.2d at 756. Thirty years later, in *Felder* this Court noted that this notion of proximate cause had been rejected in what the Court termed a "revolution" in dram shop liability, citing *Rappaport v. Nichols*, 156 A.2d 1, 9 (N.J. 1959) as a leader of that revolution: "The [New Jersey] court also found that the intervening action of the intoxicated patron could have been a foreseeable and normal incident of the risk created by the tavern owner in serving liquor to him." *Felder*, 292 Md. at 180, 438 A.2d at 497. As explained by one court, by 1973, eight years before *Felder* was decided, the *Rappaport* notion of proximate cause already had gained wide acceptance: "The modern view, and probably the majority view, in cases involving a liquor vendor's liability to third persons is that the furnishing of intoxicants may be the proximate cause of the injuries." *Vance v. United States*, 355 F. Supp. 756, 761 (D. Alaska 1973).

Eleven years after *Felder* rejected it, the modern view became the law of Maryland. In *Eagle-Picher Industries, Inc. v. Balbos*, 326 Md. 179, 604 A.2d 445 (1992), this Court adopted the "substantial factor" test of proximate causation set out in Section 431 of the *Restatement (Second) of Torts* (1965):

> The actor's negligent conduct is a legal cause of harm to another if
>
> (a) his conduct is a substantial factor in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Eagle-Picher, 326 Md. at 208-09, 604 A.2d at 459. In *Pittway Corp. v. Collins*, 409 Md. 218, 243-50, 973 A.2d 771, 786-90 (2009) this Court solidified its adoption of the modern view by specifically embracing Section 433 of the *Restatement (Second) of Torts*:

> The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:
>
> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it,
>
> (b) *whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm*, or has created a situation harmless unless acted upon by other forces of which the actor is not responsible;
>
> (c) lapse of time.

Id. at 245, 973 A.2d at 787 (emphasis added). The Court of Special Appeals used this analysis of causality to find that a premises liability cause of action against a dram shop existed for the consequences of its drunken patrons assaulting another patron. *Troxel v. Iguana Cantina, LLC*, 201 Md. App. 476, 29 A.3d 1038 (Md. Ct. Spec. App. 2011), *cert. denied*, 424 Md. 630, 37 A.3d 318 (Table) (2012). The misconduct of the dram shop in *Troxel* is the same, in kind, as the misconduct of the dram shop in this case.

Other states that, at the time *Felder* was decided, had not yet adopted dram shop liability, have embraced modern notions of causality and have applied them in the dram shop context. *Felder*, 292 Md. at 192, 438 A.2d at 498, identified seven states "which, like Maryland, have criminal statutes proscribing sales of intoxicants to minors or persons visibly under the influence of liquor, but no Dram Shop Acts," and no common law cause of action for dram shop liability.[2] Courts in six of those seven states now consider causation sufficiently proximate to impose liability on dram shops.[3] Only the highest court of Nebraska clings to the idea that sending drunks onto the roads is causally unrelated to the harm they do there.[4]

Just two years after *Felder*, the Arizona court recognized that modern views of causation rendered obsolete its precedent regarding dram shop liability, specifically alluding to the *Restatement*:

---

[2] Citing *Lewis v. Wolf*, 596 P.2d 705 (Ariz. Ct. App. 1979); *Carr v. Turner*, 385 S.W.2d 656 (Ark. 1965); *Wright v. Rose Moffitt, t/a Fairways Inn*, 437 A.2d 554 (Del. 1981); *Holmes v. Circo*, 244 N.W.2d 65 (Neb. 1976); *Hamm v. Carson City Nugget, Inc.*, 450 P.2d 358 (Nev. 1969); *Marchiondo v. Roper*, 563 P.2d 1160 (N.M. 1977); *Griffin v. Sebek*, 245 N.W.2d 481 (S.D. 1976). Overrulings of some of these cases are discussed, *infra*.

[3] The highest court in Nevada has adopted Section 431 of the *Restatement (Second) of Torts*, but since doing so has not ruled on dram shop liability. The court in Delaware has adopted modern notions of causation but has continued to refuse to recognize a duty. In South Dakota the legislature subsequently took away the common law cause of action the court recognized. *See* discussion, *infra* p. 12.

[4] *Pelzek v. American Legion*, 463 N.W.2d 321, 323 (Neb. 1990) ("[S]elling liquor to a minor . . . is not the proximate cause of any injuries that the minor might suffer. It is the negligent operation of an automobile after the drinking of liquor which causes the injury.") *See* discussion, *infra* p. 16.

> The common law rule of tavern owner nonliability was mainly based upon the concept that the chain of legal causation between the selling of the alcohol and the injury was broken or "superseded by the voluntary act of the purchaser in imbibing the drink." . . . The policy of the law on questions of intervening and superseding cause has evolved to the rule that the original actor is relieved from liability for the final result when, and only when, an intervening act of another was unforeseeable by a reasonable person in the position of the original actor and when, looking backward, after the event, the intervening act appears extraordinary. [citing, among other things, *Restatement (Second) of Torts* §§ 435(2), comments c and d, and 442 (1965)]. However, where the negligent conduct of the first actor increases the foreseeable risk of a particular harm occurring through the conduct of a second actor, the "fact that the harm is brought about through the intervention of another force does not relieve the [first] actor of liability." *Id*. § 442(B).

Ontiveros v. Borak, 667 P.2d 200, 206 (Ariz. 1983) (internal citations omitted) (superseded by statutory regime of dram shop liability, A.R.S. §§ 4–311 *et seq*.) It continued, "Common sense, common experience and authority all combine to produce the irrefutable conclusion that furnishing alcohol, consumption of alcohol and subsequent driving of a vehicle which is then involved in an accident are all foreseeable, ordinary links in the chain of causation leading from the sale to the injury," *id*. at 207, noting, "[t]he question of causation in such cases should ordinarily be a question of fact for the jury under usual principles of Arizona tort law." *Id*.

The Arizona court dwelled on the question of the propriety of it, versus the legislature, addressing the evolution of common law:

> [T]the common law, which is judge-made and judge-applied, can and will be changed when changed conditions and circumstances establish that it is unjust or has become bad public policy. In reevaluating previous decisions in light of

> present facts and circumstances, we do not depart from the proper role of the judiciary.
>
> Inherent in the common law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of stare decisis, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose. If this were not so, we must succumb to a rule that a judge should let others "long dead and unaware of the problems of the age in which he lives, do his thinking for him."

Id. at 205 (quoting *Lewis*, 596 P.2d at 706, in turn quoting Justice William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949)). Analyzing whether immunity for dram shops was antiquated, it noted:

> When most people walked and few had horses or carriages, . . . it may have been that the common rule of law of non-liability arising from the sale of liquor to an intoxicated person was satisfactory. But the situation then and the problem in today's society of the imbiber going upon the public highways and operating a machine that requires quick response of mind and muscle and capable of producing mass death and destruction are vastly different.

Id. (quoting *Meade v. Freeman*, 462 P.2d 54, 65 (Idaho 1969), *overruled by Alegria v. Paynok*, 619 P.2d 135 (Idaho 1980) (Prather, J. dissenting)). It then opined:

> Judge Prather's words are even truer today, fourteen years after they were written. The statistics cited in the concurring opinion in *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983), indicate a frightful toll-25,000 deaths and 650,000 injuries each year in motor vehicle accidents in which alcohol is a contributing cause. We believe, therefore, that the words of Division II of our Court of Appeals are correct:

> It seems clear that the common law rule is an anachronism, unsuitable to our present society, and that its reasoning is repugnant to modern tort theories.

Id. at 207 (quoting *Lewis*, 596 P.2d at 708). Arizona judicially abrogated dram shop liability through routine application of principles of causation and a reflection that dram shop immunity was anachronous after the horse and carriage long had been replaced by ubiquitous automobiles.

The Arkansas Supreme Court reasoned similarly. In *Shannon v. Wilson*, 947 S.W.2d 349 (Ark. 1997), it found that the sale of alcohol by a dram shop to a minor was the cause of harm to a third party. In *Jackson v. Cadillac Cowboy, Inc.*, 986 S.W.2d 410 (Ark. 1999), following *Shannon*, it extended the causation principle to sale to intoxicated persons. Regarding causality, the Court said:

> Under the existing common-law rule, no cause of action exists against one selling liquor because the drinking of liquor, not the remote sale of it, is considered to be the proximate cause of any injury. . . .
>
> The rule of nonliability predicated on the "proximate cause" of injuries being the consumption, not the sale of intoxicants, is not persuasive. Implicit in the common-law rule is that proximate cause must be the immediate cause. . . . The mere fact that other causes intervene between the original act of negligence and the injury for which recovery is sought is not sufficient to relieve the original actor of liability, if the injury is the natural and probable consequence of the original negligent act or omission and is such as might reasonably have been foreseen as probable.

Shannon, 947 S.W.2d at 356.

The Arkansas court, like the Arizona court, had little trouble finding that applying modern common law doctrines of causation to dram shops was no usurpation of

legislative function. It found, "When a judicially created rule becomes outmoded or unjust in its application, it is appropriate for the judiciary to modify it." *Id.* at 353. After invoking the same language from Justice Douglas as invoked by the Arizona court, it quoted its own precedent, which echoes this Court's test for common law change:

> In *Parish v. Pitts, supra*, this Court noted that "the field of common law is not primarily the Legislature's problem, it is the primary concern of this Court. Accordingly, the Court, not the Legislature, should extirpate those rules of decision which are admittedly unjust, for it is to the judiciary that the power of government is given to provide protection against individual hurt." *Id. citing*, Green, *Freedom of Litigation*, 38 Ill. L. Rev. 355, 382 (1944). Thus, as a part of our common-law doctrine, this Court is free to amend the common law. True, as we have frequently stated, the legislature may amend or change our common law, but we are not bound to adhere to outmoded holdings pending legislative action. This Court has a duty to change the common law when it is no longer reflective of economic and social needs of society.

Id.

The New Mexico court in 1977 was well aware of the problems caused by dram shops. Like this Court, it gave the legislature room to act, and, like this Court, it noted, "We do not, however, feel that it would be improper for this Court to address this issue in the future if the Legislature chooses not to act." *Marchiondo v. Roper*, 563 P.2d 1160, 1162 (N.M. 1977). Five years later the legislature had not acted and the court recognized dram shop liability in the face of argument "that it was within the province of the legislature, *not* the judiciary, to change the rule." *Lopez v. Maez*, 651 P.2d 1269, 1274 (N.M. 1982) (emphasis in original). It noted that the relevant common law rules were judicially created, and that "the revision of an outmoded common law doctrine is within

the competence of the judiciary." *Id.* The Court invoked newer ideas of proximate cause, relying on *Rappaport* and other cases to find that the acts of the intoxicated person "will not relieve the original wrongdoer [the dram shop owner] of liability if those acts *are reasonably foreseeable.*" *Id*. at 1275-76 (emphasis in original).

South Dakota, in reversing the case cited in *Felder*, *Griffin v. Sebek*, based its decision in part on the carnage caused by drunks in cars: "We take judicial notice that since *Griffin* was decided, alcohol has been involved in 50.8% of this state's traffic fatalities from 1976 to 1981; in 1981 alone, 62% of South Dakota's traffic fatalities were alcohol related. This tragic waste of life prompts us to review our conclusions in *Griffin*." *Walz v. City of Hudson*, 327 N.W.2d 120, 122 (S.D. 1982). The court noted that, should the legislature disagree, it could override the court's ruling. The legislature did so. *See Selchert v. Lien*, 371 N.W.2d 791 n.1 (S.D. 1985) (noting abrogation of *Walz* by SDCL § 35-4-78 (Interim Supp. 1985)).[5]

Nevada is in a position similar to Maryland. In *Hamm v. Carson City Nugget, Inc.*, 450 P.2d 358 (Nev. 1969), cited in *Felder*, it refused to recognize dram shop liability. It

[5] The statute reads, in current form:

> No licensee may sell any alcoholic beverage to any person who is obviously intoxicated at the time. A violation of this section is a Class 1 misdemeanor.
>
> However, no licensee is civilly liable to any injured person or the injured person's estate for any injury suffered, including any action for wrongful death, or property damage suffered because of the intoxication of any person due to the sale or consumption of any alcoholic beverage in violation of the provisions of this section.

most recently has reaffirmed *Hamm*, specifically basing its decisions on rejection of causality, in *Hinegardner v. Marcor Resorts, L.P.V.*, 844 P.2d 800, 802 (Nev. 1992), *see also id.* at 1093, 802 (cases cited therein), and in *Snyder v. Viani*, 885 P.2d 610, 612-13 (1994). In *Snyder* it noted:

> At common law, courts refused to recognize a cause of action arising out of the sale or furnishing of intoxicating beverages. . . . [T]he common law considers the act of selling the intoxicating beverage as too remote to serve as the proximate cause of an injury resulting from the negligent conduct of the purchaser of the drink. Nevada subscribes to the common law rule. [*Hinegardner*] at 1093, 844 P.2d at 802. Our continued adherence to the bright-line common law rule necessitates our conclusion that, as with injuries to third parties, consumption is the proximate cause of alcohol-related injuries to the drinker.

Id.

However, three years after *Snyder* it adopted Section 431 of the *Restatement (Second) of Torts*: "We conclude that the substantial factor test is a correct statement of legal cause, and the jury instructions were proper. *See Restatement (Second) of Torts* § 431." *Arnesano v. State ex rel. Dep't of Transp.*, 942 P.2d 139, 144 (Nev. 1997), *rev'd regarding different point in Martinez v. Maruszczak*, 168 P.3d 720 (Nev. 2007). *See also Cnty. of Clark, ex rel. Univ. Med. Ctr. v. Upchurch*, 961 P.2d 754, 760-61 (Nev. 1998). Nevada has not again considered dram shop liability since *Arnesano* was decided.

In the 1976 case cited in *Felder*, *Holmes v. Circo*, 244 N.W.2d 65, 67 (Neb. 1976), Nebraska rejected both duty and causality in the dram shop context, explaining that the legislature had repealed a statute creating a broad private remedy for dram shop misconduct. It has affirmed its view of both duty and causality in dram shop cases,

specifically restating its view on causality. *Pelzek*, 463 N.W.2d at 323 ("[S]elling liquor to a minor is a violation of § 53-180, it is not the proximate cause of any injuries that the minor might suffer. It is the negligent operation of an automobile after the drinking of liquor which causes the injury."). *See also id*. at 324 (on duty). The Court's having recognized modern notions of causality at least since 1969, *Landmesser v. Ahlberg*, 166 N.W.2d 124, 127 (Neb. 1969), its reluctance to recognize a dram shop cause of action is better explained as a reluctance to interfere with perceived legislative prerogative rather than a position on causality. The dissent noted that modern principles of causation are generally the law in Nebraska, *see Pelzek*, 463 N.W.2d at 325 (Shanahan, J., dissenting) and criticized the Court for engaging in an "Alphonse and Gaston act" with the legislature with regard to which body should recognize this critical cause of action. *Id.* at 326.[6]

Like Nebraska, Delaware rejected both causality and duty in the case cited in *Felder*, *Wright v. Moffitt*, 437 A.2d 554 (Del. 1981). Its rationale, too, was based on the legislature having created, and then eliminated, a private cause of action for certain violations of Delaware's statutory regime of alcoholic beverage control. *Id*. at 558. Unlike the Nebraska enactment the Delaware private remedy was narrow, applying only to persons administratively designated as persons "who habitually drink[] alcoholic liquor to excess." *Id.* Despite this narrowness the Court opined that the legislature had

[6] *See* discussion, *infra*, Sections III and IV, regarding the appropriateness of this Court acting.

purposefully decided not to enact dram shop liability and it refused to invoke its common law power to do so.

Despite subsequently recognizing modern notions of causality at least by 1988, *Naidu v. Laird*, 539 A.2d 1064, 1075 (Del. 1988), and despite acknowledging a strong interest in eliminating carnage caused by drunks on Delaware's roads, *Acker v. Cantinas*, 586 A.2d 1178, 1181 (Del. 1991), the Delaware court steadfastly has refused, as a matter of common law, to recognize a duty. Alluding to a line of post-*Wright* dram shop cases it has said that under the unique history of legislation in this area, it would not create "a common law duty that directly contravenes the primacy of the legislative branch in resolving" the question of dram shop liability. *Riedel v. ICI Americas Inc.*, 968 A.2d 17, 21 (Del. 2009).

Unlike the Delaware court, the *Felder* court was concerned with causation, not duty. It invited the Maryland legislature "to determine if the public policy of the State continues to favor a rule which, in any and all circumstances, precludes consideration of whether the sale of intoxicating liquor to an inebriated tavern patron may be a proximate cause of subsequent injury caused to others by the intoxicated customer." *Felder*, 292 Md. at 184, 438 A.2d at 499. Causation is archetypically a concern of the common law, as it transcends differing duties. *See, e.g.*, Joseph H. Beale, *The Proximate Consequences of an Act*, 33 Harv. L. Rev. 633 (1920).

Maryland doctrine is now in line with *Rappaport* and the similar cases identified in *Felder*. *See, e.g.*, *Thompson v. Tranberg*, 360 N.E.2d 108, 111-12 (Ill. App. Ct. 1977) (applying *Restatement* § 433 factors to determine whether dram shop's conduct caused

injury). This Court need not overrule *Felder* so much as acknowledge that *Felder* already has been overruled, *sub nom*, with regard to the issue of causality. That acknowledgement would render valid the cause of action asserted here.

III. THIS COURT'S DUTY TO IMPLEMENT THE REMEDIAL IMPERATIVE OF THE COMMON LAW COMPELS RECOGNITION OF A CAUSE OF ACTION IN THIS CASE.

The remedial imperative of the common law—"Where there is a right, there is a remedy"—has long been embraced by this Court. *Magruder v. Swann*, 25 Md. 173, 206, 1866 WL 2019, *18 (1866). ("The theory of all republican government is that the judicial function is a public trust for the protection of society. The Court personates the majesty of the law, before which, all men are equal, '*ubi jus, ibi remedium.*'"). Indeed, this Court has echoed Chief Justice Marshall in finding that the Court has a "constitutionally mandated duty to administer justice." *Comm'n on Med. Discipline v. Stillman*, 291 Md. 390, 402, 435 A.2d 747, 754 (1981). *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."). Recognition of a cause of action here is an application of the remedial imperative: "If the remedy at law did not exist it would have to be invented. . . . 'for if men will multiply injuries, actions must be multiplied too.'" *Gottlieb v. American Auto. Ins. Co.*, 177 Md. 32, 42, 427 A.2d 609, 610 (1939) (quoting *Ashby v. White*, 2 Ld. Raym. 938, 955 (1703)).

Administration of the remedial imperative is, in the first instance, the Constitutional duty of this Court: "It is *our* duty to determine what is the common law

applicable to the circumstances and condition of Maryland." *Damasiewicz v. Gorsuch*, 197 Md. 417, 440, 79 A.2d 550, 560 (1951) (emphasis in original); Md. Const. art. IV, § 1 (vesting judicial power in this Court); *Comm'n on Med. Discipline*, 291 Md. 390, 435 A.2d 747. This duty of the Court flows in part from the Constitution vesting in the People a right not only to the substance of the common law but also to its processes. Md. Decl. of Rights arts. 5, 18-27. Those processes include the judicial explication of tort law. The Constitution vests the Legislature with a secondary power to "revise," "amend," or "repeal" common law rules this Court has evolved. Md. Decl. of Rights art. 5 (vesting ultimate oversight of common law in Legislature). Recognition of a cause of action here is entirely consistent with this Constitutional scheme.

This is not a situation, as in Delaware or South Dakota, where the legislature has spoken on public policy, suggesting the Court's deference to its voice. *See Mayor & City Council of Baltimore v. Clark*, 404 Md. 13, 36, 944 A.2d 1122, 1135 (2008) ("It is well settled that, where the General Assembly has announced public policy, the Court will decline to enter the public policy debate, even when it is the common law that is at issue."). The legislature has at least twice considered, but has not enacted, dram shop legislation[7], but this kind of legislative inaction cannot be considered an endorsement of

[7] In 2002, apparently in part in reaction to the *Wright* case, *see* Fiscal Note to S.B. 739, 416th Gen. Assemb., 2002 Reg. Sess. (Md. 2002), http://mlis.state.md.us/ PDF-Documents/2002rs/fnotes/bil_0009/sb0739.PDF (last visited Oct. 26, 2012), and subsequently in 2011 and 2012, apparently in reaction to this case, *see* Maryland Department of Legislative Services, Office of Policy Analysis, *Issue Papers: 2012 Legislative Session*, at 207-08 (2011), *available at* http://mlis.state.md.us/ 2012rs/misc/2012_IssuePapers.pdf, the Maryland Legislature has entertained bills imposing dram shop liability. No legislation has been enacted. *See* H.B. 1120, 428th Gen.

the *status quo*. *Police Comm'r of Baltimore City v. Dowling*, 281 Md. 412, 420, 379 A.2d 1007, 1012 (1977) (attempt to infer legislative intent from failure of legislature to pass a statute was "a weak reed upon which to lean," and was rejected). *See also Suessmann v. Lamone*, 383 Md. 697, 748, 862 A.2d 1, 31 (2004) (Bell, C.J. dissenting) ("Maryland law is clear, legislative silence on a particular subject is not evidence, one way or the other, of legislative intent as to that subject."); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) ("Ordinarily, 'Congress' silence is just that—silence.'") (rejecting Congressional silence regarding extant case law as endorsing that case law). Recognizing a cause of action here is simply application of evolved common law principles to a particular situation.

Acknowledging here that the common law underpinnings of *Felder* already have been breached poses no ultimate danger of interfering with legislative will, as the Legislature can revise common law doctrine this Court exposits. *Ireland v. State*, 310 Md. 328, 331-32, 529 A.2d 365, 366 (1987) ("no great inconvenience, if any, can result from the power deposited with the judiciary to decide what the common law is. . . ."). *See Romero v. Byers*, 872 P.2d 840, 844 (N.M. 1994) ("failure or refusal to act [when the legislature has not expressed its will] would be, in essence, an abdication of our responsibility for the state and development of the common law.").

Assemb., 2011 Reg. Sess. (Md. 2011), http://mlis.state.md.us/2012RS/billfile/hb1120.htm (last visited Oct. 26, 2012); H.B. 1000, 430th Gen. Assemb., 2012 Reg. Sess. (Md. 2012), http://mlis.state.md.us/2012rs/billfile/hb1000.htm (last visited Oct. 26, 2012).

Most recently, in *Tracey v. Solesky*, No. 53, Sept. Term 2012, 2012 WL 1432263 (Md. Apr. 26, 2012), this Court modified common law doctrine, more than a century old, that required a showing of actual knowledge of the dangerousness of a particular domestic animal before liability would be imposed for the animal's bad acts. *Tracey* stands in a long tradition of the Court, well cataloged and explicated in *Kelley v. R.G. Industries, Inc.*, 304 Md. 124, 497 A.2d 1143 (1985):

> This Court has repeatedly said that "the common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems." *Harrison v. Mont. Co. Bd. of Educ.*, 295 Md. 442, 460, 456 A.2d 894 (1983). *See Felder v. Butler*, 292 Md. 174, 182, 438 A.2d 494 (1981). The common law is, therefore, subject to judicial modification in light of modern circumstances or increased knowledge. *Jones v. State*, 302 Md. 153, 161, 486 A.2d 184 (1985); *Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983); *Condore v. Prince George's Co.*, 289 Md. 516, 425 A.2d 1011 (1981). Indeed, we have not hesitated to change the common law to permit new actions or remedies where we have concluded that such course was justified. *Boblitz v. Boblitz, supra* (authorizing negligence action by one spouse against another); *Moxley v. Acker*, 294 Md. 47, 447 A.2d 857 (1982) (changing common law so as to permit an action of forcible detainer even though force is not present); *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981) (recognizing tort of abusive or wrongful discharge); *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978) (refusing to recognize interspousal immunity with regard to outrageous intentional torts); *Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (1977) (recognizing tort of intentional infliction of emotional distress).[8]

[8] *See also* Jennifer R. Karangelen, *The Road to Judicial Abolishment of Contributory Negligence Has Been Paved by* Bozman v. Bozman, 34 U. Balt. L. Rev. 265, 274-77 (2004) (describing Maryland case law); *Harrison v. Montgomery Cnty. Bd.*

Id. at 140-41, 497 A.2d at 1150-51.

The common law of torts serves at least two ends: compensating victims of misconduct, *Kassama v. Magat*, 136 Md. App. 637, 667-68, 767 A.2d 348, 365 (2001), *aff'd*, 368 Md. 113, 792 A.2d 1102 (2002) ("[I]t is a fundamental goal of tort law to put the victim, insofar as it is possible to do so by compensatory damages, in the position that he/she would have been in if the defendant had not been negligent."), and deterring future misconduct. *Tracey*, 2012 WL 1432263, at *8 (quoting *Matthews v. Amberwood Assoc. Ltd. P'ship, Inc*., 351 Md. 544, 570, 719 A.2d 119, 131-32 (1998) (quoting William L. Prosser, *et al*., *Prosser and Keeton on the Law of Torts* § 4, at 25-26 (5th ed. 1984) ("The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with the compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts are known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.")). Both of those ends are served by the recognition of a cause of action here.

---

of Educ., 295 Md. 442, 464 n.1, 456 A.2d 894, 905 n.1 (1983) (Davidson, J., dissenting) (collecting cases).

IV. "INCREASED KNOWLEDGE" GARNERED FROM YEARS OF EXPERIENCE WITH DRAM SHOP LIABILITY DEMONSTRATES THAT LEAVING DRAM SHOPS IMMUNE FROM LIABILITY "IS A VESTIGE OF THE PAST, NO LONGER SUITABLE TO THE CIRCUMSTANCES OF OUR PEOPLE."

Felder noted that "increased knowledge" could demonstrate that common law doctrine "is a vestige of the past, no longer suitable to the circumstances of our people" and should be replaced. 292 Md. at 182, 438 A.2d at 499. Even if *Felder* had not already *sub nom* been abrogated, experience would require a finding that leaving dram shops immune from responsibility for launching drunks onto the highways was no longer viable.

As other courts have noted, *supra*, dram shop immunity was a vestige of a time without automobiles. Contemporaneous with the *Felder* decision, a time at when "[t]he carnage caused by drunk drivers" was too well documented to require "detailed recitation," *South Dakota v. Neville*, 459 U.S. 553, 558 (1983), Mothers Against Drunk Driving ("MADD") was founded. Laurie Davies, *25 Years of Saving Lives 1980-2005*, http://www.madd.org/about-us/history/madd25thhistory.pdf (last visited Oct. 26, 2012). That founding often is cited as an impetus for a sea-change in attitudes toward drinking and driving. *See, e.g.*, Michael L. Berger, *The Automobile in American History and Culture: A Reference Guide* 347 (Greenwood Press 2001), *available at* http://books.google.com/books/about/The_Automobile_in_American_History_and_C.html?id=oRwMv8iNP-MC.

National legislation reflecting new attitudes flowed shortly after *Felder*. In 1984 Congress conditioned state access to federal highway funds on 21 being the legal

minimum age for access to alcohol. National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158. *See South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding constitutionality). In 2000 Congress similarly conditioned highway monies on states establishing a blood alcohol level of .08 as *per se* evidence of drunken driving. The Department of Transportation and Related Agencies Appropriations Act of 2001, Public Law No. 106-346, 114 Stat. 1356 (2000). Prior to this legislation, states typically did not make blood alcohol level *per se* evidence of a violation and set the level as high as 0.15. Andrew Gore, *Know Your Limit: How Legislatures Have Gone Overboard With Per Se Drunk Driving Laws and How Men Pay the Price*, 16 Wm. & Mary J. Women & L. 423, 428 (2010). Sobriety checkpoints have become common, spurred by a 1984 recommendation from the National Highway Transportation Safety Board. *See* David C. Crosby, *The Constitutionality of Sobriety Checkpoints in Alaska*, 8 Alaska L. Rev. 227, 227 n.4 (1991). This Court, upholding the constitutionality of such checkpoints in 1984, found that the state had a strong interest in such control measures because "nationally, fifty-five percent of all traffic fatalities are alcohol related. The magnitude of the problem created by intoxicated motorists cannot be exaggerated." *Little v. State*, 300 Md. 485, 504, 479 A.2d 903, 912 (1984).[9]

[9] The National Highway Traffic Safety Administration ("NHTSA") has found that enforcement works: "States can achieve significant reductions in alcohol-related crashes when they engage in sustained high-visibility enforcement." *The 2006 National Labor Day Impaired Driving Enforcement Crackdown: Drunk Driving. Over the Limit. Under Arrest.*, at v (2008), *available at* http://www.nhtsa.gov/Impaired.

Designated drivers, unknown in America in 1980, have become ubiquitous. In 1988, the Harvard Alcohol Project "worked with the communications industry to build 'designated drivers' into scripts of top rated television programs including such shows as L.A. Law, The Cosby Show, and Cheers" and reported that over a four-year period more than 160 prime time programs responded. David Mechanic, *The Media, Public Perceptions & Health, And Health Policy*, 5 Hous. J. Health L. & Pol'y 187, 210 (2005). Today, 84 percent of Americans are aware of designated driving through the "Friends Don't Let Friends Drive Drunk" campaign created by the U.S. Department of Transportation and the Ad Council to promote the practice. *See* Designated Driver Safe Ride Program, http://www.nhtsa.gov/people/injury/alcohol/designateddriver/index.html (last visited Oct. 26, 2012). Dram shop and social host liability have become almost universal. *Wright*, 131 Md. App. at 475 n.5, 749 A.2d at 246 n.5. *See* Mothers Against Drunk Driving, *Dram Shop and Social Host Liability* (2011) (hereinafter "MADD Report"), http://www.madd.org/laws/law-overview/Dram_Shop_Overview.pdf (table).

Reforms in general have had a marked impact on highway safety:

> The results of these efforts, both legal and cultural, have been truly remarkable. In 1982, 43,510 people died in all traffic crashes in the United States. Of this total figure, 60 percent, or 26,173 people, were the victims of alcohol-related crashes. In 2005, by contrast, 43,443 people were killed in traffic crashes, but only 17,590, or 40 percent, were fatalities in which alcohol was a factor. This means that even though the number of traffic fatalities remained almost exactly the same over this period of time, the number of fatalities that were alcohol-related decreased by nearly 35 percent. This substantial drop in alcohol related deaths is all the more remarkable given that during the same period of time, the number of licensed drivers, the number of registered vehicles,

> and the number of vehicle miles traveled continued to increase.

John M. Breen, *Modesty and Moralism: Justice, Prudence, and Abortion—A Reply to Skeel & Stuntz*, 31 Harv. J.L. & Pub. Pol'y 219, 300-01 (2008) (footnotes omitted).

Dram shop liability in particular generates salutary effects. According to a well-documented MADD report:

> - Dram shop liability laws reduce alcohol-related crashes. Texas experienced a 6.5 percent decrease in single vehicle nighttime crashes resulting in injury immediately after a liability case was filed in 1983, and an additional 5.3 percent decrease after another case was filed in 1984. In 2001, researchers found a 5.8 percent decrease in fatal crashes from dram shop liability laws. Other studies have found a similar deterrent effect from dram shop liability by three to five percent. This is because this liability makes it in the economic best interest of establishments to have responsible serving practices.
>
> - Dram shop laws increase publicity of the impacts of over-serving. Studies show that states that have a high level of dram shop liability have more publicity about the impacts of liability and have more servers and managers who are aware of liability.
>
> - Dram shop laws decrease excessive and illegal consumption. Studies have found that states with high levels of dram shop liability also had fewer lower-price drink promotions (like "happy hours") that encourage excessive consumption in a limited amount of time. This is important, because access to an unlimited amount of alcohol for a flat fee increases the number of drinks in a sitting by 1.6 drinks on average. States with dram shop liability also had more thorough checks of identification on average, which means that fewer minors were able to drink illegally. This is an accomplishment, considering that US purchase surveys show that 40 to 90 percent of outlets sell to underage

> buyers and that this stems from low and inconsistent levels of enforcement against adults who sell or provide alcohol.

MADD Report, *supra* (footnotes omitted).

Maryland experienced 493 traffic fatalities in 2010.[10] Extrapolating a reduction of three to five percent, dram shop liability would save 15 to 25 lives per year.[11] That sobering piece of "increased knowledge," a criterion for revising common law doctrine, was unavailable to the *Felder* court.

CONCLUSION

Felder has been abrogated *sub nom*. This Court should acknowledge that abrogation and recognize a cause of action here, applying current principles of generally applicable common law.

Social mores have changed since *Felder* was decided and experience indicates that dram shop liability deters misconduct and compensates the victims of it. These circumstances render it "eminently wise," to revise judge-made law. *Bozman v. Bozman*, 376 Md. 461, 495, 830 A.2d 450, 470 (2003).

---

[10] NHTSA, *Traffic Safety Performance Measures for Maryland 2006-2010, available at* http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/STSI/24_MD/2010/24_MD_2010.PDF.

[11] One of the most rigorous empirical studies, performed for the National Bureau of Economic Research ("NBER"), found a rate of reduction of 5.3 percent. Frank J. Chaloupka, Henry Saffer, & Michael Grossman, *Alcohol Control Policies and Motor Vehicle Fatalities* 16 (NBER, Working Paper No. 3831, 1993), *available at* http://www.nber.org/papers/w3831.pdf?new_window=1.

The ruling of the lower court, granting summary judgment, should be REVERSED and this case should be REMANDED for further proceedings consistent with the ruling of this Court.

Date: November 1, 2012

Respectfully submitted,

_____

Andrew E. Bederman
Jason W. Fernandez
GREENBERG & BEDERMAN, LLP
1111 Bonifant Street
Silver Spring, Maryland 20910
Telephone: (301) 589-2200
Fax: (301) 589-6706
abederman@gblawyers.com

John Vail
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street, NW, Suite 520
Washington, DC 20001
Telephone: (202) 944-2803
Fax: (202) 965-0920
john.vail@cclfirm.com

Attorneys for Petitioners

RULE 8-504(a)(8) STATEMENT

This Brief was printed utilizing proportionally spaced font. The body and footnotes are printed in Times New Roman font, 13 point.

_____

Andrew E. Bederman

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of November, 2012, two copies of the foregoing Corrected Brief of Petitioners, were sent by United Parcel Service for overnight delivery, to the following counsel of record:

Robert Hetherington
McCarthy Wilson LLP
2200 Research Boulevard
Suite 500
Rockville, Maryland 20850

_____
Andrew E. Bederman

Attorney for Petitioners