IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2012

DOCKET NO. 57

William J. Warr, *et al.*,

Petitioners,

v.

JMGM Group, LLC,

Respondent.

REPLY BRIEF OF PETITIONERS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Defendant focuses its response on an assertion that a dram shop owes no duty to a person injured because the dram shop served intoxicants to a visibly intoxicated person. It mounts no serious challenge to Plaintiffs' assertion that this Court already has changed doctrine regarding causation that precluded this Court from recognizing dram shop liability in *Felder v. Butler*[1] and *Joyce v. Hatfield*.[2]

The existence of such a duty did not trouble the *Felder* court or the *Hatfield* court before it, nor should it trouble this one. That duty is but a special case of the duty all persons owe to all other persons to use reasonable care. That general duty includes an obligation not to increase the risk of harm to persons and for Defendant, special responsibilities that flow from the special trust granted to it in its license to serve intoxicants. Defendant's assertion that no duty exists is premised on inapposite authority, embodied in Sections 314 and 315 of *Restatement (Second) of Torts* (1965), that deals with questions not at issue here, whether duties exist to take affirmative actions to assist a person in distress or to control the conduct of a third person. The dram shop tort is premised on a party's failure to control its own actions, not those of another.

Neither Defendant nor its *amicus* questions the power of this Court to recognize dram shop liability. The normal development of the common law compels such

[1] *Felder v. Butler*, 292 Md. 174, 438 A.2d 494 (1981).

[2] *Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951).

recognition and that recognition is consonant with the remedial imperative of the common law ensconced in the Constitution.

The ruling below should be reversed and this case remanded for further proceedings.

II. DEFENDANT OWED A DUTY TO PLAINTIFFS NOT TO SERVE THE VISIBILY INTOXICATED PERSON WHO INJURED THEM.

Defendant, which holds a license to sell intoxicants, argues that it had no duty to stop serving alcohol to a person it knew was intoxicated and violent. The proposition does not sound plausible. As Dickens put it, "If the law supposes that . . . the law is a ass—a idiot."[3] The law is not so feeble-minded.

Duty, as Defendant recognizes, Resp't's Br. 6, is "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." William L. Prosser, *et al.*, *Prosser and Keeton on the Law of Torts* § 53 (5th ed. 1984), *adopted in Grimes v. Kennedy Krieger Institute, Inc.*, 366 Md. 29, 86, 782 A.2d 807, 841 (2001). The Kentucky Supreme Court explicated Section 53 of Dean Prosser's treatise in finding the definition met in the context of dram shop liability:

> [I]n the present case, appellant argues as an historical premise that there is no duty owed by the tavern owner to the person subsequently injured, regardless of negligence, foreseeability and proximate cause. Prosser discusses the "artificial character" of reasoning from the premise of "no duty" in disregard of negligence principles in these words:

[3] The character Mr. Bumble in *Oliver Twist*, reacting to the assertion that the law assumes that his spouse acts under his direction.

> "The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . . It is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . [I]t should be recognized that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." Prosser and Keeton on The Law of Torts, § 53, 357-58 (5th ed. 1984).

Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell, 736 S.W.2d 328, 330 (Ky. 1987) (superseded by dram shop statute as noted in *Taylor v. King*, 345 S.W.3d 237 (Ky. Ct. App. 2010)). This Court has invoked this same language from Prosser regarding when a duty should be found, *Barclay v. Briscoe*, 427 Md. 270, 293, 47 A.3d 560, 574 (2012); *Grimes*, 366 Md. at 86, 782 A.2d at 841, and has endorsed negligence principles that establish that Plaintiffs are entitled to the protection of the civil justice system.

Contrary to the assertion of Defendant, "This Court has repeatedly rejected any argument that [Md. Code, Art. 2B, § 12-108(a)(1)(ii) (2012)][4] creates a tort duty . . . ,"

[4] The statute provides:

> (a)(1) A licensee licensed under this article, or any employee of the licensee, may not sell or furnish any alcoholic beverages at any time: . . .
>
> (ii) To any person who, at the time of the sale, or delivery, is visibly under the influence of any alcoholic beverage.

Resp't's Br. 10-11 (citing this Court's decisions in *Hatfield* and *Felder*, and two Court of Special Appeals cases following them), both *Hatfield* and *Felder* were decided on the basis of causality, not duty.[5] The question of duty did not trouble either court. In *Hatfield*, the court assumed, without deciding, that a duty existed, forecasting that duty existed by citing to similar circumstances in which it had found duties.[6] In *Felder*, this Court at least

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Plaintiffs rely also on Md. Code, Art. 2B, § 12-110 (2012), which proscribes sales to habitual drunkards. The affect each has on duty being conceptually identical, for brevity Plaintiffs will refer only to the first.

[5] The decision in *Felder* is discussed at length in Plaintiffs' opening brief. *Hatfield*, like *Felder*, was decided on the basis of causality, not duty. The Court of Special Appeals emphasized this basis of the *Hatfield* decision in *Joseph v. Bozzuto Management Co.*, 173 Md. App. 305, 323, 918 A.2d 1230, 1240 (2007):

> In *Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951), the defendant clearly violated the law by knowingly selling liquor to an intoxicated minor, who drove away from the tavern and struck another car causing the death of the plaintiff's husband. The Court of Appeals refused to accept the illegal sale as the proximate cause of the subsequent injury. The use of the violation as evidence of negligence did not even arise for discussion.
>
> > The common-law rule holds the man who drank the liquor liable, and considers *the act of selling it as too remote to be a proximate cause of an injury caused by the negligent act of the purchaser of the drink.*
>
> 197 Md. at 255, 78 A.2d 754 (emphasis supplied).

[6] *Hatfield*, 197 Md. at 252-53, 78 A.2d at 755, invoked principles Plaintiff advances here:

> We may assume, without deciding, that on such facts the defendant would be 'guilty of an actionable wrong independently of any statute', not, however, for making the driver drunk by selling him liquor, but for placing him bodily,

tacitly acknowledged that the statute, *supra* note 4, which precludes sales of alcohol to visibly intoxicated persons, affects the analysis of whether a dram shop owner complied with the general duty of reasonable care set out in *Restatement (Second)* § 283[7] and *Restatement (Third) of Torts: Physical and Emotional Harm* (2010) § 3.[8] Discussing the findings of parallel courts, the *Felder* court noted:

> Some of these cases conclude that criminal statutes in force in their jurisdictions which proscribe sales of intoxicants to minors or inebriated persons *establish a standard of conduct* for tavern owners and their employees from which to deviate may constitute actionable negligence.

Felder, 292 Md. at 181, 438 A.2d at 498 (emphasis added).

In a footnote at the end of that sentence, it observed:

> in a state of unconsciousness, in the sleigh and starting the horses. This court has adopted the statement in the Restatement, Torts, § 390 [in a tentative draft, § 260], 'One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or from facts known to him should know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of bodily harm to himself and others whom the supplier should expect to share in, or be in the vicinity of its use, is subject to liability for bodily harm caused thereby to them'.

[7] "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man *under like circumstances.*" (Emphasis added).

[8] "A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm."

> The authorities generally recognize that *the standard of conduct of a reasonable man* may be determined by a legislative enactment, even though penal in character. See, e.g., W. Prosser, Torts s 36 at 190 (4th ed. 1971); Restatement (Second) of Torts s 285 (1966).

Id. at 181 n.2, 438 A.2d at 498 n.2 (emphasis added).[9] Defendant, who argues from both Prosser and the *Restatement* that no duty exists, does not discuss these sections of those works which explain how the general duty is addressed in particular situations.

Defendant's increasing the risk of the exact harm realized by Plaintiffs also is a violation of the general duty of care, actionable breach of which is explicated in Sections 285(c), *supra* note 9, 302A,[10] 302B,[11] and 449[12] of *Restatement (Second)* and Section 19

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[9] The relevant section of the *Restatement* provides:

> § 285. How Standard Of Conduct Is Determined
>
> The standard of conduct of a reasonable man may be (a) established by a legislative enactment or administrative regulation which so provides, or (b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or (c) established by judicial decision, or (d) applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision.

Restatement (Second) § 285.

[10] "A negligent act or omission may be one which involves an unreasonable risk of harm to another through either

> (a) the continuous operation of a force started or continued by the act or omission, or
>
> (b) the foreseeable action of the other, a third person, an animal, or a force of nature."

of *Restatement (Third)*.[13] *See Ghassemieh v. Schafer*, 52 Md. App. 31, 40, 447 A.2d 84, 88-89 (1982) (citing *Restatement (Second)* § 285 and describing a general duty "to refrain from any act which a reasonable person should recognize as involving an unreasonable risk of harm to another."). These provisions also are not discussed by Defendant.

Defendant's discussion of duty relates primarily to the recognition, in *Restatement (Second)* §§ 314-15[14], that the general duty generally does *not* require a person to act

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[11] "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."

[12] "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."

[13] Section 19 provides: "The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party."

[14] The relevant sections provide:

> § 314. Duty To Act For Protection Of Others
>
> The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.
>
> § 315. General Principle
>
> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

affirmatively for the protection of others or to control the conduct of others. Resp't's Br. 8. Dram shop liability arises not from failure to control the conduct of visibly intoxicated persons—it does not require, for example, that dram shops forcibly preclude them from driving—but from the dram shop's own misconduct in providing intoxicants to them.[15]

> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Comment a to Section 315 notes, "The rule stated in this Section is a special application of the general rule stated in § 314."

[15] Most states that recognize dram shop liability:

> [P]rovide a cause of action based on the sale of alcohol to a person who is visibly intoxicated. Indeed, it was sales to intoxicated customers that formed the basis of liability in the original dramshop acts of the nineteenth century. The justification for the rule is obvious: When a visibly intoxicated person attempts to purchase alcohol, it should be abundantly clear to the server that it is dangerous to add to the customer's intoxication. Although the responsibility for the initial drunkenness must lie with the intoxicated person, providing the customer with even more alcohol significantly increases the risk of harm, which is a rational basis for the dramshop's liability if harm results.

Richard Smith, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 J. Corp. L. 553, 559 (2000). *See, e.g.*, the Michigan pattern jury instruction for dram shop liability, which provides, in relevant part:

> The plaintiff has the burden of proving each of the following:
>
> > a. that [name of plaintiff] was [injured/damaged] by [name of alleged intoxicated person];
> >
> > b. that [name of alleged intoxicated person] was visibly intoxicated at the time [he/she] was [sold/given/furnished] alcoholic liquor by [name of defendant/name of agent/name of employee];

In the commentary to *Restatement (Third)* § 37, which replaces Sections 314 and 315 of *Restatement (Second)*, the authors of the *Restatement* explain that those sections do not excuse facilitating third-party misconduct:

> a. History. Section 314 of the Restatement Second of Torts provided that knowledge that another was at risk and the ability to prevent or ameliorate the risk are insufficient to impose a duty. However, distinction between *active risk creation and passive failure to act in the face of a danger that was not the doing of the actor* was relegated to commentary. Section 315 of the Second Restatement stated a more specific rule, subsumed within § 314, that an actor owed no duty to control third parties, subject to stated exceptions. Section 315, however, *neglected to clarify that its no-duty rule was conditioned on the actor having played no role in facilitating the third party's conduct, such as by providing a dangerous weapon to an insane individual.* See Comment *d*. This Section replaces both § 314 and § 315 of the Second Restatement.

Restatement (Third)of Torts § 37 cmt. a (emphasis added).

Comment *d* further addresses the situation at hand:

> d. Natural risks, third-party risks, and conduct that increases the magnitude of natural or third-*party* risks. This Section applies to all risks of physical or emotional harm. It applies to risks due to natural forces, such as the threat to a swimmer who is drowning or a hiker who is caught in an unexpected mountain storm. It also applies to risks that result from the conduct of a third person, whether innocent, negligent, or intentional. Thus, absent an exception provided later in this Chapter, a bystander owes no duty of care to an individual

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> c. that the [sellin/giving/furnishing] of the alcoholic liquor was a proximate cause of [name of plaintiff]'s [injury/damage].

Michigan Model Civil Jury Instructions, Dram Shop Actions, Ch. 75, *available at* http://www.courts.michigan.gov/courts/michigansupremecourt/mcji/pages/dram-shop-actions.aspx (last visited Jan. 15, 2013).

> being assaulted on a public street. *On the other hand, an actor's conduct may increase the natural or third-party risk—such as by* inciting a swimmer to swim despite a dangerous riptide or by *providing* a weapon or *alcohol to an assaulter.* Similarly, an actor's business operations might provide a fertile location for natural risks or third-party misconduct that creates risks that would not have occurred in the absence of the business. *In these cases, the actor's conduct creates risks of its own and, therefore, is governed by the ordinary duty of reasonable care* contained in § 7. Section 19 specifically addresses the duty of reasonable care when an actor's conduct increases the risk of third-party conduct that causes harm.
>
> *Section 315 of the Restatement Second of Torts contributed to frequent judicial pronouncements, contrary to the explanation above, that absent a special relationship an actor owes no duty to control third parties. Section 315, however, must be understood to address only an affirmative duty to control third parties. It did not address the ordinary duty of reasonable care with regard to conduct that might provide an occasion for a third party to cause harm.* The Restatement Second of Torts § 302B, Comment *e*, provides for a duty of care when "the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such [third-party] misconduct." Section 449 of the Second Restatement also contemplated liability, without regard to any special relationship, for acts that are negligent because of the risk of the third party's conduct. An affirmative duty to control third parties may also arise from an undertaking pursuant to §§ 42-44.

Restatement (Third)of Torts § 37 cmt. d (emphases added).

Defendant succumbs to the confusion identified in the commentary. It frames its argument around the proposition, "According to Maryland law, the fact that an actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." Resp't's Br. 8. Plaintiffs do not contend that Defendant has a duty to Plaintiffs to take affirmative action,

such as physically intervening to prevent an intoxicated person from driving. They argue that Defendant needed to control its own conduct. Defendant's serving a visibly intoxicated person "create[d] risks of its own and, therefore, is governed by the ordinary duty of reasonable care." Comment *d*, *supra*; *Brigance v. Velvet Dove Rest., Inc.*, 725 P.2d 300, 304 (Okl. 1986) (adopting this concept of duty in recognizing dram shop liability: "[W]e find the commercial vendor for on the premises consumption is under a duty, imposed both by statute and common law principles, to exercise reasonable care in selling or furnishing liquor to persons who by previous intoxication may lack full capacity of self-control to operate a motor vehicle and who may subsequently injure a third party. A person owes a duty to others not to subject them to an unreasonable risk of harm.") *See* Oklahoma Civil Jury Instruction No. 10.14, Dram Shop-Duty of Care: "A bar owner [or other commercial vendor that sells liquor for on-the-premises consumption] has a duty to use ordinary care not to serve alcohol to a person that the bar owner [or other commercial vendor] knows or reasonably should know from the circumstances is already intoxicated." *Available at* http://www.oscn.net/applications/oscn/deliverdocument.asp?id=74074&hits= (last visited Jan. 15, 2013).

None of the precedents from this Court on which Defendant primarily relies—*Barclay v. Briscoe*, 427 Md. 270, 47 A.3d 560 (2012); *Remsburg v. Montgomery*, 376 Md. 568, 831 A.2d 18 (2003); *Valentine v. On Target, Inc*., 353 Md. 544, 727 A.2d 947 (1999); or *Ashburn v. Anne Arundel County*, 306 Md. 617, 510 A.2d 1078 (1986)—considers duty of this kind. Each of them discusses the affirmative duty to control another, citing *Restatement (Second)* §§ 314 and/or 315. *Barclay*, 427 Md. at 294-97, 47

A.3d at 574-76; *Remsburg*, 376 Md. at 590-94, 831 A.2d at 31-33; *Valentine*, 353 Md. at 551-52, 727 A.2d at 950; *Ashburn*, 306 Md. at 628, 630-31, 510 A.2d at 1083, 1085.

Barclay, this Court's most recent precedent invoked by Defendant, Resp't's Br. 24-25, does discuss increased risk, but only in the context of creating a "special duty" to take affirmative actions, as contemplated by *Restatement (Second)* §§ 314-315. *Barclay* dealt with an assertion that an employer had a duty to control an employee who caused injuries to a third party when driving home from a 22-hour shift. The *Barclay* court considered an assertion by the plaintiffs that an Oregon case, *Faverty's v. McDonald's Restaurants of Oregon, Inc.*, 133 Or. App. 514, 892 P.2d 703 (1995), supported liability. *See* Resp't's Br. 24. The *Barclay* court wrote, "according to Oregon case law, *including its recognition of dram shop liability*, the employer would still be 'subject to the general duty to avoid conduct that creates a forseeable risk of harm' to a third party." *Barclay*, 427 Md. at 300, 47 A.3d at 578 (emphasis supplied). "As explained, *supra*," the Court continued, "this is not the law in Maryland." *Id*. *See* Resp't's Br. 24. This last sentence, by its *supra* citation, refers to the Court's rejection in its immediately preceding discussion, especially in note 15, of the plaintiff's attempt to evade, by invoking *Restatement (Third) of Torts* § 41, the conclusion that an absence of authority to control the employee precluded a finding of duty. Section 41 provides that an increased risk of harm can lead to a finding of a special relationship as contemplated in *Restatement (Second)* §§ 314-315. This Court emphasized that Section 41 merely restated Sections 314-315 and that regardless of any increased risk, both the Second and Third *Restatement* require something not present in *Barclay*, "access to the property or the instrumentalities

of the employer," *Barclay*, 427 Md. at 298 n.15, 47 A.3d at 576 n.15 as a condition of finding a duty.

The Court's summarizing final statement, "[W]e conclude . . . that an affirmative act of control by the employer, following and prompted by the employee's incapacity must be present in order for a duty to arise," *Barclay*, 427 Md. at 306, 47 A.3d at 582, makes clear that the Court was rejecting a special duty under *Restatement (Second)* § 314 and not the application of general duty as described by this Court in *Hatfield* and *Felder* and as reflected not in *Restatement (Second)* §§ 314-315 but in Sections 302A, 302B, and 449 of *Restatement (Second)* and Section 19 of *Restatement (Third)*, *supra* notes 10-13 This general duty was recognized by this Court in *Reed v. Campagnolo*, 332 Md. 226, 240, 630 A.2d 1145, 1152 (1993), specifically endorsing comment *c* to *Restatement (Second)* § 302, which provides, in relevant part, "c. The actor may be negligent in setting in motion a force the continuous operation of which, without the intervention of other forces or causes, results in harm to the other." The case at bar involves, as *Barclay* does not, a statue affecting the duty of the defendant; does not, as *Barclay* does, involve an employee-employer relationship; and does not turn, as *Barclay* does, on whether there is a duty to take an affirmative act.

Defendant also argues "A duty imposed by statute does not necessarily create a tort duty," Resp't's Br. 9, and that "'in order to use a statutory duty as a foundation for a negligence claim'" a plaintiff must establish that the plaintiff is a member of a statutorily protected class. *Id*. at 11 (citing *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70, 79, 835 A.2d 616, 621 (2003) (finding that violation of a statute was prima facie evidence of

negligence)). But the cause of action Plaintiffs' assert does not turn on a statute itself creating an independent tort duty, either as was at issue in *Brooks* or as is contemplated in *Restatement (Second)* §§ 314 and 315. Rather, Plaintiffs follow this Court's reasoning in *Felder*. The duty the statute imposes on Defendant informs the general duty Defendant owes to all persons: it affects "the standard of conduct of a reasonable man" in Defendant's position, something "[t]he authorities generally recognize" that it would. *Felder*, 292 Md. at 181 n.2, 438 A.2d at 498 n.2. Defendant's assertion, "This Court has repeatedly rejected that this statute or its predecessor statute creates a tort duty on the part of a vendor of an alcoholic beverage to an individual plaintiff allegedly injured by an intoxicated person who was served alcohol in violation of such a statute," Resp't's Br. 10-11, is accurate with regard to an independent tort duty as contemplated in *Restatement (Second)* §§ 314 and 315, but is not consistent with *Felder* itself with regard to how the existence of the statute affects the standard of conduct expected of Defendant. *See Restatement (Second)* § 285, *supra* note 9. The Hawai'i Supreme Court voiced exactly this understanding of how a statute affects the duty of a dram shop in *Reyes v. Kuboyama*, 76 Hawai'i 137, 870 P.2d 1281 (1994):

> We recognized in Ono that the liquor control statute, HRS chapter 281, did not itself provide for such a tort duty on the part of dram shop operators. However, we pointed out that general principles of tort law, as embodied in the *Restatement (Second) of Torts*, recognized that a tort duty could be judicially adopted from a legislative enactment, and we noted with approval that "[e]ven where a legislative enactment contains no express provision that its violation shall result in tort liability, and no implication to that effect, the court may, and in certain types of cases customarily will, adopt the requirements of the enactment as the standard of conduct

> necessary to avoid liability for negligence[.]" *Id*. at 138, 612 P.2d at 539 (quoting *Restatement (Second) of Torts*, § 285, comment (c)). We thus held that § 281-78(a)(2)(B) "does impose a duty upon a tavern keeper not to serve a person under the influence of liquor." *Id*.

See also Ontiveros v. Borak, 136 Ariz. 500, 511, 667 P.2d 200, 211 (1983) (superseded by statute as recognized in *Booth v. State*, 207 Ariz. 61, 69, 83 P.3d 61, 69 (Ariz. Ct. App. 2004)):

> those who furnish liquor have an obligation or "duty" to exercise care for the protection of others. This is an obligation imposed upon tavern owners for the benefit of those who may be injured by the tavern owners' patrons, whether such injury occurs on or off the premises. We find that duty both as a matter of common law and of statute. The duty is not limited to preventing violent or unruly conduct that threatens other patrons (*McFarlin v. Hall, supra*); it includes the duty to exercise due care in ceasing to furnish intoxicants to customers in order to protect members of the public who might be injured as a result of the customer's increased intoxication.

III. DEFENDANT SERVING A VISIBLY INTOXICATED PERSON WAS A LEGALLY COGNIZABLE CAUSE OF PLAINTIFFS' INJURIES.

Defendant argues that the modern notions of proximate cause this Court endorsed in *Eagle-Pilcher Industries, Inc. v. Balbos*, 326 Md. 179, 604 A.2d 445 (1992), and *Pittway Corp. v. Collins*, 409 Md. 218, 973 A.2d 771 (2009), affect only "but for" causation and do not affect the "concept of legally cognizable causation" addressed in *Hatfield*. Resp't's Br. 22-23. This is, simply, inconsistent with *Pittway*, which endorsed and quoted *Restatement (Second)* § 431 and noted it "reads as follows: '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 . . . .'" (Emphasis added). *Pittway*, 409 Md. at 244, 973

A.2d. at 787. The *Pittway* court made clear that "but for" causation was not even at issue in the case:

> We acknowledge that the distinction between causation-in-fact and legal causation is not always a simple one. Prosser & Keeton, § 42, at 272-73. Nevertheless, because petitioners do not dispute that their negligent conduct was a cause-in-fact of respondents' injuries, we need only focus on whether petitioners' conduct was a legal cause of respondents' injuries.

Pittway, 409 Md. at 246 n.13, 973 A.2d at 788.[16]

[16] This inquiry closely parallels the question of whether a duty exists. *See* discussion at pp. 2-3, which includes this quotation from the section of Dean Prosser's treatise following the section quoted from *Pittway*: "The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct . . . . It is a shorthand statement of a conclusion, rather than an aid to analysis in itself . . . . [I]t should be recognized that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Prosser and Keeton on the Law of Torts*, *supra*, § 53, pp. 357-58.

Proximate cause recently was described in similar fashion by Justice Ginsburg, writing for the Court and also invoking Prosser:

> The term "proximate cause" is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 42, p. 273 (5th ed. 1984) (hereinafter Prosser and Keeton). "What we . . . mean by the word 'proximate,'" one noted jurist has explained, is simply this: "[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting).

CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2637 (2011).

The question of whether serving a visibly intoxicated person is a legally cognizable cause of injuries like those suffered by plaintiffs has been asked, and answered affirmatively, by numerous courts employing doctrine that this Court has adopted since *Felder*. *See* Pet'r's Br. 5-16. By applying to the particular case of a dram shop the general doctrine it already has adopted this Court must reach the same result.

CONCLUSION

For reasons stated, this Court should REVERSE the decision below, recognize dram shop liability, and REMAND this case for further proceedings consistent with that recognition.

Date: January 18, 2013

Respectfully submitted,

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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.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of January, 2013, two copies of the foregoing Reply Brief of Petitioners were sent by United Parcel Service for overnight delivery, to the following counsel of record:

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