Circuit Court for Charles County
Case No. C-08-CV-20-000551

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1481

September Term, 2021

DARBY ELIZABETH WILLETT, ET AL.

v.

APE HANGERS, LLC, d/b/a APE HANGER’S BAR & GRILL

Berger,
Albright,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: August 8, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellee, Ape Hangers, LLC, is the owner of Ape Hanger's Bar & Grill ("Ape Hangers") in Bel Alton, Charles County, Maryland. During the early morning hours of April 23, 2017, after consuming alcohol at Ape Hangers, Wayne Willett, Jr., drove his car into a tree and died. The decedent's wife, Terri L. Willett, and their four daughters (collectively, "the Willetts"), Appellants, filed a wrongful death claim[1] against Ape

[1] Maryland's wrongful death statute was enacted to provide a remedy for a tort victim's family once the tort victim died, a type of tort recovery that was absent in the common law. *Spangler v. McQuitty*, 449 Md. 33, 51 (2016). The statute allows the decedent's spouse and children, among others, to seek damages against the tortfeasor whose wrongful act caused the decedent's death. Md. Code, Cts. and Jud. Proc. § 3-902(a). "Wrongful act" includes "any act, neglect, or default including a felonious act which would have entitled the party injured to maintain an action and recover damages if death had not ensued." Md. Code, Cts. and Jud. Proc. § 3-901(e).

The Supreme Court of Maryland has interpreted Maryland's wrongful death statute to mean that the "liability of the wrongdoer exists where the deceased could have recovered if death had not ensued." *Spangler*, 449 Md. at 56 (quoting *State v. United Rys. & Elec. Co. of Balt.*, 121 Md. 457, 458 (1913)). Thus, while Maryland adopts the minority view that the statute "create[s] a new and independent cause of action, distinguishable from a decedent's own personal injury action during his or her lifetime, or a survival action," a wrongful death claim is still "derivative of the decedent's claim in some sense." *Id.* at 60 (quoting *Mummert v. Alizadeh*, 435 Md. 207, 222 (2013)). Generally, "a plaintiff beneficiary in an action under the wrongful death statute must show by a preponderance of the evidence that the conduct of a defendant was negligent and that such negligence was a proximate cause of the death of the decedent." *Weimer v. Herrick*, 309 Md. 536, 554 (1987).

If established, however, a wrongful death claim may still be barred if the decedent does not have a "viable claim at the outset of the litigation." *Spangler*, 449 Md. at 66. In Maryland, certain affirmative defenses, like contributory negligence, that would otherwise bar the decedent's negligence claim, would also foreclose the beneficiary's wrongful death claim. *See Dehn v. Edgecombe*, 152 Md. App. 657, 695 (2003) (citing cases). This is because "where [contributory negligence] appl[ies], the decedent [does] not have a viable claim from the outset." *Mummert*, 435 Md. at 221.

Hangers in the Circuit Court for Charles County. In their Amended Complaint,[2] the Willetts alleged a single count of premises liability that intertwined two theories of negligence: common law negligence and premises liability. Ape Hangers moved to dismiss, arguing that (1) Maryland does not recognize "dram shop liability,"[3] and (2) Mr. Willett was contributorily negligent as a matter of law. The circuit court granted the motion to dismiss following a hearing. The Willetts timely appealed, presenting one question for our review:

> Whether the trial court erred in granting [Ape Hangers'] motion to dismiss [the Willetts'] Amended Complaint?

For the reasons that follow, we shall affirm the circuit court's judgment.

The Willetts' Amended Complaint

The Willetts started with allegations about Ape Hangers' reputation for unlawful activities on its premises, activities to which Ape Hangers' management turned a blind eye. Thus, the Willetts alleged that Ape Hangers "operates a local motorcycle bar . . . that serves alcoholic beverages, including hard liquor, and is known for its rowdy biker

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[2] The Willetts' original Complaint alleged two counts: (1) "Wrongful Death," asserting that Ape Hangers breached its duty of reasonable care and prudence when dispensing alcohol to Mr. Willett and allowing Mr. Willett to drive while intoxicated and (2) "Negligent Hiring, Training and Supervision," alleging that Ape Hangers breached its duty of reasonable care to Mr. Willett in the hiring, retention, and supervision of its agents, servants, and employees by being complicit in overserving alcohol, although knowing the danger of that conduct. Ape Hangers moved to dismiss, and before a hearing on that motion, the Willetts amended their complaint, stating a single claim styled "premises liability."

[3] "Dram shop liability" refers to "[c]ivil liability of a commercial seller of alcoholic beverages for personal injury caused by an intoxicated customer." *Warr*, 433 Md. at 173 n.1 (quoting Black's Law Dictionary 568 (9th ed. 2009)).

atmosphere." They added that Ape Hangers "has a reputation for overserving patrons, for allowing its employees and bartenders to consume alcohol and become inebriated on the job, and for the management to turn a blind eye to this unlawful activity."

The Willetts turned next to what happened at Ape Hangers on April 22 and 23, 2017, the time before Mr. Willett died. According to the Willetts, starting at approximately 11:13 pm, Ape Hangers "sold or provided excessive amounts of alcoholic beverages to [Mr. Willett, an Ape Hangers patron.]" When he arrived at Ape Hangers, Mr. Willett "was visibly intoxicated . . . to the point that his speech was slurred and he could not maintain his balance, even while sitting down. Mr. Willett had no control over his reflexes, judgment, and sense of responsibility."

Rather than refusing to serve the visibly intoxicated Mr. Willett, Ape Hangers "continued to supply Mr. Willett with excessive amounts of alcohol even after the point of visible intoxication, including providing Mr. Willett with approximately seven (7) back-to-back shots of hard liquor in under one (1) hour." According to the Willetts, Ape Hangers "encouraged" Mr. Willett to continue drinking and allowed its employees (also alleged to be agents or servants) "to drink alcohol with [Mr. Willett]." Allegedly, "[t]he bartender took multiple shots of hard liquor with Mr. Willett, even after he witnessed Mr. Willett fall off of his barstool." According to the Willetts, Ape Hangers did not intervene, either by stopping the service of alcohol to Mr. Willett or by instructing its employees not to drink with Mr. Willett.

Ultimately, according to the Willetts, Ape Hangers did not "avail itself of the last clear opportunity to prevent" Mr. Willett from driving home. Instead, they allege, Ape

Hangers' employees and managers "watched Mr. Willett take out his car keys and proceed to drive his car [away]." At 2:06 am on April 23, 2017, while driving home, Mr. Willett hit a tree and suffered fatal injuries.

The Willetts allege that Ape Hangers owed Mr. Willett two duties. The first was "a duty under the common law to conduct itself with reasonable care and prudence when dispensing alcohol." The second, allege the Willetts, was that because Mr. Willett was a patron of Ape Hangers, "[it] owed Mr. Willett a duty to exercise due care to protect him from defective conditions and dangerous activities on the premises."

With regard to the defective and dangerous condition of Ape Hangers' premises, the Willetts alleged that Ape Hangers created a dangerous condition or activity that it, alone, was in a position to control. Specifically, according to the Willetts, Ape Hangers failed to properly train its employees on the distribution of alcohol to visibly intoxicated patrons and/or allowed its employees to consume alcohol with them. Ape Hangers also failed to "monitor its employees' consumption of alcohol while at work." According to the Willetts, Ape Hangers actually knew, or had constructive knowledge of, these dangerous conditions and/or activities.

The Willetts alleged that Ape Hangers' failure to act was the actual, as well as, the proximate cause of Mr. Willett's "getting into his car and driving home." Specifically, the Willetts allege that had Ape Hangers "properly trained and monitored the activities of its agents, servants, and/or employees, [Ape Hangers] would have stopped serving Mr. Willett alcohol and allowed him the opportunity to return to a sober condition before getting into his car and driving [away]." They added that "[a]s the proximate and

foreseeable consequence of [Ape Hangers'] negligent acts in failing to train and supervise its employees and prevent the intoxication and negligent reckless driving of Mr. Willett, [Ape Hangers] contributed to his death and the Plaintiffs' resulting damages."

Ape Hangers' Motion to Dismiss the Amended Complaint[4]

According to Ape Hangers, the Amended Complaint failed because (1) it was based on dram shop liability, a theory that Maryland does not recognize, and (2) Mr. Willett was contributorily negligent as a matter of law. With regard to the nature of the Willetts' claim, Ape Hangers argued that even though the Willetts style their claim as one for premises liability, it is, fundamentally, a claim for dram shop liability because the injury to Mr. Willett – his death – did not occur on Ape Hangers' premises. Additionally, argues Ape Hangers, the claim is not one for premises liability because Mr. Willett's death resulted not from a dangerous condition on Ape Hangers' premises, but rather from his own consumption of alcohol. As to contributory negligence, Ape Hangers argued that even if Maryland recognized dram shop liability, the Willetts allege that Mr. Willett's "intoxication and negligent reckless driving" contributed to his death. This allegation means, as a matter of law, that Mr. Willett was contributorily negligent and that the Willetts' wrongful death claim is barred.

The Willetts opposed Ape Hangers' dismissal motion, arguing, among other

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[4] Prior to moving to dismiss the Willetts' Amended Complaint, Ape Hangers moved to strike it. While that motion was pending, Ape Hangers moved to dismiss the Amended Complaint. Shortly thereafter, the trial court denied Ape Hangers' motion to strike.

things, that the injury they alleged was Mr. Willett's worsened condition, not his death.[5] They argued that their Amended Complaint sufficiently pled common law negligence and premises liability. As to the former, the Willetts looked to the common law's "seven classic factors" to argue that Ape Hangers owed Mr. Willett three separate duties, all of which were breached. With regard to proximate causation, the Willetts argued that that was a matter for the jury to decide, particularly since Maryland's common law no longer declared that the act of selling intoxicating liquor could not be a legal cause of injury. With regard to their premises liability theory, the Willetts pointed out that premises liability is a claim distinct from dram shop liability and that the dangerous condition they alleged was Ape Hangers' "failure to supervise and control the premises and the conduct

[5] We read the Amended Complaint to allege both that Mr. Willett's condition worsened while he was at Ape Hangers and that he died after driving away from Ape Hangers. As to his death, the Amended Complaint alleged that "[a]s a proximate and foreseeable consequence of [Ape Hangers'], including its agents, servants, and/or employees, negligent acts in failing to train and supervise its employees and prevent the intoxication and negligent reckless driving of Mr. Willett, [Ape Hangers] contributed to his death and [the Willetts'] resulting damages." The Amended Complaint also alleged that the Willetts "sustained pecuniary loss, mental anguish, emotional pain and suffering and other damages arising out of the death of [Mr. Willett]."

To be sure, the Amended Complaint does not include the words "Mr. Willett's condition worsened while he was at Ape Hangers" or the like. Nonetheless, one could reasonably infer such an allegation from the allegations that are present. Specifically, the Amended Complaint alleged when Mr. Willett arrived at Ape Hangers, he was "visibly intoxicated . . . to the point that his speech was slurred and he could not maintain his balance, even while sitting down. Mr. Willett had no control over his reflexes, judgment, and sense of responsibility." After Mr. Willett was served additional alcohol at Ape Hangers, including seven back-to-back shots of liquor in under an hour, "Mr. Willett f[e]ll off of his barstool." From the allegation that Mr. Willett went from entering Ape Hangers intoxicated, with compromised balance, to actually falling off his barstool, a reasonable fact-finder could infer that his condition allegedly worsened while he was on Ape Hangers' premises.

of its employees." They added that because Mr. Willett was an invitee on the premises, Ape Hangers owed Mr. Willett "the highest duty" to use reasonable care to keep the premises safe, but Ape Hangers failed to do so by failing to train and supervise its employees in the proper service of alcohol, and by failing to come to Mr. Willett's aid before he entered his car in Ape Hangers' parking lot. As for contributory negligence, the Willetts argue that it was a matter for the jury and that, in any event, contributory negligence did not bar their claim because Ape Hangers had the last clear chance to avert the consequences of Ape Hangers' original negligence.

Ape Hangers replied to the Willetts' opposition. Ape Hangers reiterated that because the Willetts' Amended Complaint alleged injury for overservice of alcohol to Mr. Willett while knowing that he was severely intoxicated, it was a claim for dram shop liability. Ape Hangers added that Mr. Willett was not alleged to have been injured by a third party or a dangerous condition at Ape Hangers, but rather "off site because he chose to consume too much alcohol and drove himself home." As a consequence, Ape Hangers argued, the Willetts' premises liability claim failed.

After a hearing, the motions court granted Ape Hangers' dismissal motion but did not state its reasoning. The Willetts noted this timely appeal.

DISCUSSION

The Parties' Contentions on Appeal

Here, the Willetts and Ape Hangers repeat many of the arguments they made to the motions court. Thus, the Willetts argue that the motions court was incorrect to dismiss their Amended Complaint. They contend that their Amended Complaint asserted (and

adequately pled) two "closely-related theories of negligence based on Mr. Willett's relationship with Appellee as an invitee patron[.]" The first was a general negligence theory under which Ape Hangers had "the duty to exercise reasonable care and avoid acting in a way that causes increased risk of harm[.]" The Willetts look again to the "seven classic factors" to argue that Ape Hangers owed three duties to Mr. Willett. As to causation, particularly legal causation, the Willetts argue that Maryland's historic common law rejection of such causation has been eroded by more recent changes in Maryland's decisional law and statutes. The second theory of negligence that applied here, according to the Willetts, was "premises liability for negligent supervision and training." Specifically, argue the Willetts, the dangerous condition that Ape Hangers failed to supervise and control was the conduct of its bartenders, who served Mr. Willett "reckless amounts of hard liquor and other alcohol" and themselves consumed alcohol, thereby encouraging Mr. Willett to consume more. The Willetts conclude that their claim is not barred by Mr. Willett's contributory negligence.

Ape Hangers counters that the motions court was correct to grant its dismissal motion. It argues that the Willetts' claim amounts to an attempt to impose dram shop liability on Ape Hangers, a form of civil liability that Maryland's appellate courts have repeatedly rejected as inconsistent with Maryland's common law and absent from Maryland's statutes. Ape Hangers adds that even if Maryland recognized dram shop liability, the Willetts' claim would be barred by Mr. Willett's contributory negligence. As a consequence, says Ape Hangers, the motions court's decision should be affirmed.

Standard of Review

The standard by which we review a grant of a motion to dismiss is "whether the trial court was legally correct[.]" *Litz v. Maryland Dep't of Env't*, 446 Md. 254, 264 (2016) (quotation marks and citation omitted). In doing so, we "'must assume the truth of, and view in a light most favorable to the nonmoving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them[.]'" *Reiner v. Ehrlich*, 212 Md. App. 142, 151 (2013) (quoting *Gomez v. Jackson Hewitt, Inc.*, 427 Md. 128, 142 (2012)). Dismissal is proper where the alleged facts and permissible inferences "would, if proven, nonetheless fail to afford relief to the plaintiff." *O'Brien & Gere Engineers, Inc. v. City of Salisbury*, 447 Md. 394, 403-04 (2016) (quotation marks and citations omitted). "The grant of a motion to dismiss may be affirmed on any ground adequately shown by the record, whether or not relied upon by the trial court." *Gomez*, 427 Md. at 142 (quotation marks and citation omitted).

Analysis

We shall limit our consideration to the issue of proximate causation, which appears to us to be the most straightforward of the grounds advanced below for dismissal. We agree with the motions court that the Willetts' Amended Complaint fails to state a claim. Even if Ape Hangers owed Mr. Willett a duty to protect him from the dangerous condition created on its premises by employees overserving and drinking with Mr. Willett, and management's turning a blind eye to these activities, Mr. Willett was not underage at the time. As an adult, Mr. Willett remained bound by our common law of proximate causation, i.e., that the sale of alcohol is "too remote to be a proximate cause

of injury caused by the purchaser of alcohol." *State for Use of Joyce v. Hatfield*, 197 Md. 249, 255 (1951) (quoting *Seibel v. Leach*, 233 Wis. 66, 67, 68 (1939)). We explain.

As a variety of negligence, premises liability requires proximate causation, among other elements of proof. Specifically, such a complaint requires four familiar allegations: "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the defendant's breach of the duty proximately caused the loss or injury suffered by the plaintiff, and (4) that the plaintiff suffered actual loss or injury." *Troxel v. Iguana Cantina*, 201 Md. App. 476, 495 (2011) (citing *Corinaldi v. Columbia Courtyard, Inc.*, 162 Md. App. 207, 218 (2005)).[6]

Although a business owner's highest duty is to "the business invitee," i.e., a patron such as Mr. Willett, the business owner's responsibility is not boundless. A duty to protect arises only where the business invitee is not expected to discover or realize the danger themselves, or will fail to protect themselves from the danger, among other things.

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[6] On occasion, we have framed the elements of a premises liability claim involving a business owner and patron somewhat differently. Thus, in *Troxel*, we said that

> "a tavern owner will have a duty to protect his patrons, and thus be liable for negligence, if: (1) the [owner] controlled [a] dangerous or defective condition; (2) the [owner] had knowledge or should have had knowledge of the injury causing condition; and (3) the harm suffered was a foreseeable result of that condition."

Troxel, 201 Md. App. at 493 (cleaned up). Under this rendition, proximate causation is contained within the third element, *see Mitchell v. Rite Aid of Md.*, 257 Md. App. 273, 329-31 (2023) (noting that proximate causation requires "that plaintiffs' injuries were the foreseeable result of the negligent conduct[]" (quotations omitted)), and the only real difference for the purposes of this opinion appears to be how particular elements are packaged.

Indeed, a landowner is liable for physical injury caused to a business invitee by a condition on the premises

> if, but only if, [the landowner] (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that [invitees] will not discover or realize the danger, or [that invitees] will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Deering Woods Condo. Ass'n v. Spoon, 377 Md. 250, 263 (2003) (adopting Section 343 of the Restatement (Second) of Torts) (Am. Law Inst. 1965)).

Proximate causation, or the "'conclusion that someone will be held legally responsible for the consequences of an act or omission[,]'" entails two separate concepts, causation-in-fact and legal causation. *Pittway Corp. v. Collins*, 409 Md. 218, 243 (2009) (citing case). Causation-in-fact, a threshold inquiry, asks whether a defendant's conduct actually caused an injury, or, in other words, "who or what caused an action." *Id*. at 244. If the "injury would not have occurred absent or 'but for' the defendant's negligent act[,]" or, in the case of multiple negligent acts, the defendant's conduct was a substantial factor in producing plaintiff's injuries, then there is causation-in-fact. *Id.* (omitting citations). Legal causation, the second step of the analysis, asks, "who should pay for the harmful consequences of such an action." *Id.* This part of the causation analysis "requires us to consider whether the actual harm to a litigant falls within a general field of danger that the actor should have anticipated or expected. Legal causation is a policy-oriented doctrine designed to be a method for limiting liability after cause-in-fact has been established." *Id.* at 245 (omitting citations and footnote). Although ordinarily a matter for

the trier of fact, the determination of proximate causation (causation-in-fact and legal causation) "'becomes a question of law in cases where reasoning minds cannot differ.'" *Id*. at 253 (citing *Segerman v. Jones*, 256 Md. 109, 135 (1969)).

Time and again, we have recognized that under Maryland's common law, the overserving of alcohol is not, as a matter of law, the legal cause of injuries either to the intoxicated drinker or to third parties the intoxicated drinker may then injure. We have reached this conclusion whether the injuries were suffered on or off the premises of a tavern, liquor store, or social host. *See Hatfield*, 197 Md. at 254-55 (injury to a third party driver off tavern's premises); *Felder v. Butler*, 292 Md. 174 (1981) (same); *Warr v. JMGM Group, LLC*, 433 Md. 170 (2013) (injury to third party driver and passengers off tavern premises); *Fisher v. O'Connor's, Inc.*, 53 Md. App. 338 (1982) (injury to intoxicated patron on tavern's premises); *Wright v. Sue & Charles, Inc., et al.*, 131 Md. App. 466 (2000) (injury to intoxicated minor driver off liquor store's and social host's premises).

In *Hatfield*, *supra*, the widow of James Joyce brought suit for her husband's death in a car accident caused by a minor who had been served and consumed alcohol at a tavern, who then got behind a wheel of a car and had a collision with the car being driven by Joyce. *Hatfield*, 197 Md. at 251. The Court affirmed the trial court, which had sustained Hatfield's demurrer on grounds that providing alcohol was not a proximate cause of the accident. The Court stated:

> Apart from statute, the common law knows no right of action against a seller of intoxicating liquors, as such, for 'causing' intoxication of the person whose negligent or wilful [sic] wrong has caused injury. 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.
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> * * *
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> Under the common law it is not an actionable wrong either to sell or to give intoxicating liquors to an able-bodied man . . . . 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.

Id. at 254-55 (quotation marks and citation omitted).

The Court noted that some states, but not Maryland, had enacted statutes that created a civil cause of action for damages against one selling alcohol to an intoxicated person, who, as a result of the intoxication, negligently causes injury to another. *Hatfield*, 197 Md. at 253-54. The Court held that in the absence of any Maryland statute, there was no cause of action against the seller of liquor for causing intoxication of a person whose negligent actions then cause injury. *Id*. at 256. The Court stated that "the fact that there is now no such law in Maryland expresses the legislative intent as clearly and compellingly as affirmative legislation would." *Id*.

In *Fisher*, another case where an intoxicated tavern patron was injured on the tavern's premises, citing *Hatfield,* we held that a patron injured "as a result of his own intoxication" had no cause of action against the tavern. *Fisher*, 53 Md. App. at 342. Like Mr. Willett, Mr. Fisher was a tavern patron. Like Mr. Willett, Mr. Fisher was so intoxicated that he was seriously injured, albeit on the tavern premises and not fatally.[7]

[7] Mr. Fisher alleged that he fell from his bar stool, "fractured his right tibia and fibula, . . . 'completely crippl[ing]' his right leg to the point that he is 'now forced to use a brace and crutches'" to walk. *Fisher*, 53 Md. App. at 338-39.

Like the Willetts, Mr. Fisher alleged that the tavern's serving of alcohol to him, when the tavern knew that Mr. Fisher was "already in an obviously intoxicated condition," caused Mr. Fisher's injuries by "precipitat[ing] his fall to the floor." *Fisher*, 53 Md. at 338-39. After repeating that "[a]t common law there was no liability on the part of bar or tavern owners for injuries sustained by a person to whom the bar or tavern owner sold intoxicating beverages[,]" *id.* at 342, we said, "[I]f a cause of action may be brought against a bar or tavern owner by a patron who is injured as a result of his own intoxication, that cause must arise from an act of the Legislature." *Id.*

For the Willetts, the implication of Maryland's common law, as discussed in the above cases, is clear. Whether their theory is that Ape Hangers was ordinarily negligent, or liable for failure to control a dangerous condition on its premises, and whether the injury for which they seek compensation is Mr. Willett's death off Ape Hangers' premises or the worsening of his condition at Ape Hangers, all such claims (in order to succeed) require that Ape Hangers be the legal cause of Mr. Willett's injuries. As above, though, Maryland's common law, as a matter of law, affirmatively establishes otherwise. The common law's recognition of "no liability" on the part of the tavern, even where the tavern knows the patron is intoxicated, in fact already obviously intoxicated, means the tavern is not the legal cause of the patron's injury, as a matter of law.

In their attempt to avoid this conclusion, the Willetts focus primarily on the duty elements of negligence and premises liability, but we focus on their argument about proximate causation. The Willetts argue that *Hatfield*'s and *Fisher*'s common law rule of proximate causation (or lack thereof) was "eroded" by *Kiriakos v. Phillips*, 448 Md. 440

(2016). Specifically, the Willetts argue that because *Kiriakos* recognized that a minor's decision to drink "does not disrupt the causal chain" between the adult that allows the minor to do so and the resulting injury, the same logic should hold true for adults. As it has criminalized the knowing service of alcohol to minors, Maryland also criminalizes, by Section 6-307 of the Alcoholic Beverages Article,[8] the overserving of alcohol to visibly intoxicated tavern patrons. Accordingly, argue the Willetts, a visibly intoxicated patron's decision to drink does not interrupt the causal chain between overservice (now criminalized) and injury.

But the Supreme Court of Maryland's (at the time the Court of Appeals of Maryland)[9] reasoning in *Kiriakos* does not carry over here. The proximate cause analysis in *Kiriakos* started with a statute that protected a specific class of protectees—those under

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[8] In 2023, this Article was retitled "Article Beverages and Cannabis Article." The Willetts cite Section 6-304 in their brief. We assume they mean Section 6-307, which prohibits alcoholic beverage license holders and their employees from "sell[ing] or provid[ing] alcoholic beverages to an individual who, at the time of the sale or delivery, is visibly under the influence of an alcoholic beverage." Md. Code, Al. Bev. § 6-307. A separate section of the Alcoholic Beverages and Cannabis Article further provides for a "General Penalty" when "a person violates this article and no penalty other than the suspension or revocation of a license is provided." Md. Code, Al. Bev. § 6-402(a). Specifically, the general penalty is that the person who violates such a provision of the article "is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 2 years or a fine not exceeding $1,000 or both." Md. Code, Al. Bev. § 6-402(a).

[9] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. See, also, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

the age of 21—not a statute of general application. As such, our Supreme Court began by recounting the specific dangers that alcohol poses to minors[10] and minors' decision-making abilities. *See* 448 Md. at 449 ("The harm that alcohol poses to youths is pernicious, pervasive, and deadly especially when motor vehicles are involved.") (footnote omitted); *see also id.* at 448 ("Although young people are close to a lifelong peak of physical health, . . . they are still developing in profound ways suggesting that they, in contrast to adults, are not capable of handling the more dangerous elements this world offers.") (quotations omitted). *Kiriakos*, two consolidated cases, involved, in one case, alleged fatal injury to an intoxicated 17-year-old who was ejected from the bed of a pickup truck driven by an adult after they left a party at the home of another adult.[11] After examining Section 10-117(b) of Maryland's Criminal Law Article, a statute passed well after *Hatfield,*[12] and determining that plaintiffs had adequately pled duty and breach, our

[10] For the purposes of this opinion, we use "minor," "underage person," and "individual under the age of 21 years" interchangeably.

[11] The second case alleged life-threatening injury to a pedestrian who was hit by a vehicle driven by an intoxicated 18-year-old. At the time, the 18-year-old was said to be driving a vehicle negligently entrusted to him by an adult. The adult had permitted the 18-year-old to drink on the adult's property. Our Supreme Court examined common law negligence, in addition to Section 10-117(b), in holding that as a social host of the 18-year-old, the adult owed a duty to the injured third party. Thereafter, and as in the first case, our Supreme Court also concluded that plaintiff had adequately plead proximate causation, including causation-in-fact and legal causation.

[12] At the time that *Kiriakos* was decided, Section 10-117(b) provided that "[e]xcept as provided in subsection (c) of this section, an adult may not knowingly and willfully allow an individual under the age of 21 years actually to possess or consume an alcoholic beverage at a residence, or within the curtilage of a residence that the adult owns or leases and in which the adult resides." Section (c), an exception not pertinent to *Kiriakos* (or here), excepted an adult's furnishing of alcohol to members of the adult's

Supreme Court moved on to the separate element of proximate causation. Given that the consolidated cases both involved "multiple alleged negligent actors," the Supreme Court looked to "'whether a negligent defendant is relieved from liability by intervening negligent acts or omissions.'" *Kiriakos*, 448 Md. at 473 (quoting *Pittway Corp.*, 409 Md. at 247)). In both cases, our Supreme Court concluded that the allegations were such that a jury could find proximate causation (causation-in-fact and legal causation). And in so concluding, the Court reasoned that, although "'[t]he 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' . . . [m]any jurisdictions . . . agree that underage persons lack full adult capacity to handle alcohol." *See* 448 Md. at 466-67 (emphasis omitted) (quoting *Hatfield*, 197 Md. at 254)).

As to Section 6-307 of the Alcoholic Beverages Article, the statute on which the Willetts rely, our Supreme Court has already held that such statutes, unlike the one at issue in *Kiriakos*, are insufficient to create a tort duty because they protect the public as a whole, not a specific class of protectees. *Warr*, 433 Md. at 198-99. In *Warr*, plaintiffs filed suit against a tavern after one of its intoxicated patrons killed their daughter, and injured them, in a car accident after leaving the tavern. Plaintiffs argued that the statute

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same immediate family and the alcohol is consumed in a private residence or within the residence's curtilage. Md. Crim. Law §§ 10-117(b) and (c). Our Supreme Court specifically noted that "[t]he enactment of CR § 10–117(b) reflects a determination by the General Assembly that more protection of youths from alcohol was needed." *Kiriakos*, 448 Md. at 466.

that criminalized the sale of alcohol to a visibly intoxicated patron meant that the tavern owed plaintiffs a duty in tort. Our Supreme Court disagreed, concluding that the statute, as one enacted for the benefit of the general public, was insufficient to create such a tort duty. *Id*. at 198.[13]

Returning to the Willetts' allegations about the duties Ape Hangers owed Mr. Willett,[14] and Ape Hangers' breach of those duties, these allegations, even if true, are insufficient substitutes for proximate causation because proximate causation (including legal causation) is a separate and necessary element of a negligence (or a premises liability) claim. "Negligence is not actionable unless it is a proximate cause of the harm alleged." *Stone v. Chicago Title Ins.,* 330 Md. 329, 337 (1993) (citing cases). In other words, even if a plaintiff establishes a duty and breach on the part of defendant, plaintiff

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[13] Our reading of *Kiriakos* is that it does not erode *Warr* but actually enhances it. In both cases, our Supreme Court looked closely at a criminal statute to determine, under the Statute and Ordinance Rule, whether our General Assembly's intent was such that a tort duty could be gleaned. To be sure, a different statute was at issue and the result was different. But the analytical path was the same.

[14] As to Ape Hangers' duty, the Willetts argue that because Mr. Willett was not "an able-bodied man" when he arrived at Ape Hangers, Ape Hangers owed Mr. Willett a duty to refrain from causing him further harm or increased risk and to protect him from the harm that resulted from the increased risk he faced on Ape Hangers' premises. For this argument, the Willetts look to *Southland Corp. v. Griffith*, 332 Md. 704, 719 (1993) and its adoption of Section 314A of the Restatement (Second) of Torts. *Southland Corp. v. Griffith* involved injuries to an off-duty policeman who was assaulted by teenagers on the premises of a 7-Eleven Store, all while the policeman's son asked the 7-Eleven attendant to summon police help. Our Supreme Court recognized that "a shopkeeper has a legal duty to come to the assistance of an endangered business visitor if there is no risk of harm to the proprietor or its employees," *Southland Corp. v. Griffith*, 332 Md. at 719. Because our analysis turns on proximate causation, particularly legal causation, we assume, without deciding, that Ape Hangers owed Mr. Willett a duty.

must also produce evidence of causation. *Kiriakos*, 448 Md. at 465 (citing *Blackburn Ltd. P'ship v. Paul*, 438 Md. 100, 126 (2014)). Once again, we are led to conclude that even if Ape Hangers owed Mr. Willett a heightened duty of care because he was a premises patron, or merely an ordinary duty of care, the breach of these duties is insufficient to overcome *Fisher*'s conclusion that as between the overserving tavern owner and the intoxicated patron, our common law recognizes no legal causation for the patron's injuries.[15]

Given the foregoing analysis, there is no need for us to delve into contributory negligence or last clear chance.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.

[15] We note that the Willetts make no argument that *Fisher* was wrongly decided.