IN THE SUPREME COURT
OF THE STATE OF MONTANA

Supreme Court No. DA 20-0480

KYLE R. BABCOCK,

Plaintiff and Appellant,

v.

CASEY'S MANAGEMENT, LLC,

Defendant and Appellee,

APPELLEE'S ANSWER BRIEF

On Appeal from the Eleventh Judicial District Court, Flathead County, the Honorable Judge Dan Wilson Presiding
State of Montana, District Court Cause No. DV 19-075D

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Filed_____, 2021
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IN THE SUPREME COURT
OF THE STATE OF MONTANA

Supreme Court No. DA 20-0480

ISSUE PRESENTED

Was the District Court correct when it held that injury claims arising from an event involving the consumption of alcoholic beverages at a bar are subject to the two (2) year statute of limitations set forth in Montana's Dram Shop Act (M.C.A. § 27-1-710)?

STATEMENT OF THE CASE

The underlying case involves allegations of personal injuries arising from a bar fight. According to the allegations in the Complaint, on the evening of January 19th, 2017 and early morning hours of January 20th, 2017, a man named Brendan Windauer ("Mr. Windauer") was drinking at Casey's Bar in Whitefish. *See Compl.*, ¶ 5-14 (Dkt. #1), *Appendix 1*. The Plaintiff, Kyle Babcock ("Mr. Babcock"), was apparently also a patron at Casey's Bar that night. *Id.*

According to the police report, Mr. Babcock and Mr. Windauer got into a "very brief" shoving match. *See Whitefish Police Dept. Case Report, "narrative" on p. 4, ¶ 2, attached to Def.'s SJ Mot. as Exhibit A* (Dkt. #8), *Appendix 3.* The shoving match itself apparently ended relatively quickly without anyone being injured. *Id.* It appears that nobody reported the shoving match to Casey's Bar employees (bar tenders or security). *Id.* Instead, the parties to the shoving match continued standing in a crowd watching a band play. *Id.* Several minutes after the

shoving match ended, Mr. Windauer suddenly turned around and hit Mr. Babcock in the face. *Id.*

According to the police report and witness accounts, only one punch was thrown. *Id.* Mr. Windauer then immediately ran out of the building, where he was tackled by Mr. Babcock's friend who chased him. *Id.* Casey's Bar's security team broke up that tussle and Mr. Windauer then ran away before the police arrived. *Id.*

A little over two years after the event, Mr. Babcock subsequently filed the present suit against Casey's Bar on January 28, 2019, alleging a significant brain injury. *See Compl.* (Dkt. #1). Mr. Babcock did not name Mr. Windauer, the person who actually hit him, in his lawsuit. *Id.* Mr. Babcock's Complaint undeniably alleged an event involving a person who consumed one or more alcoholic beverages at Casey's Bar and subsequent damages allegedly suffered by Mr. Babcock at that event. *Id.* Accordingly, the action fell under Montana's Dram Shop Act found at M.C.A. § 27-1-710 ("Dram Shop Act").

Montana's Dram Shop Act contains an explicit two (2) year statute of limitations. *Mont. Code Ann. § 27-1-710(6)("[t]he civil action must be commenced pursuant to this section within 2 years after the sale or service").* The present lawsuit, however, was filed more than two (2) years after the event. *See Compl.* As a result, early on in the litigation, Casey's Bar filed a motion for summary judgment, requesting that the District Court dismiss Mr. Babcock's Complaint as being time barred. *See Def.'s SJ Mot.* (Dkt. #8).

In an attempt to avoid the two (2) year statute of limitations required under the Dram Shop Act, Mr. Babcock responded to the summary judgment motion by arguing that one or more of his claims were "common law" and, according to Mr. Babcock's reasoning, therefore not subject to the Dram Shop Act's two (2) year statute of limitations. *See Pl.'s SJ Resp. Br.* (Dkt. #12), *Appendix 4*.

The District Court correctly held that Count 1 of the Complaint (Liquor Liability) fell under the Dram Shop Act and was barred by the two (2) year statute of limitations. *Order Granting SJ, p. 4-5* (Dkt. #31), *Appendix 7.* Relative to Count II (Premises Liability), the District Court held that count was also governed by the Dram Shop Act, stating "[t]he Dram Shop Act applies to Babcock's Count 2 because the claim asserts liability against Casey's, an entity which furnished alcohol to Windauer, who, in turn, injured Babcock during an event that involved Windauer, the person who consumed the alcoholic beverage furnished to him by Casey's." *Order Granting SJ, p. 10* (Dkt. #31). The District Court then held "Because Count 2 of Babcock's Complaint is governed by the Dram Shop Act, the Act's 2-year statute of limitations also governs this claim." *Id.* The District Court then dismissed Count 3 (Punitive Damages) because this claim was premised on establishing liability under Counts 1 or 2, both of which had failed. *Id. at pp. 10-11.*

In a nutshell, the District Court correctly found that the two (2) year statute of limitations in the Dram Shop Act applied to all of the claims in the Complaint

because all of the claims arose from an event described in the Dram Shop Act and, as a result, dismissed Mr. Babcock's Complaint. *Id.* Mr. Babcock is now appealing the District Court's decision.

FACTUAL BACKGROUND

The following facts are material[1] to the present motion:

1. The alleged event which form the factual basis for Mr. Babcock's Complaint was on January 19th or 20th, 2017. *See Compl.*, ¶¶ *5-14* (Dkt. #1),

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[1] In Mr. Babcock's Opening Brief in this appeal, he is attempting to create the illusion of a dispute of fact by repeatedly claiming that Mr. Windauer was allegedly "known to be violent", knowing Casey's does not agree with that allegation. *Opening Br., p. 1, 4, & 17.* Casey's Bar itself has no reason to believe that Mr. Windauer was known by Casey's to be violent. This dispute is not material to the summary judgment motion, however.

The case was dismissed before significant discovery. Casey's Bar is not sure what evidence, if any, Mr. Babcock is relying upon when making the statement that Mr. Windauer was known to be violent nor is it aware of who allegedly knew that Mr. Windauer was allegedly violent. Perhaps Mr. Babcock knew Mr. Windauer outside of the altercation and knew him to be violent. If Mr. Babcock believed Mr. Windauer was known to be violent, however, Mr. Babcock failed to tell Casey's Bar staff of that fact (prior to the punch that was thrown and prior to this litigation). Mr. Babcock and his friends never reported Mr. Windauer to security after the shoving match between Mr. Babcock and Mr. Windauer, so it was not aware there was a problem until the single punch was thrown.

Casey's Bar's lack of knowledge of the history between Mr. Babcock and Mr. Windauer, however, does not create a genuine issue of material fact relative to the summary judgment motion that was filed. Mr. Windauer and Mr. Babcock's past disputes with one another do not change the date of the event nor the date of filing the Complaint, which are the material facts relative to a statute of limitations claim.

Appendix 1; and *c.f. Amend. Answ.* ¶ 2 (Dkt. #7) (clarifying that the date of the punch appeared to be in the early morning of January 20, 2017, not the "evening" but admitting January 20, 2017 is the operative date of the alleged incident), *Appendix 2*.

2. Mr. Babcock's Complaint and Demand for Jury Trial was filed on January 28, 2019. *See Compl.* (Dkt. #1).

3. The Complaint, in the general "Facts" section, alleges that Casey's Bar furnished an alcoholic beverage to Mr. Windauer. *Compl.*, ¶ 11 (Dkt. #1) ("[o]n the evening of January 20, 2017 Casey's supplied Windauer with alcohol.")[2].

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[2] Mr. Babcock's statement that "Up until its Motion for Summary Judgment, Casey's denied that Windauer consumed any alcohol on the night of the incident" is misleading. It was over two years from the time of the event until suit was filed. Many of the staff at Casey's Bar had left its employment. Casey's Bar's counsel was not certain what Mr. Windauer even looked like at the time the Answer was filed. Accordingly, it was impossible to initially verify whether Mr. Windauer had been served or not. Rather than taking Mr. Babcock's word for it, Casey's Bar exercised its right under Montana's Rules of Civil Procedure to state that it did not know the truth of the allegation at that time. Specifically, in Paragraph 6 of its Amended Answer, Casey's Bar indicated that it was "without knowledge or information sufficient to form a belief about the truth of the allegations" pursuant to Mont.R.Civ.P. Rule 8(a)(5). *See Amend. Answ. (Dkt. #7).*

For purposes of the summary judgment motion (which is the issue in this appeal), however, it was taken as true that Casey's Bar served Mr. Windauer with an alcoholic beverage on either January 19th or in the early morning of the 20th.

4. The Liquor Liability Count factual allegations were incorporated into Counts II (Premises Liability) and III (Punitive Damages) of the Complaint. *Id.* at ¶¶ 23, & 39 ("Babcock relleges each proceeding paragraph as thought fully set forth herein.")

5. In his Complaint, Mr. Babcock alleged that Casey's Bar "supplied Windauer with alcohol" under Count I (Liquor Liability), Count II (Premises Liablity), and Count III (Punitive Damages). *Id.* at ¶¶ 15, 23, & 39 ("Babcock relleges each proceeding paragraph as thought fully set forth herein.")

6. Under each of his three claims, Mr. Babcock alleged that Casey's Bar is liable for injuries or damages sustained by Mr. Babcock arising from an event involving Mr. Windauer where he was served alcohol. *See Compl.* (Dkt. #1).

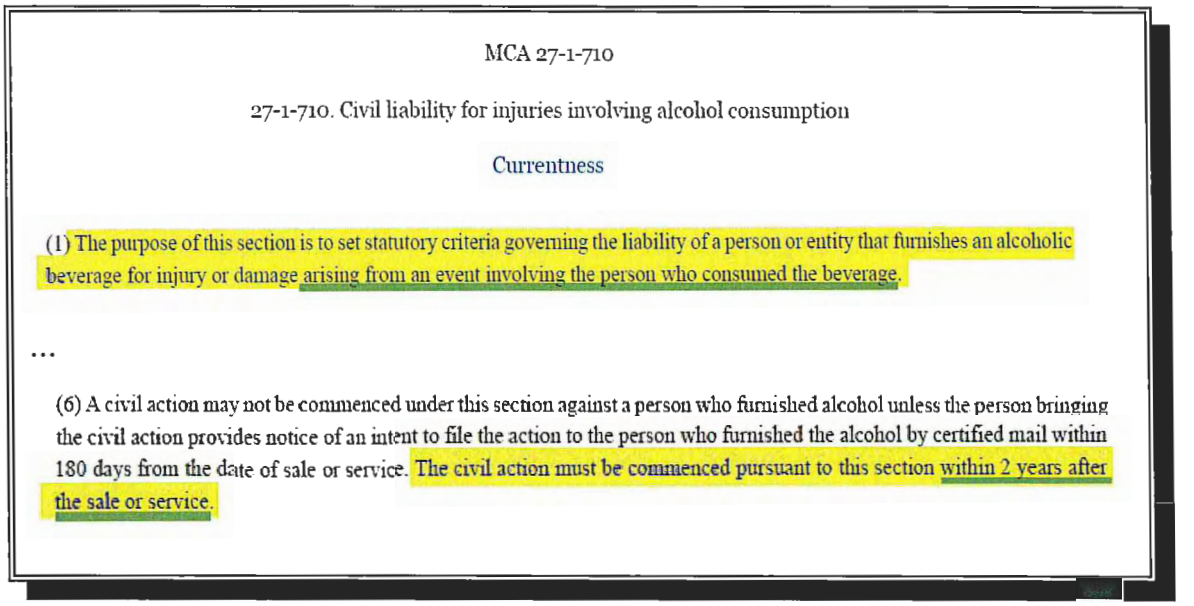
STANDARD OF REVIEW

Casey's Bar agrees that the District Court's grant of summary judgment in this case should be reviewed *de novo* and the District Court's conclusions of law should be reviewed for correctness. *Harrington v. Crystal Bar, Inc.*, 2013 MT 209, ¶ 9, 371 Mont. 165, 306 P.3d 342.

SUMMARY OF ARGUMENT

In this case, the District Court's conclusions of law were all correct and the District Court's dismissal of Mr. Babcock's Complaint through summary judgment was appropriate. The simple truth is, Mr. Babcock filed his claims past the relevant statute of limitations. Montana's Dram Shop Act (M.C.A. § 27-1-710)

provides for a two-year statute of limitations for any claim in which there is an "injury or damage arising from an event" involving a person who consumed an alcoholic beverage as follows:



MCA 27-1-710

27-1-710. Civil liability for injuries involving alcohol consumption

Currentness

(1) The purpose of this section is to set statutory criteria governing the liability of a person or entity that furnishes an alcoholic beverage for injury or damage arising from an event involving the person who consumed the beverage.

...

(6) A civil action may not be commenced under this section against a person who furnished alcohol unless the person bringing the civil action provides notice of an intent to file the action to the person who furnished the alcohol by certified mail within 180 days from the date of sale or service. The civil action must be commenced pursuant to this section within 2 years after the sale or service.

See Mont. Code Ann. § 27-1-710(1) and (6)(emphasis added)[3]. The statute specifically states that it covers any injury or damage arising from an "event"

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[3] This specific two (2) year statute of limitations was added by the Montana Legislature in 2003. *See Hearing on SB337, attached as Exhibit A to Def.'s Motion for Judicial Notice, (Dkt. #23).* Prior to that time, it was unknown whether a two (2) or three (3) year statute of limitations would apply. In *Filip v. Jordan*, 2008 MT 234, 344 Mont. 402, 188 P.3d 1039, the Montana Supreme Court held that a three (3) year statute of limitations applied to the former version of M.C.A. § 27-1-710 (which did not specifically contain the two (2) year statute of limitations in its text). The Montana Legislature's intent with explicitly adding the two (2) year statute of limitations was clearly to limit the liability of bars and other establishments that serve alcohol to claims brought within two (2) years.

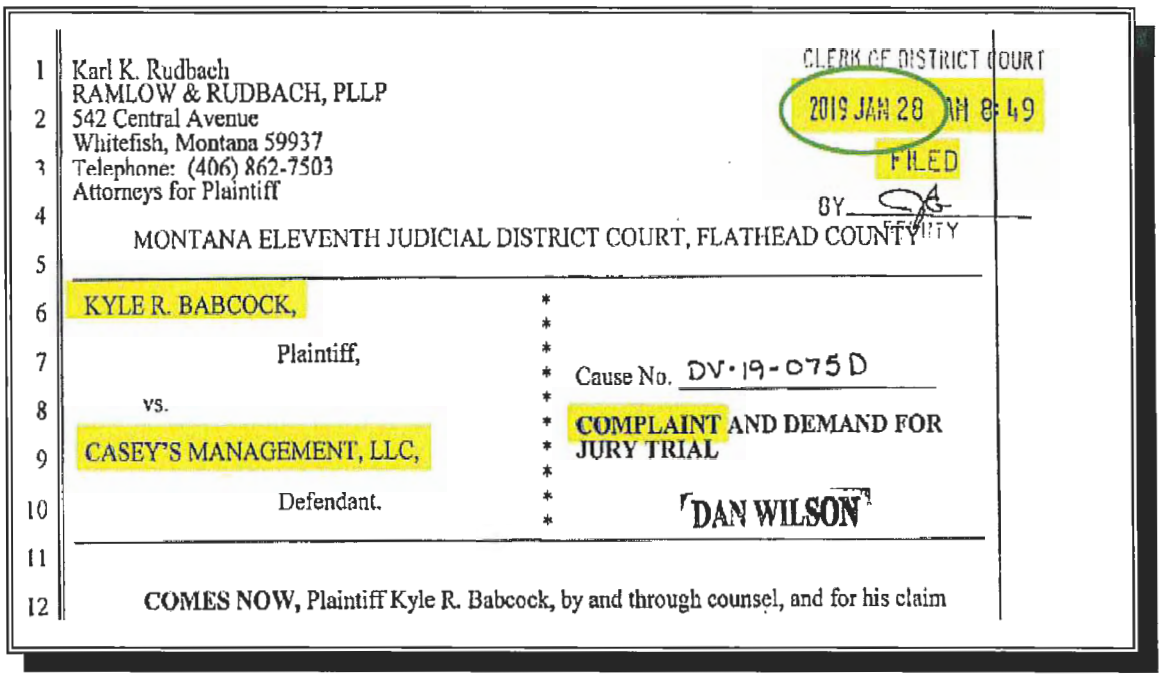
involving the person who consumed the beverage. *Id.* The alcoholic beverage itself does not need to be the cause of the injury. *Id.* Contrary to Mr. Babcock's implication in his Opening Brief, the person served does not have to be actually intoxicated. *Id.* The injury need only "aris[e] from an event involving a person who consumed the beverage." *Id.* Thus, pursuant to M.C.A. § 27-1-710, any claim based on an injury arising from an event involving a person who consumed alcoholic beverages must be brought within two (2) years of the sale or service of the beverage. *Id.*

In this case, there is no dispute that the date of the sale or service of the alcohol was on January 19-20, 2017. "January 20, 2017" is explicitly stated as the date of the event leading to the claims eight times in the Complaint. *Compl., ¶ 5-14* (Dkt. #1). According to the Complaint, Mr. Windauer is the person who allegedly consumed the beverage. *Id.* The "event" involved Mr. Windauer. The claims alleged in the Complaint accrued when the liquor was served. *Mont. Code Ann. § 27-1-710(6).* The statute of limitations on any claim against the bar "arising from an event involving" Mr. Windauer clearly began to run, at the latest, on January 20, 2017. *Id.*

Pursuant to M.C.A. § 27-1-710(6), any complaint against the bar alleging an injury as a result of an "event" involving Mr. Windauer had to be filed at the latest by January 20, 2019. Put another way, the statute of limitations on the liquor liability claim and any other claims based on an event involving Mr. Windauer in

relation to the bar would have run by January 21, 2019.

The Complaint itself, however, was not filed until January 28th, 2019:



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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KYLE R. BABCOCK,

Plaintiff,

vs.

CASEY'S MANAGEMENT, LLC,

Defendant.

Cause No. DV-19-075 D

COMPLAINT AND DEMAND FOR JURY TRIAL

DAN WILSON

COMES NOW, Plaintiff Kyle R. Babcock, by and through counsel, and for his claim

Compl., p. 1 (emphasis added) (Dkt. #1). Thus, Mr. Babcock filed his Complaint alleging claims against the bar outside of the applicable two (2) year statute of limitations.[4]

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[4] Mr. Babcock's legal counsel was aware of this two (2) year time limitation well before filing its Complaint. The Dram Shop Act requires a notice of intent to sue letter to be sent within six (6) months of the event. *Mont. Code Ann. § 27-1-710(6).* The six (6) month notice of intent deadline and the two (2) year filing deadline are in the same subsection of the Dram Shop Act. *Id.* Mr. Babcock met the six (6) month deadline for providing the notice of intent to sue via a letter dated May 18, 2017. *See Pl.'s SJ Resp. Br., p. 8 (Dkt. #12)* ("Here, Babcock provided notice via certified mail of his intent to file a Dram Shop Act claim 118 days after

The District Court's legal conclusion that the claims are all within the scope of the Dram Shop Act (M.C.A. § 27-1-710) was also correct. No matter what title Mr. Babcock gave to his tort claims, the claim(s) in the Complaint all arose from an event involving the person (Mr. Windauer) who consumed an alcoholic beverage served by Casey's Bar. *See Compl.* As a result, the claims all fall within the scope of M.C.A. § 27-1-710. There were no genuine disputes of material fact and the District Court reached the correct legal conclusions. Accordingly, the District Court's summary judgment order dismissing Mr. Babcock's case should be affirmed.

ARGUMENT

As an initial matter, Mr. Babcock does not appear to be genuinely contending that he filed his Complaint within the time allowed under the Dram Shop Act, nor could he reasonably take that position. As detailed in the prior section, Montana's Dram Shop Act (M.C.A. § 27-1-710) provides for a two-year statute of limitations for any claim based on any "injury or damage arising from an event" involving a person who consumed an alcoholic beverage. *Mont. Code Ann.* § 27-1-710(1) and (6). There is no dispute that the date of the sale or service of the

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Caseys' served Windauer (Exhibit A)...."). In that May 18, 2017, Notice of Intent to File Action, Mr. Babcock stated that the assault occurred on January 20, 2017. *Id.* As a result, there is no doubt Mr. Babcock was aware of the two (2) year deadline by at least May of 2017 (a year and a half prior to the deadline running). The fact is, Mr. Babcock simply failed to meet the statute of limitations.

alcohol was on January 19-20, 2017. *Compl., ¶ 5-14 (emphasis added)*(Dkt. #1). The Complaint itself, however, was not filed until January 28th, 2019. The only conclusion that can be correctly reached is that Mr. Babcock's Complaint was not filed within the time allowed under the Dram Shop Act.

Mr. Babcock, however, is attempting to avoid the Dram Shop Act statute of limitations on several of his claims (which arise from the same event) by simply labeling his claim as something other than a liquor liability claim or by claiming that the Dram Shop Act is not the exclusive remedy even though the alleged liability arises from an event covered by the Act. *See Babcock's Opening Br., § 1.* The District Court, however, was correct that the Dram Shop Act was intended to be the exclusive remedy for claims that are described within the Dram Shop Act (i.e. claims that fall within the scope of the Dram Shop Act). The name Mr. Babcock chooses to attach to his claim does not change the fact that the claim arose from an event covered by the Dram Shop Act.[5] Because the facts fall within a described "event" in the Act, the Act is the exclusive remedy.

A. The Dram Shop Act Governs Liability When a Patron is Furnished an Alcoholic Beverage and Someone Is Subsequently Injured by an Event Involving that Patron.

The Dram Shop Act applies if a patron is served an alcoholic beverage and there is an event involving that person that injures someone. Section (1) of the

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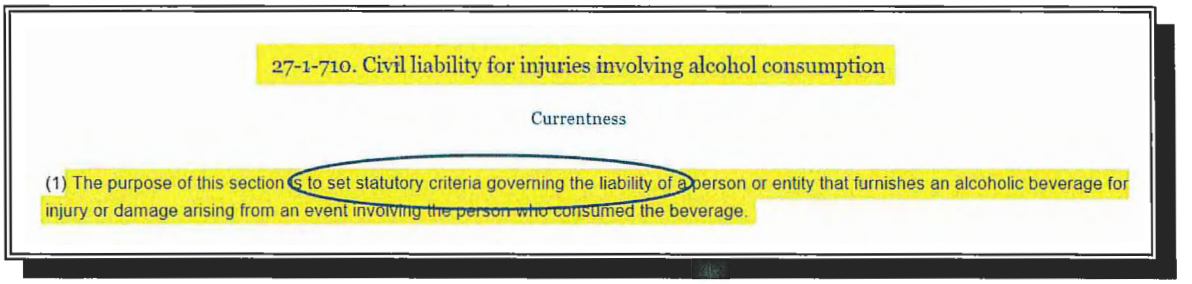
[5] "A rose by any other name would smell as sweet." - William Shakespeare.

Dram Shop Act states, in full, that the purpose of the Dram Shop Act is to set the criteria for liability of an entity that furnishes alcoholic beverages as follows:



27-1-710. Civil liability for injuries involving alcohol consumption

Currentness

(1) The purpose of this section is to set statutory criteria governing the liability of a person or entity that furnishes an alcoholic beverage for injury or damage arising from an event involving the person who consumed the beverage.

Mont. Code Ann. § 27-1-710(1) (emphasis added). By statute, the Dram Shop Act applies whenever the claim is for an "injury or damage arising from an event involving the person who consumed the beverage." *Mont. Code Ann. § 27-1-710(1).*

The "set statutory criteria" language in the Dram Shop statute plainly states that the Legislature's purpose in enacting the Dram Shop Statute was (and is) to outline in what circumstances, and under what specific facts, a bar may be held liable for an injury "arising from an event involving the person who consumed the beverage." *Id.* This language alone is sufficient to indicate a Legislative intent that claims that fall within the Dram Shop Act are to be exclusively governed by the Dram Shop Act.

The Montana Legislature also went on to limit liability to essentially three[6] circumstances, as follows:

> (3) Furnishing a person with an alcoholic beverage is not a cause of, or grounds for finding the furnishing person or entity liable for, injury or damage wholly or partly arising from an event involving the person who consumed the beverage unless:
>
> (a) the consumer was under the legal drinking age and the furnishing person knew that the consumer was underage or did not make a reasonable attempt to determine the consumer's age;
>
> (b) the consumer was visibly intoxicated; or
>
> (c) the furnishing person forced or coerced the consumption or told the consumer that the beverage contained no alcohol.

Id. at (3) (emphasis added). The statute explicitly provides that merely serving a person "is not a cause of, or grounds for finding...[the bar] liable...unless" one of the three (3) circumstances exist. *Id.* The statute does *not* say "in addition to common law claims." Rather, the statute clearly limits the circumstances in which a bar may be sued for an "event" involving a patron. In fact, the language in subsection (3) cannot reasonably be interpreted any other way but as providing an intent to *limit* claims.

Put another way, if the damages or injuries are "arising from an event" that involves a person who was served by the bar, it is only under the three circumstances set forth in subsection (3) that the bar may be held liable. All other

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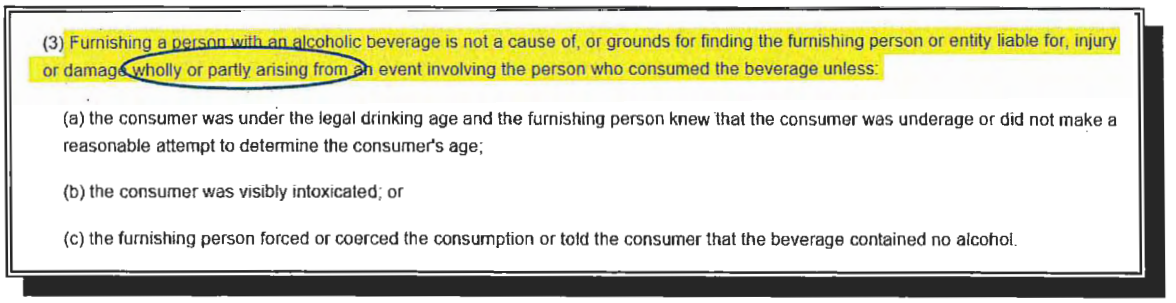
[6] Subsection (2) of the Dram Shop statute also allows for liability if the person served is under 21, but that must be read in conjunction with subsection (3)(a) to give effect to both parts. Subsection (5) also allows for liability if the person consuming the beverage is suing for injuries to themselves, but only in limited circumstances. In all events, the circumstances under which the bar may be held liable are limited.

common law liabilities that existed prior to the statute being enacted in 1986 were necessarily subsumed into the Dram Shop Act by the limiting language found in M.C.A. § 27-1-710. In other words, any common law claims that existed prior to the Dram Shop Act were altered or amended so that they can only be brought pursuant to the terms of the statute. *See Filip v. Jordan*. 2008 MT 234, 344 Mont. 402, 188 P.3d 1039 (holding that the Dram Shop Act altered existing common law claims).

It is also worth noting that the statute also includes language stating that the statute applies even if the injury is even "partly" caused by a person who was served an alcoholic beverage:



(3) Furnishing a person with an alcoholic beverage is not a cause of, or grounds for finding the furnishing person or entity liable for, injury or damage wholly or partly arising from an event involving the person who consumed the beverage unless:

(a) the consumer was under the legal drinking age and the furnishing person knew that the consumer was underage or did not make a reasonable attempt to determine the consumer's age;

(b) the consumer was visibly intoxicated; or

(c) the furnishing person forced or coerced the consumption or told the consumer that the beverage contained no alcohol.

Mont. Code Ann. § 27-1-710(3) (emphasis added). This "wholly or partly" language indicates a legislative intent to cast a broad net to cover potential claims that could be brought against a bar, while simultaneously limiting the circumstances under which a bar may be held liable when the statute applies. This choice of language further supports that the statute was (and is) intended to be the

exclusive remedy when the injury rises from an event involving a person who consumed a beverage.

The Legislative history of the Dram Shop Act is also in accord with the idea that the Dram Shop Act was intended to *limit* liability (not expand it). *See e.g. Hearing on SB337, attached as Exhibit A to Def.'s Motion for Judicial Notice, (Dkt. #23).* Senate Bill337 was the bill that amended the Dram Shop Act to include an explicit two (2) year statute of limitations after this Court's decision in *Filip v. Jordan*. 2008 MT 234, 344 Mont. 402, 188 P.3d 1039. SB337 was titled: "AN ACT REVISING THE CIVIL LIABILITY OF BUSINESSES AND SOCIAL HOSTS FOR INJURIES INVOLVING ALCOHOL CONSUMPTION; ESTABLISHING CRITERIA FOR GOVERNING LIABILITY....". *Id.* Based on the title of SB337 alone, the intent of that bill was to establish the criteria for governing liability in situations where alcohol was served. *Id.*

In his Opening Statement at the Senate hearing on SB337, the sponsor of SB337 explained that "'Dram Shop' is an old English term for a place where alcohol is served." *Id.* at p. 2 of 14. The sponsor explained that a number of states have gone back to previous laws where the bar "is not responsible for the drinker's actions", but "SB 337 does not go that far." *Id.* at pp. 2-3. The sponsor explained that under SB 337 and Montana's Dram Shop Act, the bar may still be sued but only under limited circumstances. *Id.* at p. 3. In a nutshell, the sponsor believed that SB337 was a reasonable compromise. The first person to testify at the hearing,

Mark Staples, "discussed the balance necessary for the law to be fair," that the pendulum had swung too far in favor of holding bars liable for a drinker's actions, and that the "bill brings the pendulum back to the middle." *Hearing on SB337, attached as Exhibit A to Def.'s Motion for Judicial Notice, (Dkt. #23), p. 3.*

Other testimony at the SB337 senate hearing explained that liability insurance was becoming cost prohibitive and that many Montana businesses would end up having to shut down. *Id.* at pp. 4-6. John Hayes from Talbot Insurance Agency described how liability needed to be limited because the number of companies willing to insure bars in Montana was down to three companies and soon that could be zero. *Id.* at p. 6.

The point for the present appeal is, the Legislative intent of the Dram Shop Act was clearly to *limit* liability, not create additional liability. Reading the Act as limiting liability is the only way to remain consistent with the Legislature's intent.

Logic also dictates that the Dram Shop statute is an exclusive remedy if the claim involves an "event" described in the Act. If the Court were to allow common law claims that arose from an injury or damage arising from an event involving the person who consumed the beverage (i.e. claims that are covered by the Dram Shop statute), then the result would be to not give any effect to the Dram Shop statute. As but one example, the two (2) year statute of limitations found within the Dram Shop Act would never bar a claim because the three (3) year standard negligence statute of limitations would always apply to claims arising from the exact same

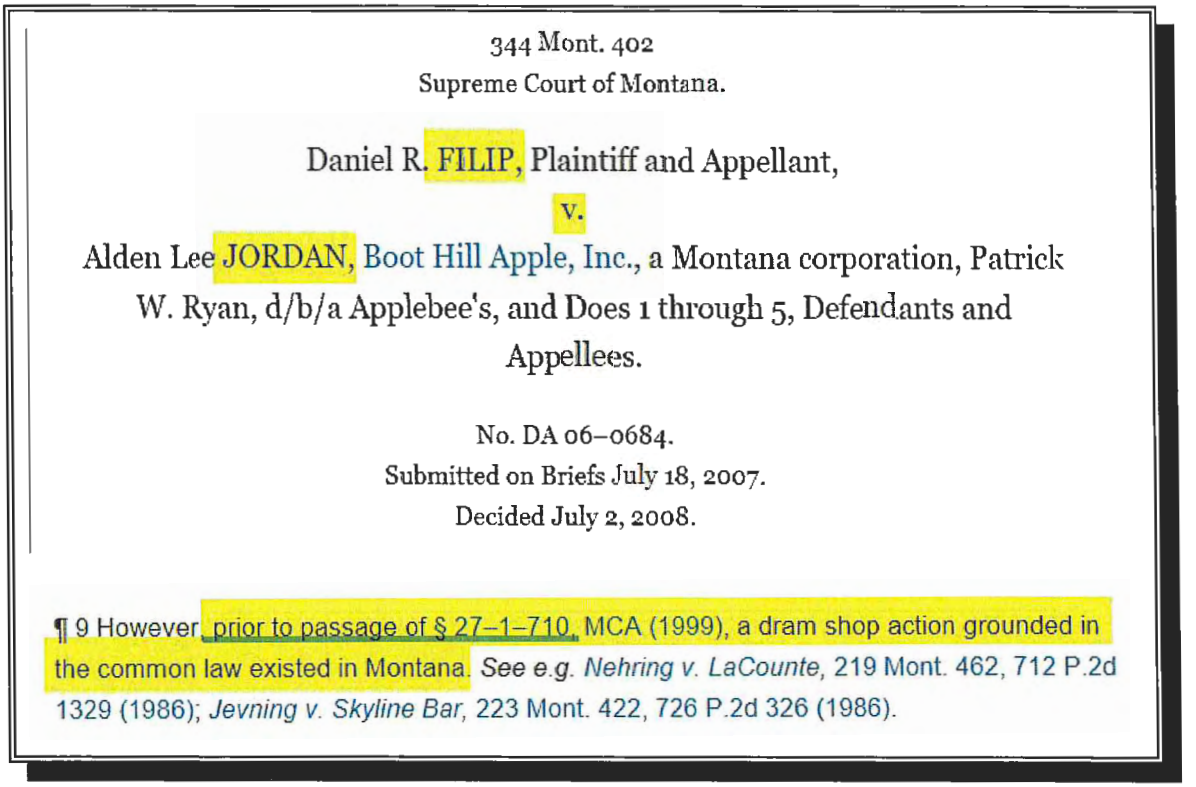
event. The Legislature's amendment to clarify it is a two (2) year statute of limitations would be judicially eviscerated and given no effect.

Put another way, if a "common law" claim could be brought based on the same circumstances that trigger the Dram Shop Act (i.e. when the injury arises from the same described event as covered by the Dram Shop Act), then the Dram Shop Act would serve no purpose. If a common law claim could also be brought in every instance covered by the Dram Shop Act, then the Dram Shop Act would be redundant at best and add additional liability at worst. All limitations imposed by the Montana Legislature in the Act would become impotent. The "unless" language in the statute would never apply. Similarly, the language in the Dram Shop Act stating "not a cause or grounds for" a claim would be eviscerated. Mr. Babcock's reading would be completely contrary to what the Montana Legislature plainly intended with the Dram Shop statute. In fact, Mr. Babcock's own attempts to avoid the Dram Shop Act's limitations are itself proof that the Dram Shop Act limits claims. Mr. Babcock would not be trying to get around the Dram Shop if it were not limiting his ability to recover. Obviously the Dram Shop Act is limiting and should be read as such.

1. The Montana Supreme Court in Filip v. Jordan recognized that the Dram Shop Act altered the common law; The net result is that common law claims are now identical to the Dram Shop Act.

The *Filip v. Jordan* case is fatal to Mr. Babcock's position that common law claims can co-exist with Dram Shop Act claims arising from the same "events." In his response to the opening summary judgment brief at the District Court level, Mr. Babcock argued to the District Court that the *Filip* case "indirectly recognized that the Dram Shop is not an exclusive remedy because his Dram Shop claim failed, Filip's other claims persisted." *Pl.'s Resp. Br., p 8, citing Filip v. Jordan*, 2008 MT 234, 344 Mont. 402, 188 P.3d 1039. That statement was not precisely accurate, however. On the contrary, the Montana Supreme Court in *Filip* recognized that common law claims that would arise from events described in the Dram Shop statute only existed *prior to* the enactment of M.C.A. § 27-1-710:

[Depiction of the relevant portion of the Filip case on the following page]



344 Mont. 402
Supreme Court of Montana.

Daniel R. FILIP, Plaintiff and Appellant,
v.
Alden Lee JORDAN, Boot Hill Apple, Inc., a Montana corporation, Patrick W. Ryan, d/b/a Applebee's, and Does 1 through 5, Defendants and Appellees.

No. DA 06–0684.
Submitted on Briefs July 18, 2007.
Decided July 2, 2008.

¶ 9 However prior to passage of § 27–1–710, MCA (1999), a dram shop action grounded in the common law existed in Montana. See e.g. *Nehring v. LaCounte*, 219 Mont. 462, 712 P.2d 1329 (1986); *Jevning v. Skyline Bar*, 223 Mont. 422, 726 P.2d 326 (1986).

Filip v. Jordan, 2008 MT 234, ¶ 9, 344 Mont. 402, 188 P.3d 1039 (emphasis added). In other words, in the *Filip* case this Court recognized that any common law claims that fall within the coverage of the Dram Shop Act were essentially eliminated by the Dram Shop Act. *Id.*

Moreover, in *Filip*, the Montana Supreme Court did not explicitly state nor impliedly hold that the alleged "common law" negligence and malice[7] claims

[7] The "malice" claim in *Filip* was brought pursuant to M.C.A. § 27-1-221, which makes the malice claim a *statutory* claim. *Filip v. Jordan*, 2008 MT 234, ¶ 5, 344 Mont. 402, 188 P.3d 1039. The alleged "malice" claim was never a common law claim in *Filip*. To the extent the claim arises out of the same event, however, the Dram Shop Act should still apply.

survived if they were also covered by the Dram Shop Act. *Id.* Rather, the Montana Supreme Court held that the Dram Shop Act altered the common law to match the statute and thereby essentially eliminated the common law claims. The common law dram shop claims are now statutory claims.

In the *Filip* case, the issue was whether a two (2) or three (3) year statute of limitations applied to claims brought under the pre-2003 version of M.C.A. § 27-1-710. *Id.* at ¶ 2. Filip was a passenger in an car driven by the bar patron. *Id.* at ¶ 3. There was an auto accident and Filip was injured. *Id.* Filip brought suit against Applebee's in Billings, alleging that the patron was served under age. *Id.* at ¶ 4. Applebee's argued that the two (2) year statute of limitations found in M.C.A. § 27-2-211(1)(c) applied because the liability was created by statute. *Id.* at ¶ 6. (Note: M.C.A. § 27-2-211(1)(c) is not the two (2) year statute of limitations found in the Dram Shop Act currently. The discussion in *Filip* involved a two (2) year statute of limitations arising from another statute).

The District Court in *Filip* agreed that the two (2) year statute of limitations found in M.C.A. § 27-2-211(1)(c) applied and dismissed the entire case (including the common law negligence and statutory malice claims, which impliedly recognizes that those claims fell within the Dram Shop statute also). *Id.* Filip appealed. *Id.*

On appeal, the Montana Supreme Court reversed the district court and held that a three (3) year statute of limitations applied. *Id.* at ¶ 14. In making its

holding, the Montana Supreme Court reasoned that the Dram Shop Act did not create a liability not previously found in common law, but rather the Montana Legislature "alter[ed]" the existing common law:

> Mont. 21, 776 P.2d 488 (1989). The Legislature has plenary power to alter common law causes of action, but this is not the same as saying that when the Legislature does so the resulting cause of action is created by statute. As we first stated in *State ex rel. Fallon County v. District Court,* 161 Mont. 79, 81, 505 P.2d 120, 121 (1972), the test for whether a liability is created by statute is whether liability would exist absent the statute in question.
>
> ¶ 13 In this instance, as noted above, Montana recognized a cause of action based on negligently providing alcohol to an intoxicated person prior to the passage of § 27–1–710, MCA (1999). *See Nehring,* 219 Mont. 462, 712 P.2d 1329; *Jevning,* 223 Mont. 422, 726 P.2d 326. Thus, ***406** § 27–1–710, MCA (1999), did not "establish[ ] a new rule of private right unknown to the common law." *Butler v. Peters,* 62 Mont. 381, 384, 205 P. 247, 248 (1922).
>
> ¶ 14 Under Montana common law prior to the passage of § 27–1–710, MCA (1999), Applebee's was potentially liable to Filip for illegally providing alcohol to Jordan. Therefore Filip's cause of action is not a liability created by statute. Accordingly, the three-year period of limitations provided in § 27–2–204, MCA, applies to this action and Filip timely filed his complaint.
>
> ¶ 15 We reverse and remand for further proceedings consistent with this Opinion.

Id. at ¶ 12-15. In other words, the Montana Supreme Court drew a distinction between "creating" a liability by statute and "alter[ing]" an existing common law claim. *Id.* The Montana Supreme Court in *Filip* recognized that the Dram Shop statute did not create a claim that did not exist prior to the statute, but rather

"alter[ed]" any common law claims that existed "prior to the passage of § 27-1-710...." *Id.*

The Montana Supreme Court did not hold that the alleged common law claim(s) of negligence and malice still existed in addition to the Dram Shop claim all arising from the same event, but rather the Court held that a three (3) year statute of limitations applied to the Dram Shop Act (as that statute existed in the *Filip* case – prior to the 2003 amendment in SB0337 that added an explicit two (2) year statute of limitations to the Dram Shop Act) and that any common law claim that existed before the Dram Shop Act was "alter[ed]" by the Dram Shop Act. *Id.*

The fact common law claims are now statutory claims due to the Montana Legislature "alter[ing]" the common law through the Dram Shop Act is an incredibly important point for the present appeal. The Montana Supreme Court's prior precedent – that common law claims were altered or amended by the Dram Shop Act and that the Dram Shop Act did not create a new cause of action – directly contradicts Mr. Babcock's position in this appeal. Under *Filip*, the common law claims that Mr. Babcock is relying on to escape the two (2) year statute of limitations were "altered" by the Dram Shop Act. The common law claims must now comply with the Dram Shop Act statute, which includes the two (2) year statute of limitations. In other words, for all intents and purposes, the common law claims are now Dram Shop Act claims and must comply with the Dram Shop Act.

The *Filip* holding necessarily means that any common law claims that fall within the coverage of the Dram Shop statute (i.e. "events" described in that statute) are now subject to the Legislature's alterations. *Id.* In other words, the pre-existing common law claims are now statutory claims under the Dram Shop statute. *Id.* The *Filip* case thus actually supports that the proposition that the "common law" claim(s) that Mr. Babcock is relying on in this case actually no longer exist (at least not in their unaltered form). If any common law claims do exist, then they are subject to the same rules as found in the Dram Shop Act (i.e. making the claim identical to the Dram Shop claim with the same statute of limitations).

Put another way, because of this Court's prior holding in *Filip*, whether the claim is a "Dram Shop" claim or a "common law" claim is just semantics because the Dram Shop rules still apply no matter how a claim is labeled. The claims arise from an "event" covered by the Dram Shop Act. No matter how the claim is labeled, the two (2) year statute of limitations found in the current version of the Dram Shop Act applies[8]. Summary judgment dismissing this case was appropriate.

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[8] Mr. Babcock's assertion that he can elect to plead alternative claims does not change this analysis. Because any common law claim arising from an "event" covered by the Dram Shop Act was "altered" by the Dram Shop Act, any common law claim is altered to be consistent with the Dram Shop Act. In other words, the Legislature altered any common law claims to be no different than the Dram Shop Act claims. An "alternative" claim that is based on a Dram Shop Act "event" cannot escape the limitations created by

2. *Mr. Babcock's suggestion of holding that the Dram Shop Act is the exclusive remedy if Subsection (3)(b) ("consumer was visibly intoxicated") of the Act is implicated, but not exclusive if Subsection (3)(a) ("under the legal drinking age") or (3)(c) ("person forced or coerced the consumption") of the Act is implicated is asking this Court to create a false distinction that is simply not found within the Act.*

In Section 1B of Mr. Babcock's Opening Appellate Brief, Mr. Babcock argues that if this Court holds that the Dram Shop Act is the exclusive remedy (which it should do), then it should hold that it is the exclusive remedy only "where a bar serves alcohol to a visibly intoxicated person." *Opening Br., § B.* To put that request into context, this Court should consider that serving a visibly intoxicated person is only one of three (3) possible grounds for liability found in Montana Dram Shop Act:

> (3) Furnishing a person with an alcoholic beverage is not a cause of, or grounds for finding the furnishing person or entity liable for, injury or damage wholly or partly arising from an event involving the person who consumed the beverage unless:
>
> (a) the consumer was under the legal drinking age and the furnishing person knew that the consumer was underage or did not make a reasonable attempt to determine the consumer's age;
>
> (b) the consumer was visibly intoxicated; or
>
> (c) the furnishing person forced or coerced the consumption or told the consumer that the beverage contained no alcohol.

See Mont. Code Ann. § 27-1-710(3). In essence, Mr. Babcock is arguing that the

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the Dram Shop Act.

Dram Shop Act is only an exclusive remedy if subsection (3)(b) applies and not if one of the other subsections apply.

Granting Mr. Babcock's request would be contrary to the language of the statute. The statute provides that if there is an "event", there are only three (3) circumstances in which the bar may be sued. Under the exception Mr. Babcock is asking this Court to adopt, the bar could be sued under every circumstance when there is an "event", unless one specific circumstance (serving a visibly intoxicated person) is met.

Drawing a distinction between these subsections for purposes of determining when exclusive liability will apply is not supported by the language of the statute nor by any other justifiable reason. Had Mr. Babcock met the applicable statute of limitations, he would have been able to litigate his claim in this case and would not be without a remedy. The failing lies with Mr. Babcock missing the statute of limitations, not the statutory scheme. The facts in this case do not justify carving up portions of the statute to make some portions exclusive and other portions not exclusive.

The out-of-state cases that Mr. Babcock cites also do not support his position. In support of Mr. Babcock's contention that the Act is exclusive only under subsection (b), Mr. Babcock cites to a number of cases from out-of-state that held that those states' versions of their own dram shop acts were the exclusive remedy. *Opening Br., § B.* Mr. Babcock argues that, in those states, the dram shop

acts had language regarding liability for serving intoxicated people and that serving intoxicated people were the facts at issue in those cases. *Id.* From that premise, Mr. Babcock then seems to imply that those courts held that their dram shop acts were only the exclusive remedy relative to serving visibly intoxicated people.

Mr. Babcock's description of the holdings in those out-of-state cases, however, does not comport with the actual holdings. For example, in Vermont the dram shop act is the exclusive remedy if the facts fall within the scope Vermont's dram shop act. *See e.g. Winney v. Ransom & Hastings, Inc.*, 149 Vt. 213, 542 A.2d 269 (1988) *citing 7 V.S.A. § 501 (explaining that Vermont's dram shop act created a new cause of action since none existed in common law prior to that act and holding "that where the particular facts of a case fall within the scope of Vermont's Dram Shop Act, the act affords the exclusive remedy.")(emphasis added).* The out-of-state courts essentially held that because the dram shop acts in those states were violated, the dram shop acts in those states applied and were the exclusive remedies in those cases. The holdings were based on the history of claims in those states, the language of those states' statutes, and the legislative intent. The holdings were not based on the claims arising from just one section of those states' dram shop acts being triggered. As the Court can see from the quote above, the holdings were not limited to just cases where visibly intoxicated

persons were served, but rather held that if the facts fall within the scope of the Act then the Act applies.

Casey's Bar is not sure how persuasive cases from other states with different statutory schemes may be as the language of the statutes differ from Montana, but if this Court does look at those cases it will see that the holdings in those foreign jurisdictions actually support Casey's Bar's position in this case. If the Act is triggered, then the Act is the exclusive remedy. In this case, Montana's Dram Shop Act was triggered and it should be the exclusive remedy.

3. *In Harrington v. Crystal Bar, the Montana Supreme Court recognized that common law claims still exist if the facts are not within the Dram Shop Act, but no such claims are applicable in the present case because the facts fall within the scope of the Dram Shop Act.*

At the District Court level, Mr. Babcock also cited to *Harrington v. Crystal Bar, Inc.* for the proposition that common law claims may still exist in addition to a Dram Shop claim. *See Pl.'s Resp. Br.*, p. 13 citing 2013 MT 209, 371 Mont. 165, 306 P.3d 342. In *Harrington*, however, the Dram Shop claim was dismissed because the event did not arise from someone being served alcohol. *Harrington v. Crystal Bar, Inc.*, ¶¶ 25-26. In other words, the common law negligence claim survived summary judgment because the Dram Shop statute was not triggered under the facts of that case. The *Harrington* case does not stand for the proposition that the same event can be covered *both* by the Dram Shop statute and

by a common law claim. Rather, the common law claim was allowed because the Dram Shop claim did not exist.

In *Harrington*, a person got into an argument with a bouncer prior to the person entering the bar. *Harrington v. Crystal Bar, Inc.*, ¶ 5 and 25. An altercation ensued in the parking lot, but the person was never served by the bar. *Id.* The injured person brought general negligence claims in addition to a Dram Shop Act claim. *Id.* at ¶ 6. The Crystal Bar moved to have all of the claims dismissed, arguing that the bouncer and the injured person had not been served at that bar and that the fight was not within the building. *Id.* at ¶ 8. The District Court agreed with the bar and dismissed the claims. *Id.*

On appeal, the Montana Supreme Court affirmed dismissal of the Dram Shop Act claim on the grounds that "...there is no evidence that Howard was served alcohol by the Crystal Bar prior to the altercation." *Id.* at ¶¶ 25-26. The Dram Shop Act simply was not triggered when nobody was served.

The distinction between the *Harrington* case and the present case is that in *Harrington* there was no "event" described in the Act because there was no "person who consumed the beverage". *Id.; and c.f. Mont. Code Ann. § 27-1-710(1).* Because there was no "event", common law claims could be raised. *Id.* Relative to the common law claims, the Montana Supreme Court held that the duty of care may extend outside of the building and that there was a question of fact as to whether there was a breach of the duty of care in that case. *Id.* ¶ 14. The

Montana Supreme Court, did not, however, hold that common law claims could exist simultaneously with a Dram Shop claim arising from the same covered event when an event exists.

Common law claims may still exist relating to injuries that do not arise from "an event" described in the Dram Shop statute. In other words, if the injuries do arise from an "event" involving someone who is served a beverage, then the Dram Shop Act applies. If the injuries do *not* arise from such a covered event, however, then common law claims outside of the Dram Shop Act may be applicable. For example, if the injury was caused by a bar employee negligently running a red light while picking up cleaning supplies for the bar at a local hardware store, then the bar could be sued outside of the Dram Shop statute under a common law negligence claim because the alleged damages do not arise from a covered "event." If the claim arose from a patron drinking a beverage and then running a red light, however, then the claim would need to be made under the Dram Shop Act and its limitations would apply because the damages do arise from a covered "event."

In this case, unlike in *Harrington*, the particular facts of this case fall within the scope of Montana's Dram Shop Act. As a result, the Dram Shop Act provides the exclusive remedy. Pursuant to M.C.A. § 27-1-710, any claim based on an injury arising from an event involving a person who consumed alcoholic beverages must be brought within two (2) years of the sale or service of the

beverage. In this case, the claim was not brought within the time allowed and thus is now time-barred.

a. The undisputed fact remains that Mr. Windauer was furnished with an alcoholic beverage, which is all that is required to trigger the Dram Shop Act.

Mr. Babcock's contention (raised for the first time on appeal) that he had to allege that Mr. Windauer was intoxicated to trigger the Dram Shop Act is not consistent with the actual language of the Dram Shop Act. *See Opening Br.*, p. 17 ("Babcock never alleged Windauer was intoxicated or that any alcohol served to Windauer caused his injuries."). By asking this Court to focus on whether Mr. Windauer was intoxicated or not, Mr. Babcock is trying to draw attention away from the actual language of the statute so he can set up a strawman argument.

The Dram Shop Act defines an "event" as a person being "furnishe[d] an alcoholic beverage", not as a person being "intoxicated." *Mont. Code Ann. § 27-1-710(1).* The statute itself does not require the patron to be intoxicated to give the bar the protection of the statute. *Id.* In fact, the proposed requirement that a patron must be intoxicated would not make any sense. The proposed new requirement would require bars to over-serve customers to get the protection of the statute. It would also require bars to argue that its patrons were intoxicated to use the statute as a defense. The proper focus is on whether Mr. Windauer was *furnished* an alcoholic beverage, not on whether Mr. Windauer was *intoxicated*.

In this case, there can be no doubt Mr. Windauer was furnished an alcoholic beverage. Mr. Babcock's Counts II (Premises Liability) and III (Punitive Damages) allege that Mr. Windauer was served alcohol. *See Compl., Counts II and III.* In his Complaint, in the general "Facts" section, Mr. Babcock alleges that Casey's Bar furnished an alcoholic beverage to Mr. Windauer. *Compl.*, ¶ 11 ("[o]n the evening of January 20, 2017 Casey's supplied Windauer with alcohol."). Mr. Babcock then re-alleged the allegation that Casey's Bar "supplied Windauer with alcohol" under Count I (Liquor Liability), Count II (Premises Liablity), and Count III (Punitive Damages). *Id.* at ¶¶ 15, 23, & 39 ("Babcock relleges each proceeding paragraph as thought fully set forth herein.")[9].

By incorporating his allegation that "Casey's supplied Windauer with alcohol" into Counts II and III, Mr. Babcock made that allegation a part of Counts II and III. Rule 10(c), M.R.Civ.P. states, in relevant part, that:

> A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. ...

M.R.Civ.P., Rule 10(c). Incorporating prior allegations in a complaint into each count necessarily re-pleads those allegations into each subsequent count. *Id.* By incorporating paragraph 11 of the Complaint into his Counts II and III, Mr.

---

[9] In fact, the entire Liquor Liability Count factual allegations were also incorporated into Counts II (Premises Liability) and III (Punitive Damages). *Id.* at ¶¶ 23, & 39 ("Babcock relleges each proceeding paragraph as thought fully set forth herein.").

Babcock made the allegation that "[o]n the evening of January 20, 2017 Casey's supplied Windauer with alcohol" in both Counts II and III.

It would have been an error for the District Court to not consider that Mr. Babcock chose to incorporate the allegations regarding Mr. Windauer being supplied alcohol. *Cummings v. Town of Plains*, 242 Mont. 236, 240, 790 P.2d 486 (1990). Mr. Babcock chose to incorporate those allegations and is thus bound by those allegations now. He cannot change the allegations on appeal simply because they turned out to be fatal to his case.

It is also worth noting that while the District Court certainly looked at Mr. Babcock's own pleadings (as is required under M.R.Civ.P, Rule 56), the District Court did not decide the summary judgment motions on a motion to dismiss standard (i.e. looking at the Complaint alone). The District Court looked beyond the Complaint to the actual facts. The undisputed facts presented to the District Court in the summary judgment motions were that: (1) Mr. Windauer consumed an alcoholic beverage that was furnished by Casey's Bar, and (2) damages arose from an event involving Mr. Windauer. *See e.g. Def.'s SJ Mot., pp. 5-6; (Dkt #8) and Pl.'s SJ Resp. Br., p. 7 (Dkt. #12)("A factual issue remains regarding whether Casey's acted reasonably in allowing a violent and underage patron to imbibe on its premises and injure Babcock").* The actual undisputed facts presented to the District Court established the existence of an "event" that falls under Montana's

Dram Shop Act. Montana's Dram Shop Act was triggered by the actual facts (Mr. Windauer being furnished alcohol) as applied to the language of the statute.

An alleged dispute of fact over whether Mr. Windauer was *intoxicated* or not is simply not material because *intoxication* is not what triggers the Dram Shop Act's application. The issue was whether Mr. Windauer was furnished a drink, which it is undisputed he was. Therefore, the District Court's decision to dismiss all counts as being untimely should be affirmed.

CONCLUSION

The Dram Shop Act was triggered because Casey's Bar served Mr. Windauer and there was an "event" involving Mr. Windauer that caused Mr. Babcock's alleged damages. Mr. Babcock's assertion that naming the same claims arising from the same events "common law" claims somehow circumvents the two (2) year statute of limitations found within the Dram Shop Act amounts to semantics. Calling the same claims "common law" instead of "Dram Shop" claims does not change the fact the "events" leading to the alleged injury are within the scope of Dram Shop Act. Calling a Dram Shop claim a "common law" claim does not change the fact the claim is one arising from an event described in the Dram Shop Act. The claim is still a Dram Shop claim. The two (2) year statute of limitations still applies.

As this Court previously explained in its *Filip* decision, the Dram Shop statute altered the common law. There is no way to allow un-altered common law

claims based on the same "events" described in the Dram Shop statute without abrogating the Dram Shop statute (and necessarily also going against the intent of the Montana Legislature). In other words, the Court cannot follow the Dram Shop statute (and its limitations) while simultaneously also allowing broader un-altered common law claims based on the same events. Thus, the Court cannot allow alleged "common law" claims to avoid the limitations of the Dram Shop Act.

The bottom line is, all of the alleged "common law" claims fall within the Dram Shop statute. *See Compl.* The Montana Legislature clearly intended for a two (2) year statute of limitations to apply to claims that fall within the Dram Shop Act. Mr. Babcock failed to bring his claims within the applicable two (2) year statute of limitations. Thus, summary judgment dismissing Count I (Liquor Liability), Count II (Premises Liability) and Count III (Punitive Damages) was appropriate. The District Court reached the correct legal conclusion. Therefore, affirming the District Court's July 9, 2020 Order Granting Defendant's Motion for Summary Judgment is appropriate.

Respectfully submitted this 5th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 11.0 for Windows plus counting the words in the screen shot depictions of documents is 9,146 words, not averaging more than 280 words per page, excluding the certificate of service and certificate of compliance.

Dated this 5th day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that on March 5, 2021, I served a true and correct copy of the preceding document, by prepaid mail, on the following parties and amici:

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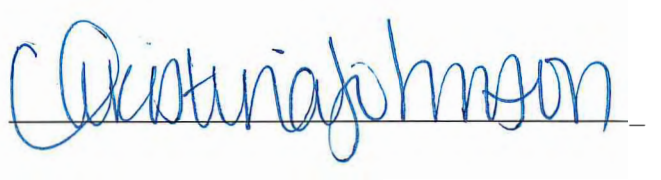
Signature: 

CERTIFICATE OF SERVICE

I, Reid J. Perkins, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-05-2021:

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Electronically signed by Christina Johnson on behalf of Reid J. Perkins
Dated: 03-05-2021